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TRANS MILITARY BAN MUST SURVIVE STRICT SCRUTINY

Federal Court Rejects Trump Administration Ploy and Orders Trial

EXECUTIVE SUMMARY

LGBT LAW NOTES

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Federal Court Rejects Trump Administration Ploy and Orders Trial on Trans Military Ban

By Arthur S. Leonard

U.S. District Judge Marsha J. Pechman issued an Order on April 13 in *Karnoski v. Trump*, 2018 WL 1784464, 2018 U.S. Dist. LEXIS 63563 (W.D. Wash.), one of four pending legal challenges to the Trump Administration's announced ban on military service by transgender people. Judge Pechman, who sits in the Western District of Washington (Seattle), rejected the Administration's argument that existing preliminary injunctions issued by her and three other federal district judges last year against the transgender ban are moot because of President Donald J. Trump's March 23 Memorandum, which purported to "revoke" his August 25, 2017, Memorandum and July 26, 2017, tweets announcing the ban. Rejecting all objections by defendants to the pending lawsuit, she ordered that discovery begin preparatory to a trial.

The defendants then moved for a protective order, seeking to stall discovery while they pursue an interlocutory appeal of Judge Pechman's ruling that the preliminary injunction was rendered moot in this and the three other pending cases challenging the ban. On April 19, Judge Pechman issued a brief order, rejecting defendant's motion, as to which see below for more details. *Karnoski v. Trump*, 2018 U.S. Dist. LEXIS 66385 (W.D.Wash.).

Judge Pechman's skepticism as to the defendants' argument is clear from her description of events: "The 2018 Memorandum confirms [Trump's] receipt of [Defense Secretary James Mattis's] Implementation Plan, purports to 'revoke' the 2017 Memorandum and 'any other directive [he] may have made with respect to military service by transgender individuals [an oblique reference to the July tweets],' and directs the Secretaries of Defense and Homeland Security to 'exercise their authority to implement any appropriate policies concerning military service by transgender individuals.'" Thus, the judge rejected the Administration's contention that Mattis was directed by the President to have a new study made to decide whether to let transgender people serve, and saw it for what it was: an order to propose a plan to implement Trump's announced ban.

Judge Pechman also rejected the government's argument that the policy announced in the February 22 Memorandum signed by Secretary James Mattis either deprives all the plaintiffs in the case of "standing" to sue the government, or that the policy it announces is so different from the one previously announced by President Trump that the current lawsuit, specifically aimed at the previously announced policy, is effectively moot as well. The government argued that due to various tweaks and exceptions to the policy announced on March 23, none of the individual plaintiffs in this case were threatened with the kind of individualized harm necessary to have standing, but Pechman concluded that each of the plaintiffs, in facts submitted in response to the March 23 policy, had adequately shown that they still had a personal stake in the outcome of this case.

Instead, and most consequentially, Judge Pechman found that the court should employ the most demanding level of judicial review – strict scrutiny – because transgender people are a "suspect class" for constitutional purposes. However, Judge Pechman decided that it is premature to grant summary judgment to the plaintiffs, because disputed issues of material fact will require further hearings to resolve. One is whether the government can prove that excluding transgender people from the military is necessary for the national security of the United States. Another is whether the purported "study" that produced the February 22 "Report and Recommendations" and Mattis's Memorandum are entitled to the kind of deference that courts ordinarily extend to military policies.

Judge Pechman's boldest step is abandoning her prior ruling in this case that the challenged policies are subject only to heightened scrutiny, not strict scrutiny.

Judge Pechman's boldest step is abandoning her prior ruling in this case that the challenged policies are subject only to heightened scrutiny, not strict scrutiny. Although the Supreme Court has not been consistent or precise in its approach to the level of judicial scrutiny for constitutional challenges to government actions, legal scholars and lower courts have generally described its rulings as divided into three general categories – strict scrutiny, heightened scrutiny, and rationality review.

If a case involves discrimination that uses a "suspect classification," the approach is strict scrutiny. The policy is presumed unconstitutional and the

government has a heavy burden of showing that it is necessary to achieve a compelling government interest, and is narrowly tailored to achieve that interest without unnecessarily burdening individual rights. The Supreme Court has identified race, national origin and religion as suspect classifications, and has not identified any new such classifications in a long time. Lower federal courts have generally refrained from identifying any new federal suspect classifications, but the California Supreme Court decided in 2008 that sexual orientation is a suspect classification under its state constitution when it struck down the ban on same-sex marriage.

Challenges to economic and social legislation that do not involve "suspect classifications" or "fundamental rights" are generally reviewed under the "rational basis" test. They are not presumed unconstitutional, and the burden is on the plaintiff to show that there was no rational, non-discriminatory reason to support the challenged law. Courts generally presume that legislatures have rational policy reasons for their actions, but evidence that a law was adopted solely due to animus against a particular group will result in it being declared unconstitutional.

During the last quarter of the 20th century, the Supreme Court began to identify some types of discrimination that fell somewhere between these existing categories, and the third "tier" of judicial review emerged, first in cases involving discrimination because of sex. The Supreme Court has used a variety of verbal formulations to describe this "heightened scrutiny" standard, but it places the burden on the government to show that such a law actually advances an important government interest.

So far, litigation about transgender rights in the federal courts has progressed to a heightened scrutiny standard in decisions from several circuit courts, including recent controversies about restroom access for transgender high school students, public employee discrimination cases, and lawsuits by transgender prisoners. Ruling on preliminary injunction motions in the transgender military cases last fall, Judge Pechman and the three other federal judges all referred to a heightened scrutiny standard. Now Judge Pechman blazes a new trail by ruling that discrimination against transgender people should be subject to the same strict scrutiny test used in race discrimination cases.

It is very difficult for the government to win a strict scrutiny case, but its best shot in this litigation depends on the court finding that the policy announced by Mattis is entitled to deference, and this turns on whether it is the product of "expert military judgment," a phrase that appears in the Mattis Memorandum and the Report. Judge Pechman has already signaled in her Order her skepticism as to this. By characterizing this as an "Implementation Plan," she implies that the question whether Trump actually consulted with generals and military experts back in July before tweeting his absolute ban remains in play, and she pointedly notes the continued refusal by the government to reveal who, if anyone, Trump consulted.

"Defendants to date have failed to identify even one General or military expert he consulted," she wrote, "despite having been ordered to do so repeatedly. Indeed, the only evidence concerning the lead-up to his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and that the abrupt change in policy was 'unexpected.'" Here she quotes Joint Chiefs Chairman Gen. Joseph Dunford's statement the day after the tweets that "yesterday's announcement was unexpected," and news reports that White House and Pentagon officials "were unable to explain the most basic of details about how it would be carried out." She also notes that Mattis was given only one day's notice before the announcement. "As no other persons have ever been identified by Defendants – despite repeated Court orders to do so – the Court is led to conclude that the Ban was devised by the President, and the President alone."

Thus, it would be logical to conclude, as she had preliminarily concluded last year when she issued her injunction, that no military expertise was involved and so no deference should be extended to the policy. On the other hand, the new "Report and Recommendations" are now advanced by the government as filling the information gap and supporting deference. But Judge Pechman remains skeptical. (There are press reports, which she does not mention, that this document originated at the Heritage Foundation, a right-wing think tank, rather than from the Defense Department, and it has been subjected to withering criticism by, among others, the American Psychiatric Association.)

Citing their "study," the government now claims "that the Ban – as set forth in the 2018 Memorandum and the Implementation Plan – is now the product of a deliberative review. In particular, Defendants claim the Ban has been subjected to 'an exhaustive study' and is consistent with the recommendations of a 'Panel of Experts' convened by Secretary Mattis to study 'military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion,' and tasked with 'conduct[ing] an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members.' Defendants claim that the Panel was comprised of senior military leaders who received 'support from medical and personnel experts from across the [DoD] and [DHS],' and considered 'input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professions with experience in the care and treatment of individuals with gender dysphoria.' The Defendants also claim that the Report was 'informed by the [DoD]'s own data obtained since the new policy began to take effect last year.'"

But, having "carefully considered the Implementation Plan," wrote Pechman, "the Court concludes that whether the Ban is entitled to deference raises an unresolved question of fact. The Implementation Plan was not disclosed until March 23, 2018. As Defendants' claims and evidence regarding their

justifications for the Ban were presented to the Court only recently, Plaintiffs and [The State of Washington, which has intervened as a co-plaintiff] have not yet had an opportunity to test or respond to these claims. On the present record, the Court cannot determine whether the DoD's deliberate process – including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon – is of the type to which Courts typically should defer."

In other words, Pechman suspects that this purported "study" is a political document, produced for litigation purposes, and she is undoubtedly aware that its accuracy has been sharply criticized. Furthermore, she wrote, "The Court notes that, even in the event it were to conclude that deference is owed, it would not be rendered powerless to address Plaintiffs' and Washington's constitutional claims, as Defendants seem to suggest." And, she noted pointedly, the Defendants' "claimed justifications for the Ban – to promote 'military lethality and readiness' and avoid 'disrupt[ing] unit cohesion, or tax[ing] military resources' – are strikingly similar to justifications offered in the past to support the military's exclusion and segregation of African American service members, its 'Don't Ask, Don't Tell' policy, and its policy preventing women from serving in combat roles." In short, Pechman will not be bamboozled by a replay of past discriminatory policies, all of which have been abandoned because they were based mainly on prejudice and stereotyping.

Thus, although the judge denied for now the Plaintiffs' motions for summary judgment, it was because factual controversies must be resolved before the court can make a final ruling on the merits.

The Defendants won only one tiny victory in this ruling: a concession that the court lacks jurisdiction to impose injunctive relief against President Trump in his official capacity. However, even that was just a partial victory for Defendants, as Judge Pechman rejected the suggestion that the court lacks jurisdiction to issue a declaratory judgment against the President. "The Court is aware of no case holding that the President is immune from declaratory relief – rather, the Supreme Court has explicitly affirmed the entry of such relief," citing several cases as examples. "The Court concludes that, not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a 'most appropriate instance' for such relief," she continued, taking note of Trump's original Twitter announcement, and that two of the operative Memoranda at issue in the case were signed by Trump. If, as Judge Pechman suspects, the Ban was devised in the first instance by Trump, and by Trump alone, a declaratory judgment that his action violated the Constitution would be entirely appropriate.

In other words, Pechman suspects that this purported "study" is a political document, produced for litigation purposes.

In their motion for protective order, filed in response to this opinion on the summary judgment motion, defendants sought to stay discovery while they pursue an interlocutory appeal of Judge Pechman's ruling that the preliminary injunction was not mooted by Trump's purported "revocation" of his August memo and July tweets. They also argued that there was no reason for discovery because the court's review, pursuant to the Administrative Procedure Act, was "confined to the administrative record." They also argued that a protective order would serve judicial economy, since if they got the preliminary injunctions overturned on appeal on grounds of mootness, the case would essentially be over. Judge Pechman rejected all these arguments, reiterating her finding that the March 23 announcement did not amount to a "new policy" but was merely a plan to implement the policy announced in that August memorandum. She pointed out that the plaintiffs' suit was not based on alleged violations of the APA. It asserts direct constitutional claims. She wrote: "Defendants have not demonstrated that the policy excluding openly transgender people from military service constitutes an 'agency action' that 'resulted from an administrative process in the Department of Defense. Indeed," she continued, "the policy was announced by President Trump, and whether the DoD was event consulted prior to its announcement is disputed." Finally, she asserted, the defendants had not "demonstrated that precluding discovery will service the interests of judicial economy in any way."

The judge ordered that discovery proceed, and referring to the defendants' continued refusal to disclose who, if anyone, Trump consulted prior to his July tweets, pointed out that if they intend to claim Executive Privilege as to that information, "they must 'expressly make the claim' and provide a privilege log 'describing the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Indeed, here is continued skepticism that the ban was based on any sort of expert advice to the president.

Plaintiffs are represented by a team of attorneys from Lambda Legal and OutServe-SLDN, with pro bono assistance from the law firms of Kirkland & Ellis LLP and Newman Du Wors LLP. ■

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

Mississippi Supreme Court Avoids Dealing with Parental Presumption by Embracing Equitable Estoppel in Custody/ Visitation Dispute between Lesbian Former Spouses

By Matthew Goodwin and Arthur S. Leonard

On April 5, 2018, combined rulings from the Mississippi Supreme Court recognized a former same-sex spouse as a parent of a child born during the parties' marriage on the grounds of equitable estoppel in *Strickland v. Day*, 2018 Miss. LEXIS 155, 2018 WL 1660573. Surprisingly, all five written opinions in the case failed to mention or discuss the common law doctrine known as the "parental presumption."

This common law doctrine presumes that the spouse of a woman who gives birth to a child during marriage is the child's other parent. Yet the Mississippi Supreme Court's opinions in *Strickland* were silent on the issue. The parental presumption also seems arguably mandated in *Strickland* under *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), but neither of those cases are mentioned in any of the court's rulings.

Confusingly, there were five written opinions from the nine-member court subscribed to by different judges or groups of judge. None of the opinions represented a clear majority. However, taken together, the opinions amount to a ruling that Cristina Strickland is a parent of the child Z.S. and that the donation of sperm by an anonymous individual towards a child's conception has no impact on the parental rights of the former same-spouse of the child's biological mother.

The parties, Christina Strickland and Kimberly Jayroe, began a romantic relationship in 1999. In 2007, while still unmarried, Kimberly adopted a child, E.J. The two women considered E.J. their child but Christina was not an adoptive parent of E.J. because Mississippi did not allow joint adoptions by unmarried parents. The women wed in 2009 in Massachusetts, despite the fact their marriage was not recognized in Mississippi at that time.

Kimberly, who took Christina's last name upon marriage, became pregnant the following year through donor insemination using sperm anonymously donated to a Maryland sperm bank. Kimberly "signed an acknowledgment agreeing that she would 'never seek to identify the donor.' The acknowledgment further stipulated that the donor would never be advised of Kimberly's identity," according to the lead opinion by Justice David Ishee. The clinic paperwork also identified the women as spouses and both women signed documents stating they were undergoing the treatments as a couple and "acknowledged [their] natural parentage of any child born to [them]" through the insemination. The parties had planned to travel to Massachusetts for the birth so that both women's names could appear on the birth certificate, but Kimberly gave birth to Z.S. six weeks earlier in Mississippi in a surgical procedure.

Before and after Z.S.'s birth, the parties operated as a family unit and co-parented the children. Christina testified she stayed home with Z.S during the first year of his life and that both of the children — Z.S. and E.J. — share a close bond with Christina and call her mom.

When the parties separated in January 2013, Christina continued to have parenting time with both children and paid child support and expenses for Z.S. to Kimberly. Before either party had filed for or obtained a judgment of divorce, Kimberly in August of 2015 married a second spouse. Shortly thereafter, Christina filed for divorce. Kimberly moved for a declaratory judgment seeking to have her second marriage deemed valid and her first dissolved. In answer, Christina sought legal and physical custody of both children and asked to be named the parent of Z.S.

After a one-day hearing in September of 2016, the chancery (trial) court held in pertinent part that Z.S. was "'a child born *during* the marriage, *not of* the marriage' and so both parties were not considered parents" (emphasis supplied). The trial court went on to hold that "the anonymous sperm donor constituted an 'absent father' . . . " and " . . . the donor's legal parentage precluded a determination that Christina was Z.S.'s legal parent."

Writing on behalf of four other judges and himself, Justice Ishee agreed with Christina that the chancery court erred in its finding that the "sperm donor was the 'natural father,' whose parental rights were subject to termination." While hard to fathom given the length of time artificial insemination has been available in this country, the Mississippi Supreme Court had " . . . never before [determined] what parental rights, if any, anonymous sperm donors possess in the children conceived through the use of their sperm."

Justice Ishee looked to Mississippi's disestablishment-of-paternity statute for guidance on the question of the Mississippi legislature's intent on parental rights of anonymous sperm donors. That code section holds that "a father cannot seek to disestablish paternity when the child was conceived by [artificial insemination] during the marriage to the child's mother." Finding it impossible for this statute to co-exist with the chancery's ruling, Judge Ishee went on to write that " . . . requiring parents of a child conceived through the use of [artificial insemination] to terminate parental rights of the donor would not be in the best interest of the child — to say nothing of the expense and time it would require."

Justice Ishee's opinion then turned to the issue of equitable estoppel and found the record supported Christina's argument that Kimberly must be estopped from denying Christina's parentage.

First, the record showed "... Kimberly made numerous representations that Christina was an equal co-parent to Z.S." Here the court pointed to the Maryland clinic's form agreement, signed by the couple, indicating their joint intention to undergo artificial insemination, as well as the birth announcement sent out by the couple which read "'hatched by Two Chicks. Chris[tina] and Kimberly proudly announce the birth of their son.'"

Second, Justice Ishee agreed with Christina that she had changed her position in reliance on Kimberly's representation by, for example, serving as Z.S.'s primary caretaker for a year after he was born.

Third, Justice Ishee found Christina suffered a detriment caused by Kimberly's change of position after the parties split up, writing: "[B]y changing her position in reliance on her believe that she would be an equal co-parent, Christina took on all the responsibilities and rewards that accompany parenthood. To now deprive Christina of these responsibilities and rewards, and diminish her parent-child relationship with Z.S. is certainly a detriment to Christina, to say nothing of the detriment to Z.S. himself."

Thus, concluded Justice Ishee, the chancery court erred in finding Christina had only acted *in loco parentis* for Z.S., and remanded the case to the trial court for a rehearing on custody.

Christina is represented by Mississippi attorney Dianne Herman Ellis and Lambda Legal staff attorney Elizabeth Lynn Littrell. Lambda Legal's petition for review specifically asked the court to consider whether *Obergefell* required Mississippi to apply laws relating to the marital presumption in this case. Again, none of the opinions addressed these questions despite Lambda's request that they do so.

As Justice Coleman wrote in a partial concurrence and dissent, "[a]ll justices agree that, at least in the instant case, the trial judge erred in finding that the parental rights of the anonymous sperm donor must be terminated before the legal status of Christina Day could be adjudicated."

There, all clear agreement appeared to end. A few of the dissenters took issue with the plurality basing its finding of error on estoppel grounds when, apparently, estoppel had not been raised by Christina at the trial level. This charge appears to have been answered by Justice Ishee insofar as his decision pointed out that the Supreme Court reviews a chancellor's conclusions of law *de novo*.

Some of the justices took issue with what they saw as Justice Ishee's apparent willingness to weigh in on the issue of the parental rights of anonymous sperm donors, arguing that task must be left to the legislature.

Yet another opinion seemingly approved of portions of the chancery court's adjudication of the custody dispute, pointing to earlier custody cases which granted nonbiological fathers the status of *in loco parentis*, which is the status the trial court gave to Christina.

That estoppel had not been raised at the trial level and yet was the ground on which the plurality found Christina to be a parent makes the court's refusal to consider, or willful ignorance of, the parental presumption all the more troubling. Indeed, if at least five members of the court felt empowered to look to a legal theory not raised at the trial level — i.e. estoppel — why would they not instead rely on the parental presumption which was raised at the trial level, and which the U.S. Supreme Court in *Pavan* implicitly held applies to same-sex and heterosexual married couples alike? We may never know given the failure of any of the opinions to mention the subject.

Perhaps the court was unwilling to address the question whether *Obergefell* should be applied retroactively to 2011 to recognize that Kimberly was married to Christina when she gave birth to Z.S. But states in some other jurisdictions have adopted such retroactive applications. ■

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

Arizona Appeals Court Endorses Parent's Right to Raise Transgender Child in Accordance With Child's Gender Identity

By Ryan Nelson

In *Paul E. v. Courtney F.*, 2018 Ariz. App. LEXIS 52, 2018 WL 1602496 (Ariz. Ct. Appl. Apr. 3, 2018), a three-judge panel of the Arizona Court of Appeals (comprised of Judges Peter B. Swann, Jon W. Thompson, and James P. Beene) considered an appeal concerning the upbringing of a transgender child of divorced parents. Upon the divorce of Paul E. (the "Father") (represented by Todd Franks and Robert C. Houser, Jr. from Franks Law Office, PC and Paul F. Eckstein and Michael P. Berman from Perkins Coie LLP) and Courtney F. (the "Mother") (represented by Steven D. Wolfson and Michelle N. Khazai from Dickinson Wright PLLC and Asaf Orr and Catherine Sakimura from the National Center for Lesbian Rights), the Father and the Mother were awarded joint custody of L. — a minor child who was assigned the sex of male at birth (the "Child") — but the Father was given final legal decision-making authority with respect to L.'s education and medical care.

According to the Mother, L. preferred "stereotypically 'female' items" and would wear female clothing at home. Yet, the Father denied that L. had any such preference. After the Mother permitted L. to wear a skirt to school and asked L.'s teacher to read a book titled *Princess Boy* to L.'s class, the Father arranged for L. to meet with a therapist who failed to diagnose L. with gender dysphoria. Subsequently, the Father asked the Superior Court of Maricopa County, Arizona, to make him L.'s primary residential parent, to award him sole legal decision-making authority over L., and to limit the Mother's parenting time. The trial court entered temporary orders consistent with the Father's requests, requiring the Mother, *inter alia*, not to dress L. in female clothing, not to purchase female-oriented toys for L., and not to refer to L. as a girl or as "her" or "she."

The following year, medical professionals diagnosed L. with gender dysphoria, yet the temporary orders remained in place pending trial. After trial, the Superior Court, *inter alia*, awarded the Father sole legal decision-making with an obligation to consult in good faith with the Mother, appointed a therapist to treat L., lifted the temporary restrictions on the Mother's parenting in certain locations (i.e., the therapist's office and the parents' homes), permanently ordered these parenting restrictions everywhere else, and prohibited either parent from discussing gender identification issues with L. or promoting or discouraging a specific view of L.'s gender identity. The Father appealed.

First, the Court of Appeals, considering the trial court's restrictions on the Father's legal decision-making authority, reasoned that the court's role is to assess which parent should hold the responsibility for legal decision-making based on the best interests of the child, rather than to engage in such decision-making itself. "The court does not have plenary authority to make decisions in place of the parents when it deems them to be in a child's best interests," wrote Judge Swann, unless a narrow exception applies — specifically, if and only if the court finds that limiting the sole legal decision-maker's authority is necessary so as not to endanger the child's physical health or significantly impair the child's emotional development. Moreover, even if the court invokes this rare exception, it can merely *limit* the legal decision-maker's authority, not *direct* the legal decision-maker to act in a particular manner. Accordingly, the court concluded that the trial court erred as a matter of law with its order limiting the Father's decision-making authority for two reasons: (1) it had acted despite no finding that the Father (i.e., the sole legal decision-maker) was endangering L.'s physical health or significantly impairing L.'s emotional development, and (2) it had *directed* the Father to engage a particular therapist for L. rather than *limiting* the Father's authority in some way. Similarly, the court concluded that the trial court had impermissibly appointed a therapist to treat L., because state law permitted the appointment of a therapist only as a judicial advisor and not as a treating physician, again emphasizing that the court generally lacks the authority to direct the legal decision-maker's authority in such a manner.

Second, the court considered the trial court's restrictions on both parents' parenting time. Judge Swann explained that a court may restrict parenting time only if such parenting time would "endanger seriously the child's physical, mental, moral or emotional health" and, even then, the court could not infringe upon the constitutional rights of parents to rear their children or the parents' or child's rights to free speech. Therefore, the court concluded that the trial court had, again, erred as a matter of law by restricting parenting time because: (1) it had acted despite a finding that such parenting time would seriously endanger the child's health, and (2) it had impermissibly infringed upon the constitutional rights of the Father, the Mother, and L.

In conclusion, the court vacated the trial court's orders directing the Father's sole legal decision-making and the parents' parenting time. This case emphasizes a recurring theme in family law—that the rights of parents to raise their children (absent a showing of harm to the child) generally shall not be micromanaged by the government. Advocates of the rights of transgender children to grow up as themselves and of parents of transgender children to raise their children accordingly can proudly turn to this case as an example of their government upholding their rights. ■

Ryan Nelson is corporate counsel for employment law at MetLife in New York City.

Third Circuit Denies Torture Claim by Gay Man from Trinidad and Tobago

By Bryan Johnson-Xenitelis

A panel of the U.S. Court of Appeals for the 3rd Circuit has dismissed in part and denied in part an appeal from the Board of Immigration Appeals' denial of a gay man's Convention Against Torture (CAT) claim stating he feared harm if returned to Trinidad and Tobago, in *Toby v. Attorney General of the United States*, 2018 U.S. App. LEXIS 9867, 2018 WL 1877515 (April 19, 2018).

Petitioner, an openly gay man from Trinidad and Tobago, entered the United States in 1994 as a visitor and overstayed. In 2006 he was convicted of possession with intent to distribute marijuana, which prompted the Department of Homeland Security (DHS) to initiate removal proceedings against him, charging him with both overstaying his visa and having been convicted of an offense involving a controlled substance. Shortly thereafter, while removal proceedings were pending, Petitioner was convicted of possession with intent to distribute cocaine and DHS added an additional charge of removability alleging Petitioner to have been convicted of an "aggravated felony" drug offense. The Immigration Judge found the cocaine offense to constitute both an aggravated felony and a "particularly serious offense," and accordingly pretermitted Petitioner's applications for cancellation of removal and asylum, and his application for withholding of removal, respectively. On Petitioner's sole remaining claim under CAT, the Immigration Judge found that while Trinidad and Tobago criminalized same-sex consensual sex, the law was rarely enforced, and ruled that it was not more likely than not that Petitioner would be tortured by, or with the acquiescence of, a government official.

Petitioner appealed the decision *pro se*, and later on appeal hired counsel who wrote a brief on his behalf. However, Petitioner and his counsel only addressed the denial of CAT relief and not any other findings or pretermissions of requests for relief by the Immigration Judge. The Board of Immigration Appeals (BIA) upheld the CAT denial, stating: "Discriminatory criminal and immigration laws, and random acts of violence [against gay men in Trinidad and Tobago], although disturbing, are insufficient to establish a likelihood of torture." Toby prompted filed a petition for review with the 3rd Circuit.

The 3rd Circuit three-judge panel issued a *per curiam* non-precedential decision. The Panel agreed with the Government that since Petitioner did not raise with the BIA the issue of whether his cocaine crime constituted an aggravated felony that he had failed to exhaust his administrative remedies and therefore that the panel lacked jurisdiction over the claim. They further held that Petitioner's counsel's failure to raise the issue before the BIA was not a denial of due process, and noted that Petitioner did not take the necessary required steps to bring an effective claim of ineffective assistance of counsel.

With respect to Petitioner's argument that the BIA wrongly upheld the Immigration Judge's denial of CAT relief, the panel noted that any CAT claim contains both a factual question ("what is likely to happen to the petitioner if removed") and a legal question ("does what is likely to happen amount to the legal definition of torture"), and that under a jurisdiction-stripping federal statute forbidding review of factual questions in cases in which the petitioner has been convicted of an aggravated felony, the court had jurisdiction to review only the legal question. While Petitioner had argued the BIA ignored certain record evidence, the panel noted that they lacked jurisdiction to review Petitioner's challenge of the Immigration Judge's factual finding that "Trinidad and Tobago's discriminatory laws [criminalizing same-sex conduct] are generally not enforced." Unable to overturn the Immigration Judge's finding, the panel held that petitioner's "fear of imprisonment based solely on his homosexuality is therefore speculative and insufficient to meet his burden of proof."

Petitioner, an openly gay man from Trinidad and Tobago, entered the United States in 1994 as a visitor and overstayed.

While Petitioner submitted evidence on appeal allegedly showing both an increase in violence against LGBTI individuals in Trinidad and Tobago and that during removal proceedings his family abroad learned of his homosexuality and indicated to him that he was likely to be the victim of a hate crime if returned, the court noted that a petition for review may only be decided based upon the administrative record of the removal case and that new evidence could not be considered at the judicial appeal stage. Accordingly, the court dismissed the petition for review with respect to the issues the panel held it did not have jurisdiction to decide, and denied the petition for review with respect to the legal aspect of the CAT claim. ■

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

11th Circuit Denies Imputed Homosexuality Asylum Claim of Cameroon Man

By Bryan Johnson-Xenitelis

A panel of the U.S. Court of Appeals for the 11th Circuit has dismissed an appeal from the Board of Immigration Appeals' denial of a Cameroonian man's asylum case, in which he claimed that though he was heterosexual, he would face harm on account of his association with two homosexual friends and his public condemnation of the treatment of homosexuals in Cameroon. These circumstances resulted in a warrant for his arrest being issued, a beating by private actors for which he believes the police refused to investigate, and the fact that one or possibly both of his gay friends were shortly thereafter murdered, in *Sama v. United States Attorney General*, 2018 WL 1870152, 2018 U.S. App. LEXIS 9861 (April 19, 2018).

Petitioner posted a message in a university publication in Cameroon in protest of the expulsion of two of his gay friends, a couple, in which he stated: "They kick them out and they are all created by God. Why, why don't you allow their rights?" Apparently in response to the message, the police issued a warrant for Petitioner's arrest. A month later, Petitioner was attacked by four men who warned him he should "stop [his] homosexual activities" and threatened to kill him if he did not stop. Petitioner was hospitalized and the police were called and took his statement; however, no action was taking regarding his open warrant. Petitioner believes that "no investigation was done" with respect to his beating. Days later, after Petitioner went into hiding, Petitioner's mother was detained for two days by police attempting to execute the warrant against Petitioner; however, his mother refused to disclose his location. Petitioner learned from the news that one of his expelled friends had been murdered and stated he believed the partner to either have been kidnapped or murdered as he was missing and he (or alternatively his body) had not been found. Petitioner traveled through Nigeria and subsequently Mexico to arrive at the U.S.-Mexico border where he sought asylum.

An Immigration Judge found Petitioner to have testified credibly, but ruled that he had failed to establish that he suffered past persecution by the government or that the government was unable or unwilling to protect him based on the fact that the police visited him in the hospital following the attack against him, noting that "the failure by the police to arrest [his attackers] does not indicate that the police failed to investigate." Characterizing Petitioner's claim as both a political opinion and a "social group" (imputed homosexual) claim, the Immigration Judge ruled that Petitioner had not presented an objectively reasonable fear of persecution by the government in Cameroon, stating that "there is no convincing evidence that any private citizens have continued searching for [Petitioner], or even if they are, that the police cannot or will not protect him as they did in the past." The Immigration Judge further relied on a 2015 U.S. Department of State Report which states: "Cameroonian authorities are willing and able to protect [LGBTI] persons and their allies." On appeal, the BIA upheld the Judge's decision, taking particular note of the 2015 report, and stating that although "homophobia is pervasive in Cameroon, incidents of arrest and extortion by [the] authorities [a]re decreasing." Petitioner timely appealed the decision.

The panel opinion by Circuit Judge William Pryor held the standard of reviewing the Board's decision was limited by the "highly deferential substantial evidence test." With respect to Petitioner's argument that he suffered past persecution, Judge Pryor stated that "[P]ersecution is an extreme concept" and that because Petitioner never alleged that he was harmed by the police or "spent any time in Cameroonian jail," the record did not "compel" a reversal.

With respect to his future fear of harm, Judge Pryor noted that while the police had detained Petitioner's mother in regard to the warrant for Petitioner's arrest, they did not arrest him at the hospital or during the period of time prior to his departure from the country. Judge Pryor acknowledged that Petitioner's family members submitted statements alleging he would be detained upon his return to Cameroon, but that the possibility of detention "does not compel the conclusion that [he] has a well-founded fear that his treatment will rise to the level of persecution." With respect to Petitioner's arguments that his evidence established Cameroonian authorities are unable or unwilling to protect gay activists, Judge Pryor found that in light of the 2015 report stating a decrease in arrests of LGBTI individuals and also a decrease in the number reports of LGBTI individuals seeking protection from the authorities, the Petitioner's possibly-reasonable inferences that he would be harmed did not compel the reversal of the Board and Immigration Judge's conclusion that Petitioner would not be singled out or that there was not a pattern or practice of persecution against gay individuals in Cameroon, particularly since Petitioner failed to establish that the police were involved in any of the violent actions against him or that they had entirely refused to assist him after his assault.

Finally, Judge Pryor found Petitioner's arguments that the Board failed to properly review all of the evidence he submitted to be "in essence, [that Petitioner] disputes the weight the Board gave to different portions of the record," and concluded that the Board "complied with its statutory requirements."

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Federal Judge in Texas Finds that Title VII Protects Transgender Workers

By Timothy Ramos

Get ready to yell, "yee-haw," for this lone star from the Lone Star state! On April 4, 2018, Chief U.S. District Judge Lee Hyman Rosenthal of the Southern District of Texas ruled that Title VII of the Civil Rights Act of 1964 protects individuals from employment discrimination on the basis of gender identity. *Wittmer v. Phillips 66 Co.*, , 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018). This marks the first time that a Texas-based federal court has interpreted Title VII's protection against sex discrimination to encompass claims brought by transgender workers.

Judge Rosenthal presides over the Houston Division of the U.S. District Court for the Southern District of Texas, located within the 5th Circuit Court of Appeals' jurisdiction. Unlike nearly all the other federal circuit courts, the 5th Circuit has yet to weigh in on whether transgender or sexual orientation discrimination amounts to sex discrimination. In lieu of any binding precedent from the 5th Circuit, Judge Rosenthal based her ruling on a recent growing movement towards LGBTQ protection under Title VII in several other circuits. Specifically, the judge looked to the 6th Circuit's discussion on transgender status in *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018), and the 2nd and 7th Circuits' respective discussions on sexual orientation in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) and *Hively v. Ivy Tech Cmty. Coll. of Indiana.*, 853 F.3d 339 (7th Cir. 2017). However, although Judge Rosenthal ruled that transgender workers constitute a protected class under Title VII, the plaintiff in the case at hand ultimately failed to state a prima facie claim for discrimination.

Nicole Wittmer is a transgender woman who interviewed with Phillips 66 Company (Phillips) for a position as an Instrument and Reliability Engineer on August 3, 2015. During this interview, Wittmer stated that she was currently employed at Agrium. Phillips later offered her the position on August 10, which was conditioned on a background check conducted by HireRight, an independent company. HireRight's report showed that Wittmer was not currently employed with Agrium on August 3 as she had claimed; thus, on September 2, Phillips's Human Resources Manager, Ellen Fulton, contacted Wittmer for clarification. Over the next six days, Wittmer sent a series of unsolicited and uninvited emails to Fulton and other Phillips employees.

By September 8, Fulton and other managers decided to rescind Wittmer's job offer because of Wittmer's inconsistent reports about her employment with Agrium. Fulton sought review and advice for the decision from other managers at Phillips; however, before she could notify Wittmer about Phillips's decision to rescind the job offer, on September 10, Wittmer sent Fulton an unsolicited email alleging that the company planned to rescind their offer because they found out Wittmer is a transgender woman. After replying to Wittmer that the company was not aware of her transgender status until her latest email—and would not factor it one way or another—Fulton called Wittmer on September 14 to formally rescind the job offer due to the inconsistent statements concerning Wittmer's employment with Agrium.

Wittmer filed a discrimination claim with the Equal Employment Opportunity Commission in October 2016. Before Wittmer filed her claim, HireRight completed its investigation and verified that Wittmer's employment with Agrium actually ended on August 3, 2015, the date of the Phillips interview.

In determining whether to grant Phillips's motion for summary judgment against Wittmer's claim, Judge Rosenthal first had to address the Texas-sized elephant in the room: whether or not Title VII's prohibition against sex discrimination includes discrimination based on transgender status. Interestingly, Judge Rosenthal's discussion equally focused on Title VII's applicability to discrimination based on sexual orientation. This appears to have added more support to the judge's ultimate finding that the federal courts have developed an expanded interpretation of Title VII's protection against sex discrimination. This expansion can trace its roots to the U.S. Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which established that an employee has a cognizable claim under Title VII for adverse actions taken by an employer due to that employee's failure to conform to gender stereotypes. As Judge Rosenthal observed, several circuits have expanded upon Price Waterhouse's failure-to-conform stereotyping protections to workers who were discriminated against based on their transgender status or sexual orientation. Specifically, Judge Rosenthal cited decisions by the 6th, 2nd, and 7th Circuits within the past year. In the Harris Funeral Homes case, the 6th Circuit explained that an employer cannot take action against an employee based on the latter's transgender status, without being at least partly motivated by the employee's sex. Furthermore, a person's transgender or transitioning status constitutes an inherently gender non-conforming trait. Meanwhile, in *Zarda* and *Hively*, the 2nd and 7th Circuits ultimately concluded that because sexual orientation discrimination is rooted in gender stereotypes, it is a subset of sex discrimination. Without any definitive ruling by the 5th Circuit, Judge Rosenthal found that "these very recent circuit cases are

persuasive" and that they "consistently recognize transgender status and sexual orientation as protected classes under Title VII."

Assuming that Title VII recognizes claims of discrimination based on transgender status, Judge Rosenthal then had to determine whether Wittmer stated a prima facie claim that could withstand summary judgment. Since Wittmer failed to provide any direct evidence of discrimination, the judge analyzed circumstantial evidence under the four requirements of the *McDonnell Douglas* framework: (1) that Wittmer belonged to a protected class; (2) that she applied for and was qualified for the position; (3) that she was rejected despite being qualified; and (4) that others similarly qualified but outside the protected class were treated more favorably. Ultimately, Judge Rosenthal found that Wittmer failed to meet the fourth requirement. Even if Wittmer did not fail, the judge explained that Wittmer did not present evidence to support an inference that Phillips's legitimate reason for rescinding her employment offer—the inconsistent statements regarding her employment at Agrium—was a pretext for discrimination. Thus, Judge Rosenthal granted Phillips's motion for summary judgment against Wittmer's Title VII claim.

On April 19, 2018, Wittmer's attorney filed a notice of appeal to the 5th Circuit, which means that the federal appellate court will finally have a chance to grab the bull by its horns and address whether Title VII covers transgender discrimination. Besides the 5th Circuit, the 10th Circuit is also expected to address the issue after it held in 2007 that Title VII did not cover transgender discrimination. Meanwhile, the 8th Circuit is currently considering whether Title VII covers sexual orientation discrimination. Only time will tell whether or not there has been a change of heart in America's Heartland.

Wittmer is represented by Alfonso Kennard, Jr., of Kennard Richard PC, Houston. ■

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

Federal Court Orders Social Security Administration to Pay Attorney's Fees to Gay Widower Who Prevailed on Benefits Claim

By Arthur S. Leonard

On July 4, 1990, John Roberts and Bernard Wilkerson, a same-sex couple living in Pennsylvania, "expressed to one another their intent to establish a common law marriage." Although at the time Pennsylvania did not recognize same-sex marriages, either under its common law or its statutory law, the men considered themselves married and lived together as a couple until Wilkerson died in 2015. Moving quickly after a federal court struck down Pennsylvania's ban on same-sex marriage in *Whitewood v. Wolf*, 992 F. Supp. 2nd 410 (M.D. Pa. 2014), the two men married formally in 2014. After Wilkerson died the next year, Roberts applied to the Social Security Administration (SSA) for widower's insurance benefits, reciting in the application that the men had lived together in a Pennsylvania common law marriage since 1990. (This was necessary because in order to be eligible for such benefits, the couple had to have been married at least ten years.) The SSA denied the claim, and therein hangs an extended tale, resulting ultimately in the April 23, 2018, ruling by U.S. District Judge Berle M. Schiller in *Roberts v. Berryhill*, 2018 WL 1911341, 2018 U.S. Dist. LEXIS 67647 (E.D. Pa.).

Roberts sought "clarification" regarding the denial of benefits and was informed by SSA that it was sending his request to its Philadelphia office. Roberts "followed up" with the Philadelphia office several times, but was repeatedly told his application was "still under consideration" and the benefits could not be paid. He then filed a Petition for Declaration of Common Law Marriage in the Philadelphia Orphan's Court, a branch of the Common Pleas Court, naming the SSA as an "interested party" and serving a citation on the agency to respond to his Petition. The agency filed a non-committal response, saying that it "does not have any knowledge or information concerning the facts contained in the Petition and, therefore, is unable to show cause as to why the Petition should or should not be granted." The Orphans' Court granted Roberts' petition, in one of many retroactive applications of the constitutional principles announced by the Supreme Court in *Obergefell v. Hodges* (2015), and declared that he and Wilkerson "entered into a valid and enforceable marriage under the laws of the Commonwealth of Pennsylvania on July 4, 1990, and remained married until the death of Bernard O. Wilkerson on December 22, 2015." The SSA neither appeared at the hearing nor appealed the ruling.

The U.S. Attorney for the Eastern District of Pennsylvania issued a statement that a new application by Roberts for the widower's benefits would be "processed and evaluated by the SSA in light of the court's order recognizing the validity of the common law marriage between Mr. Roberts and Mr. Wilkerson." Would that it were so, but it was not. The SSA continued to stonewall, and almost three years after same-sex marriage became legal in Pennsylvania under the *Whitewood* decision, SSA informed Roberts that it was not prepared to grant his application because "there has not been a policy interpretation ruling on Common Law Same-sex marriages." This prompted Roberts to file the instant lawsuit, seeking a court order requiring SSA to recognize

his marriage and pay the benefits. SSA responded by again informing Roberts that he was not entitled to the benefits, and filed a motion to dismiss. The court held oral argument on the motion on November 20, 2017, and issued an Order warning the SSA that the Administration's arguments were "unavailing" and that it needed to "revise its decision" or provide an explanation as to why Roberts was not entitled to benefits, demanding a response in 30 days after Roberts provided additional documentation that he agreed to do at the hearing.

Finally, on December 22, 2017, the SSA notified Roberts' attorney that it was granting his claim for benefits, and sent official notification of its revised decision on January 2, 2018, whereupon Roberts moved the court to enter judgment in his favor based on the revised decision. The court deferred ruling on that and ordered Roberts to file a petition for fees and costs.

In his April 23 ruling, Judge Schiller found that Roberts is a "prevailing party" for purposes of 28 U.S.C. Sec. 2412(a)(1), since his lawsuit had obtained a "material alteration in the parties' legal relationship" which was "judicially sanctioned." Wrote Schiller, "The court provided its imprimatur in this case when it ordered the SSA to either revisit its decision on Roberts' claim for benefits and either revise the decision or provide an explanation as to why he was not entitled to benefits by a Court-imposed deadline." He rejected SSA's argument that its reversal of position on Roberts' claim was "voluntary." "After months of what can best be described as governmental intransigence, the SSA finally awarded benefits to Roberts only after its motion to dismiss his claim was all but denied. Moreover, following oral argument, the SSA was well aware of the Court's 'dim view' of the Administration's position. Specifically, the Court disagreed with the SSA's argument that it required more information than the Orphans' Court's record provided, noting that Roberts should not have to 'prove the case twice.'"

Another aspect of the fee award statute is a requirement, before issuing a fee award against the government, that the court find that the government's position was "not substantially justified." As to this, Judge Schiller's opinion was particularly cutting. He rejected SSA's argument that it was not bound by the Philadelphia Court of Common Pleas order declaring Roberts and Wilkerson had a valid common law marriage. He pointed to the Social Security Act, 42 U.S.C. Sec. 416, which states, in pertinent part, that "an applicant for benefits is the widower of a fully or currently insured individual if the courts of the state in which such insured individual was domiciled at the time of death would find that such applicant and such insured were validly married at the time such insured individual died." Thus, Roberts argued and Schiller agreed, the SSA was bound by the state court's determination. SSA argued that only a ruling by a state's highest court would be binding on it, but Schiller pointed out that under Pennsylvania law, "when a court declares a marriage valid, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned," citing 23 Pa. C.S. sec. 3306. Thus, a Pennsylvania court would not question the validity of the order obtained by Roberts. "The SSA had an opportunity to challenge Roberts' claim of a common law marriage," but did not take any steps to do so, having never contested or appealed the ruling by the Orphans' Court.

"The SSA chose to ignore the courts and statutes of Pennsylvania and instead declare itself arbiter of Pennsylvania law on common law marriage. In so doing, it took an unreasonable legal position. Thus, its position regarding the effect of the Orphans' Court decree was not substantially justified, and the court can grant Roberts' application for attorney's fees," wrote the judge. Finding the amount for which Roberts applied to be reasonable, the court awarded $27,720 in fees and $400 (the amount of the filing fee) in costs.

In a concluding paragraph, Schiller was critical of how the SSA behaved throughout this story. "Despite Roberts' longstanding common law marriage, the SSA spent months searching for reasons to deny him benefits based on that marriage, allegedly because the Administration did not have a 'policy interpretation' on same-sex common law marriages in Pennsylvania." He characterized this as an "unjustifiable approach" in handling Roberts' claim, which he said was "contrary to the purpose behind the Social Security Act and to prevailing case law in this country."

The court held oral argument on the motion and issued an Order warning the SSA that the Administration's arguments were "unavailing" and that it needed to "revise its decision" or provide an explanation as to why Roberts was not entitled to benefits.

Roberts is represented by Michael Patrick Yingling of Reed Smith LLP, Chicago.

A final note: Pennsylvania legislatively abandoned the doctrine of common law marriage prospectively as of January 2, 2005. Only common law marriages performed prior to that date are recognized and valid under Pennsylvania law. ■

New York Family Court Rules on "Tri-Parent" Arrangement

By Brett Figlewski and Katie Hannson

In the Matter of David S. v. Samantha G., 2018 N.Y. Misc. LEXIS 1249, 2018 WL 1749894 (April 10, 2018), involved a tri-parent arrangement of a married, gay couple, "David S." and "Raymond T.", and their female friend, "Samantha G." Judge Carol Goldstein, of the Family Court for New York County, held that the non-biological father had standing as a third parent to seek visitation and custody of the child, despite the fact that the child had two legally-recognized parents by virtue of those parents' biological ties to the child.

In May of 2016, David S. and Raymond T. met with Samantha G., discussed how they each wished to be a parent, and designed a plan whereby a child would be conceived and raised by the three individuals in a tri-parent arrangement. They agreed that Samantha G. would continue to reside in New York City and that the married male couple would continue to reside in Jersey City, but that they would consider themselves a family. For an eight-day period, the men alternated providing a daily donation of sperm to Samantha G. for insemination. During Labor Day weekend of 2016, Samantha G. announced she was pregnant. The three parents publicized the pregnancy on social media with pictures of all of them.

The three parents jointly selected a midwife and shared in the payment of her costs in order to assist in the child's birth, which was to occur at the home of David S. and Raymond T. in New Jersey. In addition, all three attended an eight-week natural childbirth course, and Raymond T. also arranged to take a sixteen-week paternity leave after the child was born. They likewise agreed on a pediatrician and to make medical decisions jointly. They agreed, too, that the child would be covered under Raymond T.'s health insurance plan and that each would contribute to a joint savings account for the child and to which, as of the case's filing date, Raymond T. had contributed at least 50% of the funds.

After the baby boy was born on May 6, 2017, a private genetic marker test determined that David S. was the biological father and he signed a New Jersey acknowledgement of paternity when the child was five days old. The child's name, "Matthew Z. S.-G.", recognized all three parents. (Matthew is a G. family first name; the middle name, Z., is Raymond T.'s father's name; and G. and S. are the surnames of Samantha G. and David S.) After Matthew's birth, he and Samantha G. and Samantha G.'s mother remained for a week at the fathers' home, but, at the week's conclusion, Matthew went to live with Samantha G. in New York, where he continues to reside. The fathers have regular daytime parenting time with Matthew, and, in the summer of 2017, all three parents together took a vacation with the child to the Catskills. Matthew is still nursing, but overnight visits alone with his fathers are scheduled to start in the near future.

When speaking to Matthew, Samantha G. is referred to as "Momma;" David S. as "Daddy;" and Raymond T. as "Papai," which is Portuguese for father.

Issues arose between the fathers and Samantha G. with respect to parenting and access to the child. In November of 2017, David S. and Raymond T. filed a joint petition against Samantha G. seeking "legal custody and shared parenting time." In December, Samantha G. filed a cross-petition seeking sole custody of Matthew and granting David S. and Raymond T. reasonable visitation.

All parties agreed that Raymond T. should have standing to seek custody and visitation pursuant to the 2016 Court of Appeals decision in *Brooke S.B.*, 28 NY 3d 1, 39 NYS 2d 89, in which the New York Court of Appeals held that when a legal parent and the parent's partner have agreed to conceive and raise a child together, the non-biological, non-adoptive parent has standing to seek visitation and custody under Section 70 of the Domestic Relations Law, which authorizes a "parent" to do so. David S. and Raymond T. also requested that the court declare Raymond T. to be the third legal parent of the child, but Samantha G. opposed this application, and the court issued a decision based on the memoranda of law submitted by the parties.

Judge Goldstein confirmed that Raymond T. does have standing to seek custody and visitation, consistent with *Brooke S.B.*: " . . . under the above circumstances where the three parties entered and followed through with a preconception plan to raise a child together in a tri-parent arrangement, the biological father's spouse has standing to seek custody and visitation as a parent . . . " In reaching this decision, the court relied on at least two of the foundational legal principles in the *Brooke S.B.* case: firstly, the intent and consent of biological or adoptive parents to the parental role of a non-biological, non-adoptive partner; and, secondly, the animating principle of all cases related to children, namely their welfare and best interests. With respect to the latter, the Court reiterated and echoed the prescient dissenting opinion by the late Judge Kaye from the Court of Appeals' decision in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), in which the court limited custodial standing to the "bright line" of solely biological and adoptive parents. Judge Kaye's dissent had noted that the bright-line rule would invariably "fall hardest" on children in non-traditional families, including families headed by same-sex couples. It was based on these principles of *Brooke S.B.* – rather than its footnote in *dicta* that New York State recognizes only two parents for a child – that the court permitted the tri-parent custodial arrangement in the case before it. The court noted that this tri-parent situation is likely to reoccur in future cases and cited just such a case, decided in 2017 in Suffolk County (*Dawn M. v. Michael M.*, 55 Misc.3d 865, 47 N.Y.S.3d 898), and applying similar concepts from the *Brooke S.B.* decision.

The court was careful to distinguish the tri-parent cases from situations in which a married couple might use a gamete donor for family formation and in which the intent is clear that the donor will not be a parent. In such situations, the court stated that the marital presumption of legitimacy and parentage would apply and cited its application in the recent Third Department case of *Christopher YY. v. Jessica ZZ.*, 159 A.D.3d 18, 69 N.Y.S.3d 887 (2018), decided in January, as well as the Second Department *Barbour* case from March (*Joseph O. v. Danielle B.*, 158 A.D.3d 767 (2018), and in which LeGaL and The Kurland Group represented Danielle and Joy Barbour in a contest with a sperm donor. In tri-parent situations such as the case at bar, however, the court noted that the marital presumption would "indisputably be rebutted" by evidence of the clear intent and consent to a tri-parent arrangement.

Though Raymond T. was granted standing as a third parent *for purposes of custody and visitation*, Judge Goldstein stopped short of issuing an order of parentage or filiation, resting her decision on the lack of a petition for paternity or parentage, but noting that such a determination would be necessary, for example, for issuance of an order of child support, if such were sought. This issue remains an open one after the landmark change wrought by the *Brooke S.B.* decision, namely, what rights beyond visitation and custody might adhere to a successful determination of parentage under *Brooke S.B.*? While some courts have been willing to enter an Order of Filiation upon such a determination, this court refrained from doing so but, nonetheless, issued a ground-breaking decision for protection of LGBT families.

In this case, the petitioners are represented by Patricia A. Fersch of Fersch Petitti LLC, New York City, and the respondent by Alyssa Eisner of Sager Gellerman Eisner LLC, Forest Hills. ■

Katie Hansson is a law student at University of Florida (class of 2018); Brett M. Figlewski is the Legal Director of LeGaL.

New Jersey Federal Court Allows "Gay or Bisexual" Forklift Operator's Employment Discrimination Case to Move Forward

By Eric Lesh

Milko Mateo, who "describes himself as gay or bisexual," brought suit in the U.S. District Court for the District of New Jersey, against his former employer, Nestle Waters North America ("NWNA), alleging discrimination against him on the basis of his sexual orientation under Title VII and New Jersey state law, a hostile work environment, and retaliation. NWNA moved for summary judgment before Judge Kevin McNulty, who was nominated by President Obama in 2011 (and happens to be the brother-in-law of New York Senator Chuck Schumer.) *Mateo v. Nestle Waters North America*, 2018 U.S. Dist. LEXIS 64040, 2018 WL 1806049 (D.N.J., April 16, 2018).

According to Judge McNulty's opinion, Mr. Mateo started working at the NWNA distribution center in May 2012, where he was assigned to a position as a forklift operator. NWNA made Mr. Mateo aware of its employment policy prohibiting harassment in the workplace on the basis of sex and sexual orientation and required him to also attend harassment training with their HR manager, Christie Fenton.

Mr. Mateo alleges that "all of the guys," including his supervisor, Pedro Rodriguez, made anti-gay remarks in his presence. As the court recounted "Mr. Mateo alleges that he was repeatedly called 'batty boy,' a derogatory term for gay men; referred to as 'my woman'; told to 'spread his legs'; asked to help a coworker 'relieve his frustration in an empty truck'; and called a 'cocksucker.' A coworker allegedly touched Mr. Mateo's nipples and said, 'you want to suck my dick.' A coworker who made anti-gay remarks and comments allegedly yelled, 'I don't like you, I can't stand you . . . . I don't want to have to f--- you up . . . [W]ait until we get out of the warehouse, I'm going to f--- you up.' Mr. Mateo alleges many other incidents of harassing conduct. Another coworker that made anti-gay remarks and comments allegedly threatened him with knives."

NWNA, on the other hand, claims that Mr. Mateo was subject to "occasional incidents, teasing, or episodic instances of ridicule" that are insufficient to state a harassment claim and that Mr. Mateo instigated many of the incidents. There is also a dispute between the two parties about when Mr. Mateo first reported the harassment he alleges, but reports and testimony do show that Mr. Mateo did report each of these incidents in accordance with procedures outlined in NWNA's policies. Another major factual dispute is "whether NWNA took prompt and adequate remedial action."

On July 17, 2013, six days after NWNA's annual harassment awareness training, Mr. Mateo got into a fight with his colleague about the placement of fans in the warehouse. NWNA claims that Mr. Mateo instigated the incident, and Mr. Mateo alleges that the fight was started by his colleague. Both men were given a written warning, which Mr. Mateo states he was forced to sign. Mr. Mateo appealed the written warning, and the parties disagreed "about whether this was the first time Mr. Mateo mentioned that he was subject to inappropriate conduct as a result of his sexual orientation." Either way, the appeal was denied by NWSA and after another incident involving Mr. Mateo and an incident with a colleague over a time clock, NWNA terminated Mr. Mateo.

On the Title VII and state law hostile work environment claim, the court concluded that NWNA has not "met its burden of showing that there is no dispute of material fact regarding the hostile work environment allegations." The court held that a jury could find that Mr. Mateo "(1) suffered intentional discrimination because of a protected

classification; (2) the discrimination was severe or pervasive; (3) it detrimentally affected him; (4) it would have detrimentally affected a reasonable person of the same protected class in his position; and (5) there is a basis for vicarious liability." The court found a material facts with respect to NWNA's affirmative defenses were also in dispute.

The court also denied summary judgment as to the sex and sexual orientation discrimination claims, finding that Mr. Mateo could persuade a reasonable factfinder of the prima facie case, and that NWNA could not demonstrate that NWNA's stated reason for his termination, a second altercation with a co-worker, is not a pretext for discrimination. Most interestingly here, the court smack down an argument put forward by NWNA that "any notion that NWNA discriminates against homosexual employees is belied by the employment of Debra Houston, an openly gay warehouse employee who does not complain of harassment or inappropriate conduct." The court correctly reminds NWNA that "an employer cannot immunize itself from harassment claims simply by finding a member of the same protected class that does not complain of harassment."

The court also denied summary judgment on the retaliation claim.

While neither party raised the issue, the court noted that "whether Title VII prohibits discrimination based on 'sexual *orientation*' remains contested." The court points to Third Circuit case law, establishing that discrimination "against gays and lesbians is prohibited under Title VII insofar as it involves discrimination based on sex and gender stereotypes." The court also highlighted the rulings in cases from the Second Circuit and Seventh Circuit, finding that sexual orientation discrimination is prohibited by Title VII (*Zarda v. Altitude Express, Inc*., 883 F.3d 100, 132 (2d Cir. 2018) and *Hively v. Ivy Tech Cmty. College*, 853 F.3d 339, 351-52 (7th Cir. 2017). Regardless, the court held that "it is indisputable" that Mr. Mateo can pursue a sexual orientation discrimination claim under New Jersey state law. ■

Eric Lesh is the Executive Director of LeGaL.

Ohio Federal Court Rejects ADA Claim by Transgender Plaintiff, But Refuses to Dismiss Title VII Claims

By Arthur S. Leonard

If the case did not present somewhat novel issues because of the gender identity of the plaintiff, *Parker v. Strawser Construction, Inc*., 2018 U.S. Dist. LEXIS 69556, 2018 WL 1942374 (S.D. Ohio, April 25, 2018), would read like a textbook example of a Title VII sex discrimination and hostile environment case with the usual added component of a retaliation claim. But plaintiff Tracy Parker is a transgender woman whose unremarkable career as a truck driver for a construction company began to collapse after three years when she "came out" as transgender and began her on-the-job transition. This was compounded by the company's feckless response to the hostile environment created by her male co-workers, bolstered by the employer's mistaken belief that Title VII and the Ohio anti-discrimination statute would not protect her from discrimination.

But perhaps the most memorable aspect of the court's ruling on the employer's motion to dismiss concerns Parker's assertion that the discrimination she encountered violates the Americans with Disabilities Act (ADA), citing her gender dysphoria diagnosis and relying on last year's decision in *Blatt v. Cabela's Retail, Inc*., 2017 WL 2178123 (E.D. Pa., May 18, 2017). Parker's ADA claim runs up against 42 U.S.C. Sec. 12211(b)(1), a provision of the ADA excluding from the definition of disability "gender identity disorders" and "transsexualism." In *Blatt*, the district court engaged in some fancy statutory interpretation, concluding that the provision was intended by Congress to make sure that "non-disabling conditions that concern sexual orientation or identity" were not covered by the ADA. The *Blatt* court then accepted the contention that under the expanded definition of disability adopted in the 2008 Americans with Disabilities Amendment Act, the plaintiff could plausibly allege major life activities that were impaired by gender dysphoria. In Parker's case, U.S. District Judge George C. Smith was unwilling to follow this reasoning, writing: "But this Court can find no support, textual or otherwise, for the *Blatt* court's interpretation. The exclusion plainly applies to all 'gender identity disorders not resulting from physical impairments,' without any regard to whether the gender identity disorder is disabling. Further, whether a condition is 'disabling,' according to the *Blatt* court, depends on whether the condition substantially limits one or more major life activities. But limitation of major life activities is a requirement for *all* conditions qualifying as a 'disability' under the ADA, 42 U.S.C. sec. 12101(1). Thus, gender identity disorders that do not substantially limit a major life activity are already excluded from coverage, and an additional exclusion for any non-disabling condition would be superfluous." Smith concluded that the "clear result is that Congress intended to exclude from the ADA's protection both disabling and non-disabling gender identity disorders that do not result from a physical impairment." He also questioned whether recent evidence from medical journals tending to show that gender dysphoria stems from certain brain structures and physiological phenomena means that it results from a physical "impairment," but Smith noted that this was new evidence introduced in opposition to the motion to dismiss, not contained in the Complaint, and thus not to be considered on the motion to dismiss.

However, the loss of her ADA cause of action is not really a setback for Parker, since her factual allegations were found sufficient to ground Title VII claims of discrimination, hostile environment (although perhaps just barely in terms of the "severe or pervasive" requirement)

and retaliation. The company's reliance on the lack of coverage for gender identity under Title VII was not a strong argument in light of the "sex stereotype" cases involving transgender plaintiffs in the 6th Circuit going back to the middle of the last decade, but such reliance was firmly vanquished by the recent 6th Circuit ruling in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 884 F. 3d 560 (2018), in which the circuit held that "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" and, thus, gender identity discrimination claims are necessarily sex discrimination claims covered by Title VII. Indeed, Judge Smith stretched further by refusing to dismiss the claims under Ohio's state law ban on sex discrimination, although it is questionable that the Ohio courts would necessarily follow the 6th Circuit's lead when it comes to construing their own state statute.

Parker did lose her individual defendants, both because Title VII runs against companies, not individual supervisors or managers, and because her retaliation claims did not allege that individuals rather than the company had taken adverse actions against her in response to her protected activities under the anti-retaliation provisions of federal and state laws, thus failing to allege facts sufficient to ground a retaliation claim against individual supervisors or managers under the Ohio statute's anti-retaliation provision. However, the court did find a basis for holding the company potentially liable for the hostile environment created by co-workers, in light of plausible allegations that the company's response to Parker's complaints about discrimination were negligent. (At one time, a management official, responding to Parker's complaint about the company's clumsy mismanagement of the issues generated by co-worker reactions to her transition, called the company's response a "work in progress" but there was no evidence of real progress.)

Frederick M. Bean, of The Spitz Law Firm, LLC, Beachwood, OH, represents Parker. ■

Federal Trial Court Rejects Anonymity for Genderqueer Trans-Masculine Plaintiff in Employment Discrimination Lawsuit

By Arthur S. Leonard

U.S. District Judge J. Paul Oetken, himself an out gay man, has granted a motion by the defendants in an employment discrimination case to lift an order he had previously issued allowing the plaintiff in the case to proceed anonymously as "Jamie Doe." *Doe v. Fedcap Rehabilitation Services, Inc*., 2018 WL 2021588, 2018 U.S. Dist. LEXIS 71174 (S.D.N.Y., April 27, 2018). Judge Oetken gave the plaintiff 14 days to decide whether they intend to proceed with this suit using their real name.

Upon filing the lawsuit, Doe had moved *ex parte* to proceed under a pseudonym. The court granted the motion without prejudice to the Defendants' right to seek lifting of the order, which they have now done.

The starting point for the court is Rule 10(a) of the Federal Rules of Civil Procedure, which provides that "all the parties" be named in the title of a Complaint. The 2nd Circuit, which has appellate jurisdiction over cases filed in the Southern District of New York,

While acknowledging that the disclosure of Doe's trans-masculinity "would be difficult and uncomfortable," wrote the judge, "this alone is not enough to proceed pseudonomously.

The plaintiff identifies as "genderqueer and trans-masculine, with preferred pronouns of 'they,' 'their,' and 'theirs," wrote the judge. The defendants include Fedcap Rehabilitation Services, a non-profit that assists people in completing their education and making a transition into the workforce, and two of its supervisors. "Doe" alleges that "the Defendants discriminated against Doe based on Plaintiff's disability (breast cancer, depression, anxiety, and post-traumatic stress disorder), sexual orientation (queer), and gender (gender non-conformity/genderqueer/trans-masculine). Plaintiff also alleges that Defendants retaliated against Plaintiff for exercising their rights under the Family Medical Leave Act. Plaintiff has since left Fedcap and found new employment." Thus, the complaint includes both federal and state law claims.

has ruled that this requirement "serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly." That court has commented, "When determining whether a plaintiff may be allowed to maintain an action under a pseudonym, the plaintiff's interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant." The 2nd Circuit has identified a non-exclusive list of ten different factors that courts might consider in conducting such a balancing test.

The plaintiff identified four harms if their name is revealed in this litigation. Plaintiff says their trans-masculinity is an "intimate detail" that they don't want to disclose through the public record; that "outing them" as trans-masculine would compound the trauma they have already suffered from the defendant's

discrimination; that "genderqueer individuals suffer disproportionately from discrimination" and "outing" them in this way would place them "at further risk of discrimination by employees at their new job," and finally that, as a parent of school-age children, plaintiff is concerned that disclosing their identity may expose their children to bullying."

The defendants identified three types of prejudice to them if plaintiff is allowed to proceed anonymously. First, the "non-trivial cost of sealing or redacting court filings;" second, that "anonymity might allow Plaintiff to make accusations that they would not have made if their identity were publicly known;" and third, "Defendants contend that anonymity creates an imbalance when it comes to settlement negotiations." The defendants, who are not anonymous, may feel public pressure to settle the case in order to avoid bad publicity, while an anonymous plaintiff might "hold out for a larger settlement because they face no such reputational risk."

Judge Oetken concluded that the case "presents no particularly strong public interest in revealing Plaintiff's identity beyond the 'universal public interest in access to the identities of litigants,'" which he remarks is "not trivial." But the public interest would not be "especially harmed if Plaintiff proceeded pseudonymously."

However, wrote the judge, "The key issue here is the extent to which Plaintiff has already revealed their gender and sexual orientation to the general public. Defendants point to Plaintiff's voluntary participation in a news story for a major news outlet. In the story, Plaintiff used their real name, identified as genderqueer, and revealed other details about their gender non-conformity. The article also featured a photograph of Plaintiff, and the picture specifically illustrated Plaintiff's non-conformance with gender norms." Thus, the defendants argued, Doe had already voluntarily disclosed "the sensitive issues they seek to keep secret in this case."

Doe disagrees, saying they have revealed their sexual orientation but not their gender identity, particularly their identity as "trans-masculine," which would be disclosed if they have to proceed under their real name in this lawsuit. But this argument did not persuade Judge Oetken, who wrote, "But while that is true, the news story still shows that Plaintiff was comfortable with putting their gender-non-conformity in the public eye. The Court is mindful that coming out is a delicate process, and that LGBTQ individuals may feel comfortable disclosing one aspect of their identity but uncomfortable disclosing another. Nevertheless, Plaintiff's very public coming out as genderqueer undermines their arguments about the harm that would be caused by disclosure of their trans-masculinity."

"The Court is mindful that coming out is a delicate process, and that LGBTQ individuals may feel comfortable disclosing one aspect of their identity but uncomfortable disclosing another. Nevertheless, Plaintiff's very public coming out as genderqueer undermines their arguments."

The court concluded that the issue was "whether the additional disclosure of Plaintiff's identity as trans-masculine would so harm Plaintiff as to outweigh the significant prejudice to Defendants and the public interest in access to the identities of the litigants. Plaintiff has not met that significant burden." Judge Oetken suggests that Plaintiff wants "what most employment-discrimination plaintiffs would like: to sue their former employer without future employers knowing about it," but that is not how the civil litigation system is set up. "Defendants – including two individuals – stand publicly accused of discrimination and harassment, including detailed allegations of misconduct. Defendants do not have the option of proceeding pseudonymously," commented Oetken. "Allowing Plaintiff to proceed anonymously would put Defendants at a genuine disadvantage, particularly when it comes to settlement leverage. Courts allow such an imbalance only in unique circumstances, and Plaintiff has not shown that this is one of those special cases."

While acknowledging that the disclosure of Doe's trans-masculinity "would be difficult and uncomfortable," wrote the judge, "this alone is not enough to demonstrate the exceptional circumstances required to proceed pseudonomously, especially in light of Plaintiff's public identification as genderqueer."

Compare this decision to *Doe One v. CVS Health Corporation*, 2018 U.S. Dist. LEXIS 70024 (S.D. Ohio, April 26, 2018), and *Doe v. Spencer Cox Clinic*, 2018 N.Y. Misc. LEXIS 1165, 2018 N.Y. Sliip Op 50461(U), 2018 WL 1722418 (N.Y. Sup. Ct., N.Y. Co., April 6, 2018), described below under Civil Litigation Notes, in which the district courts granted motions for HIV-positive plaintiffs to proceed anonymously in lawsuits against pharmaceutical industry defendants and several hospitals and a medical clinic over alleged unauthorized disclosure of medical records. Courts generally consider HIV-status in medical records to deserve the kind of confidentiality treatment that the plaintiff in the instant case was seeking for their trans-masculine identity information.

Doe is represented by Brittany Alexandra Stevens of Phillips & Associates PLLC, and Marjorie Mesidor of Phillips & Phillips PLLC. Attorneys from the law firm of Epstein, Becker & Green, P.C., represent the defendants. ■

Illinois Appellate Court Affirms Parental Status of Same-Sex Spouse of Birth Mother

By Arthur S. Leonard

The Appellate Court of Illinois (2nd District) affirmed a decision by Winnebago County Circuit Judge Joseph H. Bruce that the wife of a woman who gave birth to a child conceived through donor insemination at a time when Illinois did not yet recognize out-of-state same-sex marriages was nonetheless a legal parent of the child. The Appellate Court declined an invitation to adopt a gender-neutral construction of the state's parental presumption statute in effect at the time the child was born, however, as the legislature has replaced it with a new statute. *Marriage of Dee J. and Ashlie J.*, 2018 IL App (2d) 170532, 2018 Ill. App. LEXIS 247, 2018 WL 1999154 (April 27, 2018).

Dee and Ashlie were married in Iowa in 2009, but were living in Illinois, where their child, A.M.J., was born in February 2014. Later that year Illinois adopted marriage equality legislatively. However, seven months after A.M.J. was born, the parties separated, and Dee petitioned to dissolve the marriage. In her petition, Dee stated that A.M.J. was born of the marriage, but she later filed an amended petition, alleging that A.M.J. was not a child "of the marriage" and sought a declaration that there was no parent-child relationship between Ashlie and A.M.J. Responding to this, Ashlie sought a declaration of her parent-child relationship with A.M.J., and asked the court to allocate decision-making responsibilities and parenting time between the two women. Ashlie argued that her parental and visitation rights were based on the common-law theories of marital contract and promissory estoppel.

After holding a hearing on the parentage issue, Judge Bruce issued a memorandum decision declaring that Ashlie did have a parent-child relationship with A.M.J., including an order to that effect. Dee tried to appeal the order, but the Appellate Court dismissed the appeal as premature, as "a parentage determination is not a final and appealable order in its own right," reserving appellate review for a final order by the trial court dissolving the marriage and allocating parental rights and responsibilities.

On appeal, Dee pressed her argument that Ashlie is not a legal parent of A.M.J. Writing for the Appellate Court, Judge Susan Hutchinson provides some background on the history of Illinois's treatment of parenting issues in the context of donor insemination and unmarried couples. In particular, she noted *In re T.P.S.*, 2012 IL App (5th) 120176, in which the court extended prior rulings concerning unmarried couples to same-sex couples who conceived children through donor insemination. In that case, the court ruled that "parental responsibility may be imposed or parental rights may be asserted 'based on conduct evincing actual consent to the artificial insemination procedure by an unmarried [same-sex] couple along with active participation by the nonbiological parent as co-parent. To hold otherwise,' the court stated, 'would deny a child his or her right to the physical, mental, and emotional support of two parents merely because his or her parentage falls outside the terms of the Illinois Parentage Act."

Affirming the trial court, Judge Hutchinson wrote that "under the standards set forth in *In re Parentage of M.J.* and *In re T.P.S.*, the evidence in this case was not close." Indeed, the court found material facts largely undisputed as to the agreement between the women, who had previously married in Iowa, to have a child together through donor insemination, Ashlie's participation in the process throughout, both names on the birth certificate, joint birth announcement sent through their employer's newsletter, a joint baby shower, and Ashlie's active participation in parenting the child prior to the couple's separation

Dee had argued that there was "negligible" evidence of a parent-child bond having been formed before the separation, but the court dismissed that point as "hardly dispositive" and found to "more important" the trial court's statement: "A nonbiological parent still retains both her parental responsibilities and rights. A child still retains the right to the physical, mental, emotional and financial support from both of her parents. A.M.J. was brought into this world because of the decision of both Dee and Ashlie to conceive a child through artificial insemination. She as nurtured for the first seven months of her life by both Dee and Ashlie. These are months when attachments and bonds are formed between an infant and both parents. The evidence shows that both parents were actively involved with A.M.J. during these months. This was sufficient time for Ashlie to demonstrate the kind of co-parent connection with A.M.J. to satisfy the requirements set forth [in the case law]. Ashlie did not merely consent to an insemination procedure and then abandon the child who was conceived through that process. She remained involved with A.M.J. like a loving parent until marital discord led to the separation of the parties seven months [after A.M.J. was born]."

Reviewing this under the "manifest weight of the evidence standard," the appellate court said "we agree with the trial court's foregoing statements in all respects." The court dismissed Dee's argument that the trial court had failed to engage in a "best interest of the child" analysis before declaring Ashlie to be a parent of A.M.J., observing that the "best interest" standard applies to custody and visitation determinations, not to the question whether somebody is a legal parent. The court also rejected Dee's attempt to argue that Ashlie could

not be considered a parent because there was not complete compliance with the paperwork requirements under the Gestational Surrogacy Act. Judge Hutchinson found that Act to be irrelevant to this case, because there is no gestational surrogacy in this case. A.M.J. was conceived using Dee's egg, not a donated egg, and Dee was not a surrogate, she was a birth parent!

Concluding the opinion, Judge Hutchinson noted Ashlie's argument that the court should affirm using the parental presumption under the Illinois Parentage Act, citing *Obergefell v. Hodges* (2015) and the requirement that same-sex married couples be treated the same as all other married couples. "We need not consider Ashlie's argument," wrote Hutchinson, "because in 2014 the legislature repealed the Illinois Parentage Act of 1984 and replaced it with the Illinois Parentage Act of 2015, and more recently the legislature made a number of technical corrections to the 2015 enactment. These legislative alterations obviate the need for us to consider Ashlie's argument, as we cannot grant her any effective relief from a statute that is no longer in effect."

Lambda Legal's Camilla Taylor, who helped argue the appeal on behalf of Ashlie, told the *Chicago Tribune*, "This solidifies a body of law in Illinois that protects the relationship between children and their nonbiological parents." Dee was represented by Zachary Townsend, who was critical of the court's failure to deal with a "best interest of the child" analysis, and characterized the ruling as "judicial activism" because the parties had not cited the two cases on which the opinion seemed to rely. "I don't think this case is necessarily representative of future same-sex cases." Actually, as the child was born before Illinois legislated for marriage equality and the state has amended its parentage law since then, one might view this as a transitional case. Under the developing statutory and case law, especially the Supreme Court's ruling in *Pavan v. Smith* (2017), same-sex spouses of birth mothers will routinely be considered legal parents. ■

Total Defeat for the Government on Refugee Claims by a Gay Man from Ghana; 9th Circuit Holds a Reasonable Trier of the Facts Would Reach Opposite Conclusions

By Arthur S. Leonard

In a total reversal of the Board of Immigration Appeals' denial of refugee status to a gay man from Ghana who had been a victim of torture, a unanimous panel of the 9th Circuit ruled on April 27 in *Abass v. Sessions*, 2018 WL 1979016, 2018 U.S. App. LEXIS 10811, that Mumin Abass is entitled to asylum, withholding of removal, and relief under the Convention against Torture, countermanding the BIA's holdings on each of these grounds of relief. Abass is represented by Katherine Evans from the University of Idaho College of Law, Moscow, ID. The court's memorandum opinion says nothing about the circumstances under which Abass came to the United States, leaving only occasional hints as to the facts strewn through the opinion.

"Any reasonable trier of fact would be compelled to conclude that Abass would more likely than not be subject to torture if removed to Ghana . . . Abass's past torture is the primary factor we permissibly rely on when deciding whether he would more likely than not suffer future torture . . . "

First addressing the asylum claim, the court wrote, "The BIA's only basis for denying Abass's asylum application was that Abass had not met his burden to show that the Ghanian government is 'unable or unwilling to protect him from anti-gay violence or harm.' In its answering brief, the government does not argue that Abass did not suffer past persecution; rather, the government only asks us to remand because, in light of our decision in *Bringas-Rodriguez*, 850 F.3d 1051 (9th Cir. 2017)(en banc), the agency should have another opportunity to elicit testimony from Abass about whether he reported his attack to the police, and if not, why not."

"Our 'unable and unwilling' standard was already established at the time both the IJ and the BIA rendered their decisions," said the court, pointing out that as far back as 2010 the 9th Circuit had ruled that "reporting persecution to government authorities is not essential to demonstrating that the government is unable or unwilling to protect [a petitioner] from private actors," citing *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010). "Even under these already established standards," continued the court, "the BIA disregarded and mischaracterized substantial evidence demonstrating that Ghanian officials are unwilling to protect LGBT individuals. The record shows that police often partake in extortions targeting gay persons and are reluctant to investigate claims of homophobic attacks. When police do intervene in mob attacks of gay persons,

they, at times, arrest the victims. Most importantly, consensual intercourse between two men is illegal in Ghana, and revealing homosexual identity to the police can subject that individual to potential arrest and prosecution. Therefore, '[Ghana's] laws [and] customs effectively deprive [Abass] of any meaningful recourse' and thus reporting his persecution would be 'futile.' *Rahimzadeh*, 613 F.3d at 922. Given the overwhelming evidence compels the conclusion the Ghanian government is unwilling to protect LGBT individuals, it is unnecessary for Abass to provide additional testimony on this point."

The court went on to find that this documentation of the treatment of LGBT people in Ghana more than suffices to establish that Abass has a well-founded fear of future persecution if he were returned to Ghana. The court found that the same accumulated evidence would support withholding of removal, stating, "A rebuttable presumption that Abass would suffer future persecution if he were returned to Ghana is equally applicable to his claim for withholding of removal. For all the reasons that support Abass's well-founded fear of future persecution and 'because the government has failed to rebut this presumption,' any reasonable trier of fact would be compelled to conclude that it is 'more likely than not that [Abass] would be subject to persecution upon returning to [Ghana] . . . Thus, in addition to remanding to the Attorney General to exercise discretion regarding asylum, we also remand for an appropriate order withholding removal of Abass."

Finally, the court turned to the Convention against Torture (CAT). The BIA had denied relief for two reasons: "The BIA found that Abass did not demonstrate that Ghanian officials acquiesced in his past torture or would acquiesce in any future torture, and the BIA concluded that Abass could safely relocate to another part of Ghana." In light of the evidence place before them, one asks which universe the IJ and BIA inhabit? "Not only does Ghana have a law that criminalizes homosexual conduct," wrote the court, "other evidence in the record points to Ghanian officials' acquiescence to torture of LGBT persons. Various political leaders call for rounding up LGBT persons, and even call for them to by lynched. The U.S. Human Rights Report likewise states that 'the attitude of the police toward LGBT persons' was a factor 'preventing victims from reporting incidents of abuse.' The record also contains multiples examples of police extortion of gay men. Thus, . . . we find that the record compels the factual finding that the government acquiesces to torture of LGBT persons."

"Any reasonable trier of fact would be compelled to conclude that Abass would more likely than not be subject to torture if removed to Ghana . . . Abass's past torture is the primary factor we permissibly rely on when deciding whether he would more likely than not suffer future torture in Ghana . . . Second, the BIA's finding that Abass would be able to safely relocate was not supported by substantial evidence . . . Abass's testimony supports that he was in hiding for a month before fleeing Ghana and that relocation is difficult because of pervasive homophobic attitudes throughout the country. Abass provided two declarations stating that he would be killed upon returning to Ghana, and one of them even stated that his lover had already been killed. Further, we have established that CAT cannot be denied on the basis of a petitioner being expected to conceal his or her identity or beliefs." Indeed, the court noted that the U.K. Border Agency Report "states that relocation in Ghana is difficult because homophobic attitudes are so pervasive. In short, nothing in the record supports the BIA's conclusion that Abass would be able to safely relocate." In addition, the court found, the record supports a finding that "Ghana is rife with 'gross, flagrant or mass violations of human rights," citing to numerous newspaper clippings in the record. Abass had also provided evidence that the Education Ministry had vowed "to severely punish any student caught engaging in homosexual or lesbianism activities." The court noted that Amnesty International has condemned "public officials for publicly endorsing lynching gay people."

"No further fact-finding is required to support Abass's CAT claim because the record already compels the conclusion that he is entitled to CAT relief . . . . The government does not offer any arguments on the merits of Abass's CAT claim and therefore waived any challenge. Because 'the BIA has already fully considered [Abass's] CAT claim' and CAT relief is nondiscretionary, we only 'remand for the agency to grant' withholding of removal under CAT."

In conclusion, the court wrote: "We hold that Abass is statutorily eligible for asylum and remand so the Attorney General may exercise discretion in granting asylum. We also hold that Abass is entitled to withholding of removal under IIRIRA. And because we hold that '[Abass] has met his CAT burden . . . he is entitled to mandatory withholding of removal on the basis of his claim under the Convention."

What is implicit in this unsigned memorandum opinion, emanating from a panel consisting of Senior Circuit Judge Dorothy W. Nelson, Senior Circuit Judge Andrew Jay Kleinfeld, and Circuit Judge William A. Fletcher, is that the IJ and the BIA totally "blew it" in this case . . . to such an extent as to raise the inference that they were pursuing an agenda of denying refugee status to gay petitioners from Africa regardless of the evidence. More than once the court says that a reasonable trier of the facts would reach a conclusion opposite to that stated by the IJ and the BIA in this case. What explains this blatant misfeasance by federal officials? Dare we say animus against gay Africans? Or just against any Africans who come from countries characterized by President Trump in his "private" moments by a racist expletive that we will not repeat here. Has the president's racism so quickly infected the career ranks of bureaucracy? ■

A Tale of Two Circuits: District Courts' Extreme Variation in Screening Transgender Prisoner Cases

By William J. Rold

The Courts of Appeals are where policy is made," said now-Justice Sonia Sotomayor, before she was forced to walk the statement back a bit at her confirmation hearings to the Supreme Court – but she was right, as any practicing lawyer knows. The Circuit in which a transgender plaintiff finds her or himself affects the course of the case almost more than any other single factor at the present time – particularly if the plaintiff is a pro se prisoner whose case is being "screened" to proceed. One could compare many courts of appeals – the Eighth and Tenth with the Ninth; or the Sixth with the Seventh – but the two cases that follow – *Canter v. Moyer* and *Clark v. LeBlanc* – arose in the Fourth and Fifth Circuits. Specifically, they concern district court screening of transgender inmate cases in Maryland and Louisiana. The presence or lack of circuit precedent was determinative in the disposition of these cases.

In *Canter v. Moyer*, 2018 U.S. Dist. LEXIS 51416, 2018 WL 1513012 (D. Md., March 13, 2018), Amber Marie Canter, f/k/a Charles Canter, proceeding *pro se*, challenged the State of Maryland's "freeze frame" policy of denying hormone treatment to inmates whose diagnosis of gender dysphoria was not established prior to incarceration. But the denial here goes farther than that. Here, Canter had brought an order to show cause, and the state defended by assuring U.S. District Judge George J. Hazel that it would have Canter evaluated by a specialist at Johns Hopkins. This never occurred, and when Canter returned to court, she had still had no evaluation; and Corrections officials were maintaining that she had no diagnosis. Canter attempted suicide at last 18 times, according to the complaint; she self-mutilated her testicles, and she experienced drainage from her breast implants due to the cessation of her estrogen medication. By the time her case was heard again, Canter had been released on parole, and Judge Hazel granted summary judgment to the defendants on declaratory and injunctive relief.

Canter also had a claim for damages, however. Defendants insisted that they were entitled to summary judgment, because Canter had no gender dysphoria diagnosis (which they impeded themselves) and because she was receiving 45 minutes of counseling once-a-month. They offered no medical evidence, and they refused to provide Canter with a copy of her own records.

Judge Hazel found that facts strikingly similar to those in *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (refusal to evaluate transgender inmate for gender reassignment surgery where current therapy failed to alleviate urge for serious self-harm raises cognizable claim under Eighth Amendment). There was no question Canter's medical needs were serious. Defendants were aware of the risk in part because it was obvious, even to a layman, citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Their subjective knowledge was also shown in their agreement in the breached resolution of the order to show cause to send Canter to Johns Hopkins. For the same reasons, the response to the subjectively known risk was not itself reasonable. Moreover, defendants "cannot credibly assert that Plaintiff's right to treatment is not clearly established" because of *De'lonta v. Johnson*. They are not therefore entitled to qualified immunity from damages.

In light of Canter's difficulty even obtaining copies of her own records, and the defendants' misrepresentations to the court, Judge Hazel exercises his discretion to appoint counsel for this *pro se* plaintiff. Because the action "will proceed to discovery," Canter needs assistance.

In *Clark v. LeBlanc*, 2018 WL 1547860 (M.D. La., March 13, 2018), U.S. Magistrate Judge Erin Wilder-Doomes issued a Report and Recommendation ["R & R"] recommending summary judgment against *pro se* transgender inmate Robert Clark. Clark claimed deliberate indifference to her serious health care needs, retaliation for complaints, and failure to protect her from sexual assault and harassment. The R & R first finds that Clark failed to exhaust administrative remedies under the Prison Litigation Reform Act by not establishing that she took appeals to the second level of Louisiana's two-tiered system. The court declines to treat her letter to the head of operations as an appeal to the department secretary of the denial of her emergency grievance for medication, because it did not mention that it was an appeal and instead sought protection against retaliation for having filed the emergency appeal.

Although unnecessary, Judge Wilder-Doomes continued, by recommending dismissal of the entire action on the merits, although she addressed only the health care claim. She finds that defendants are entitled to qualified immunity because there is no controlling precedent in the Fifth Circuit holding that transgender inmates have a right to hormone therapy under the Eighth Amendment. Applying qualified immunity standards "without the benefit of an evidentiary hearing," Judge Wilder-Doomes finds that the Fifth Circuit has precluded Clark from overcoming qualified immunity, because no constitutional right has been violated. *See Praylor v. TDCJ*, 430 F.3d 1208, 1209 (5th Cir. 2005) (assuming without deciding that transsexualism presents a serious medical need but holding, on the record before it, that "the refusal to provide hormone therapy did not constitute the requisite deliberate indifference"). Judge Wilder-Doomes finds that most district courts have denied relief under similar circumstances through dismissal or

summary judgment. Citations (mostly from Texas) omitted. "It does not appear that Plaintiff's rights are sufficiently clearly established to support a finding of liability," she concluded.

Perhaps mindful of the sweep of her recommendation, Judge Wilder-Doomes ends with the following *dicta*, the effect of which is unclear: "Notwithstanding the foregoing, the Court is reluctant to reach a definitive determination in connection with Plaintiff's claims in the absence of an evidentiary showing relative to the medical care and attention that Plaintiff has received, relative to the accommodations that have been or should be provided because of Plaintiff's condition, or relative to whether policies have been or should be implemented to address the concerns of an inmate suffering with gender identity concerns. While the Court recognizes the security concerns that would likely accompany any allowance for Plaintiff to dress like a woman, wear female undergarments, utilize cosmetics, grow his hair and fingernails longer than currently allowed for male inmates, shave Plaintiff's body hair, or generally appear as a woman in an all-male prison facility, the Court does not have the expertise to determine whether other accommodations may be appropriate that would afford Plaintiff some measure of relief without imposing an unreasonable burden upon prison resources or security concerns." The R & R also noted that qualified immunity would not constitute a defense to injunctive relief. Inexplicably, she then recommends that the case be dismissed in its entirety.

In a footnote citing to other circuits, Judge Winder-Doomes may be nodding to more progressive thought on the subject. Justice Sotomayor's admonition that circuit courts make policy is evident in the tone the courts of appeals set for these district judges and the freedom within which they believe that are constrained to act. ■

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.

New York Trial Court Grants Transgender Inmate's Petition for Name Change

By Joseph Rome, Maria Khoury, and Robert Watson

On March 16, 2018, a New York trial court ordered that a transgender inmate be permitted to change her legal name despite the opposition of the Corrections Department and the judge who had presided over the petitioner's criminal case. *Matter of A.H.M.*, 2018 NYLJ LEXIS 1150, NYLJ 1522973101, at *1 (N.Y. Sup. Ct., Clinton Co., filed March 16, 2018, published in NYLJ April 10, 2018).

According to Justice Mark Powers' opinion, the petitioner requested the court's approval to change her name because of "profound embarrassment," harassment and discrimination related to the use of her legal male name. The court noted that the petitioner apparently had not yet undergone reconstructive/gender reassignment surgery. The judge who presided over the petitioner's criminal prosecution contested the petition due to the violent nature of the crime that earned the petitioner a 12-year sentence. The sentencing judge argued that the "petitioner's use of deadly force and the serious internal injuries caused to the victim" demonstrated that the petitioner had "no regard for society." Further, the judge posited that a name change would negatively impact the collection of a $325 mandatory crime victim assistance fee.

Relatedly, the Deputy Counsel to the New York State Department of Corrections and Community Supervision (DOCCS) argued that a name change would hinder any victim's ability to track the petitioner's location on release, in particular noting that one victim has a restraining order lasting several years beyond the petitioner's expected release date.

The court held that, under New York law, it had very limited discretion to deny the name change unless there is evidence of "fraud, misrepresentation or interference with the rights of others." The objections from the sentencing judge and DOCCS did not fit into any of these categories, and the court found them to be "merely conclusory." The court noted that the petitioner had used several aliases in the past, and was now identified within the prison system by a DIN number, which would not be changed. Thus, there was no reason to believe that victims' rights would be impaired by a change of the petitioner's legal name or that there would be any record-keeping confusion within the prison system.

The court cited precedent that "incarceration, standing alone, does not bar" a name change.

Apparently in response to the objections generally alleging the petitioner's moral shortcomings, the court also cited precedent that "incarceration, standing alone, does not bar" a name change. *See Matter of Jackson*, 144 A.D.3d 1539 (N.Y. 4th Dept. 2016). Without addressing whether difficulty in collecting the $325 mandatory crime victim assistance fee would be a valid basis to oppose a name change, Justice Powers noted that the fee was in fact "being collected via prison wages."

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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. SUPREME COURT – It is truly not over until it is over. In June 2017, the U.S. Supreme Court ruled in *Pavan v. Smith*, 137 S. Ct. 2075, that Arkansas violated the constitution by refusing to treat married same-sex couples the same as different-sex couples when it came to placing parental names on birth certificates of children born to married women. Indeed, this result was so clear to the majority of the Supreme Court that they did not order merits briefing and hold oral arguments, granting judgment summarily based on the cert papers and reversing the Arkansas Supreme Court. Now plaintiffs have filed a new petition for certiorari, protesting the Arkansas court's refusal to award attorney's fees to the prevailing party in the case! Indeed, although an award of appellate attorney's fees to a party who prevails on a constitutional rights claim in the Supreme Court usually follows as a matter of course under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988, the Arkansas Supreme Court denied the fee application without explanation. In the petition, the plaintiffs state: "The Arkansas Supreme Court's denial of fees without explanation shows a complete disregard for the requirements of Section 1988 and this Court's cases construing that statute. The Arkansas court's refusal to follow and apply this binding federal law reflects its continuing intransigence in the face of this Court's ruling in *Obergefell*, which has already merited one summary reversal from this Court." The petition is *Pavan v. Smith*, No. 17-1393 (filed April 4, 2018, response due May 7, 2018). On May 7, Deputy Solicitor General Nicholas J. Bronni of Arkansas filed a Waiver document with the Supreme Court, stating that he did not intend to file a response to the Petition unless one was requested by the Supreme Court.

U.S. COURT OF APPEALS, 2ND CIRCUIT – Louis M. Duplan, a gay African-American man from Haiti who works at the Administration Unit of New York City's Bureau of HIV/AIDS Prevention and Control, sued the City under 42 U.S.C. Sec. 1981 and Title VII of the Civil Rights of 1964, claiming hostile environment discrimination, sex and race discrimination and retaliation. *Duplan v. City of New York*, 2018 WL 1996613, 2018 U.S. App. LEXIS 11116 (April 30, 2018). He filed complaints with the City, the EEOC, and the NY State Division of Human Rights in July and August 2011, challenging the denial of a promotion, claiming that he had suffered retaliation for complaining about discrimination and that he had been effectively demoted by having his substantive job responsibilities reduced. He claimed that after filing the charge, the Assistant Commissioner and other officials had engaged in a "retaliatory campaign" against him. For some reason, he did not follow up his original 2011 charges with a lawsuit, but, alleging that between 2011 and 2014 his supervisors continued to ostracize and ignore him, he filed new discrimination and retaliation charges in 2014. The district court granted the City's motion to dismiss all of his claims. The district court held that Sec. 1981 was not available in this kind of case, opining that Sec. 1983 provides the sole federal remedy against state actors for race discrimination and requires a showing sufficient to support municipal liability – a test the district court held had not been met here. The court also decided that Duplan was time-barred from alleging retaliation based on conduct that occurred more than 300 days before he filed the 2014 charges with the EEOC, noting a failure to connect the conduct included in the 300-day period with earlier conduct dating back to his 2011 charge. His failure to follow up with a lawsuit based on the 2011 charge was a major problem here from the point of view of exhaustion of remedies. The trial court also opined that the "adverse employment action" requirement for grounding a retaliation claim had not been met, and that Duplan's allegations did not describe conduct sufficiently "severe or pervasive" to meet the standard for a hostile environment claim under Title VII. The 2nd Circuit agreed with much, but not all, of this. Ultimately it pared down the case to Duplan's Title VII retaliation claims respecting alleged adverse actions that occurred within 300 days before, or shortly after, he filed his 2014 EEOC charge. The opinion for the panel by Circuit Judge Gerard E. Lynch goes into some detail about the exhaustion requirements under Title VII and how they can be applied to retaliation claims based on employer conduct after an EEOC charge has been filed, in the course of which the panel aligned the 2nd Circuit with the unanimous view of other circuits as to certain questions that had not previously been decided by the 2nd Circuit. Duplan is represented by Kathy A. Polias, of Brooklyn.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A divided panel of the 9th Circuit ruled on April 27 that an Immigration Judge's adverse credibility determination against a gay man from Nigeria seeking asylum was not supported by substantial evidence, and remanded the case for reconsideration of the decision to deny the petitioner's claims for asylum and withholding of removal. *Nwadinobi v. Sessions*, 2018 WL 1978980, 2018 U.S. App. LEXIS 10808 (9th Cir., April 27, 2018). In responding to the petitioner's appeal of the Board of Immigration Appeals decision affirming the IJ's denial of

relief, the government defended three of the agency's reasons for finding Nwadinobi's testimony not credible. One was his explanation of inconsistent birth dates on his various Nigerian identity documents. He explained this away by saying that the Nigerian government was only concerned with a person's year of birth and "sometimes" made "mistakes" as a result. The IJ rejected this explanation as "unpersuasive" with no explanation as to why. Wrote the panel, "Instead, it appears that she simply thought it was implausible that the Nigerian government would be so la in its treatment of identification documents. This is a quintessential example of impermissible 'speculation and conjecture.'" The court noted there was evidence in the record about the Nigerian government's lax record-keeping practices, which the IJ "was not at liberty to ignore." On the second point, there were discrepancies in the petitioner's testimony about the name of a friend with whom he stayed for several months when he moved to Lagos. In his asylum application, petitioner used an English name for the man, while in his testimony he referred to him by a Nigerian name. When asked about the inconsistency, he explained that he was using the friend's "local name" in Lagos, but the IJ again, without explanation, found this "unpersuasive." The panel wrote that this is "the sort of summary rejection we have previously held to be inadequate. Common sense dictates that a person can have multiple names, including nicknames and middle names. Moreover, the IJ appeared to impermissibly speculate that Nigerian naming conventions would not allow for a person to have several names, including 'local names.' Importantly, the other details about his friend were the same across both Nwadinobi's declaration and testimony." The third point concerned the petitioner's use of the words "boyfriend" and "sexual partners", which may have arisen from miscommunication due to what the appellate panel discerned was poor interpreter services, noting that the petitioner's declaration was written by somebody not fluent in petitioner's native language, and that interpretation at the hearing was muddled enough to cause various problems. While the court decided that the problems did not rise to the level of a due process violation, as charged by the petitioner, they did help to explain the conflict the IJ found in petitioner's testimony about how many sexual partners he had in Nigeria. At any rate, the majority found enough problems with the IJ's credibility ruling to require sending the case back to the agency for reconsideration. Dissenting, Circuit Judge Sandra Segal Ikuta charged that the majority had overstepped its bounds as a reviewing court in an area where the standard of review is supposed to be very deferential to the Immigration Judge factual determinations.

U.S. COURT OF APPEALS, 9TH CIRCUIT – A 9th Circuit panel denied a petition by a gay Romanian man to review the Board of Immigration Appeals ruling to affirm an Immigration Judge's decision to deny his application for asylum, withholding of removal, and protection under the Convention against Torture, in *Bogdan-Adrian v. Sessions*, 717 Fed.Appx. 747 (April 5, 2018). Unfortunately, this is one of those summary memorandum opinions that does not relate the factual allegations in any detail. From references in the court's discussion, one concludes that the petitioner was the victim of an attack of some sort in 2006, which he did not report to the police, and another attack that he did report in 2007, but nobody was prosecuted because of lack of clear evidence. The petitioner disclaims knowledge of the identity of his attackers. The court found that substantial evidence supported the BIA's decision that the petitioner failed to "demonstrate persecution by the Romanian government or by private actors the government is unable or unwilling to control," not surprisingly in light of the lack of information about who the attackers were. The court notes that even in the absence of evidence of past persecution, the petitioner might be entitled to relief based on a well-founded fear of future persecution, but absent evidence of a particularized basis for such a fear in petitioner's case, general information about Romania would not support such a claim. "Although social abuses against homosexuals do still occur in Romania," wrote the court, the petitioner "has not met his burden of proving an individualized risk of future persecution or a pattern or practice of persecution against similarly situated persons." The court also held that by not raising before the BIA his contention that his due process rights were violated by the IJ's "purported failure to provide any explanation or analysis" regarding an adverse credibility determination, he had waived the right to raise it on this appeal. Besides, said the court, he could not demonstrate the requisite prejudice "because the BIA dismissed his appeal on the merits, not on the basis of the IJ's adverse credibility determination." The petitioner is represented by Richard Harvey Trais, Chicago, IL.

CALIFORNIA – In *Doe v. Aetna, Inc.*, 2018 U.S. Dist. LEXIS 57771, 2018 WL 1614392 (N.D. Cal., April 4, 2018), U.S. District Judge Edward M. Chen deals with the appropriate forum for a claim for relief by an Aetna insured who was part of a plaintiff class that had reached a settlement agreement with Aetna concerning its rules governing coverage of HIV-related medication, which were challenged as discriminatory. Aetna was required by the settlement to mail out notices to all members of the class, approximately 12,000 of its HIV-positive insureds. The terms of the settlement agreement required Aetna to comply with all relevant state and local laws, including those governing

confidentiality of medical information. In this case, undoubtedly one of many filed around the country, "John Doe" contended that Aetna breached the settlement agreement by mailing the notice using an envelope with a large address window that revealed the recipient had been prescribed "HIV Medications." Doe filed suit in state court asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and a violation of California Business and Professions Code Sec. 17200. He sought compensatory damages, injunctive relief and attorney's fees and costs. Aetna removed the action to federal court, citing diversity of citizenship. Doe moved to remand it back to state court, arguing that the amount in dispute on his individual claim was not sufficient to meet the monetary requirement ($75,000) for diversity jurisdiction. Judge Chen sided with Doe, concluding that Aetna had failed to show by a preponderance of the evidence that Doe's individual claim in this case exceeds $75,000, and granted the motion to remand. Perhaps the most interesting part of the court's analysis concerned Aetna's claim that its cost of complying with the likely injunctive relief – switching over to the use of envelopes that don't reveal any medical information of the recipient, and training staff accordingly – would alone far exceed $75,000. Figure that one out. Judge Chen found it unavailing in the context of a suit by a single insured, figuring the cost of changing it envelope practices in communicating with Doe would be trivial, and rejected Aetna's argument that the attorney's fee Doe might be awarded (under a California consumer protection rule) would put him "over the top" for diversity jurisdiction purposes. Doe is represented by Alan M. Mansfield of The Consumer Group, San Diego, Harvey Jay Rosenfeld of Consumer Watchdog of Santa Monica, Edith Marie Kallas and Joe R. Whatley, Jr., of Whatley Kallas LLP, New York.

CALIFORNIA – The California 2nd District Court of Appeal affirmed a trial court's issuance of a civil harassment restraining order to protect a gay man who had been the recipient of threats from a handyman who worked for neighboring property owners in *Velkei v. Kohoyda*, 2018 Cal. App. Unpub. LEXIS 2246, 2018 WL 1602572 (April 3, 2018). The plaintiff, Steven Anthony Velkei, lives with his husband on Chelan Way in Los Angeles. Velkei has owned the property since April 2011, and the men have lived there more than 11 years. The defendant, Keith Allen Kohoyda, a "self-described handyman," worked for Gina and Darla Vincent, owners of adjoining property. He began working there in 2012, testifying that he was present on the property about twice a month. Velkei testified that "there has been a pattern of harassment and violence that dates back to 2012 when Kohoyda destroyed substantial property of mine at the direction of the owners of the adjoining property in a boundary dispute. The LAPD referred the matter for prosecution of felony vandalism, though prosecution did not occur. I brought and ultimately settled a civil suit that included claims for harassment and trespass against Kohoyda . . . Since the resolution of that litigation, Kohoyda has become increasingly provocative. He comes out on the street or on areas of my property where the neighbor has an easement and tries to stare me down and makes taunts at me. He has done the same to my father. He even came close to me in a threatening manner one time." Things came to a head on August 21, 2016, as Velkei was "setting up for his birthday celebration." Velkei testified that Kohoyda, who appeared "amped up" and "completely irrational," "jumped out of some bushes" and shouted to Velkei: "You queer bitch. I'm going to fuck you up. You aren't going to know what hit you. You don't know what I'm capable of." Kohoyda testified that Velkei had tried to run him over an hour earlier as Velkei was driving to the house with his elderly mother. "Efforts to diffuse the situation did not work," wrote the court. Kohoyda "kept screaming threats and using homophobic slurs." Velkei called the police, but once they left, "the harassment recommenced. Kohoyda taunted Velkei, shouting at him and making fun of him, and then began to drive up and down the street, photographing the license plate of every car that arrived to attend Velkei's birthday party." A week later, Velkei filed a request for a restraining order under Code of Civil Procedure sec. 527.6. The order was issued by Laura Hymowitz, a Commissioner for the L.A. County Superior Court, at a hearing on October 4, 2016. Velkei testified at the hearing, introducing evidence of Kohoyda's "open hostility toward gay people," including messages that Kohoyda had posted on his Facebook page at the time of the hearing. "The postings described gays as an 'abomination' in God's sight and likened them to dogs for which it is 'understandable' that Christians should beware. The postings also referred to 'inordinate affection' as 'homosexuality,' and even seemed to suggest that people who 'commit such things are worthy of death.'" Kohoyda's lawyer made no objection at the hearing to introduction of the Facebook postings. Kohoyda testified, but in addition to information noted above, appeals the court mentions only one aspect of his testimony: his attempt to introduced a videotape made 3 days after the birthday party, which the trial court declined to watch on grounds of irrelevance: Koyhoda had testified that the videotape was "significant because of the very lack of interaction between the parties three days after the August 21 incident." Commissioner Hymowitz issued the restraining order after stating, "I think legally it's a very close case, but I think he at least has shown me that he is really, really shaken up by this. And I think [Koyhoda] has acted pretty poorly and scared this gentleman." Kohoyda changed lawyers, and his

new lawyer filed a motion to dissolve, reconsider and revoke, arguing that an objection should have been made at the hearing to the Facebook evidence, but the trial court denied the motion and Kohoyda appealed. While the appeal was pending, Velkei went back to court because Kohoyda was violating the restraining order, which required him to say at least 50 yards away from Velkei's person, home or office for a period of two years. It seems that Kohoyda was passing closer by in order to access the adjoining property. Commissioner Hymowitz "clarified" the order: the 50-yard restriction was to be observed, "even if that meant that Kohoyda was prohibited from going to or from his place of employment." The Court of Appeal found that substantial evidence supported the trial court's conclusion that Velkei needed protection from Kohoyda, and rejected Kohoyda's argument that the order violated his First Amendment right to "religious freedom." Kohoyda again claimed the trial court should have excluded the Facebook evidence, but the court said that objection had been forfeited by not being made at the hearing. Furthermore, said the court, "Even if Kohoyda had timely objected, we would conclude that the trial court did not abuse its discretion in considering the Facebook posts. The posts were highly relevant as they showed Kohoyda's homophobia; his suggestion that gay people deserve death confirms the trial court's belief that Kohoyda posed a credible threat of violence against Velkei." Velkei represented himself in the proceeding and in responding to the appeal.

CALIFORNIA – In *John P. v. Superior Court of San Luis Obispo County*, 2018 Cal. App. Unpub. LEXIS 2233 (April 3, 2018), the 2nd District Court of Appeal denied a gay father's petition to review trial court's decision to end reunification services with the son and father's same-sex partner. In seeking review, the father contends that the Social Services Department "was against him and G.O. [his partner] and never planned on returning his son to them because they were gay and unmarried." But the court's recitation of the facts, if accurate, suggests that the father was just grasping at straws. The infant son had been removed upon finding that the household environment was unsafe, that G.O. was struggling with drug and alcohol dependencies and was not particularly cooperative with attempts to rehabilitate him, that strangers were drifting through the house and drug use was going on. Attempts to get the father to clean up his act were reportedly not particularly successful. This is a sad opinion to read and, of course, it is impossible to tell from reading such an opinion whether the Social Services staff was overstating the danger to the child. The father was representing himself in the process and, not surprisingly, the court of appeal faults him for having produced a writ petition that was procedurally deficient in light of the detailed and specific elements prescribed by statute for such a document.

HAWAII – *Pratt v. State of Hawaii, Dept. of Public Safety & Doe Defendants 1-10*, 2018 WL 1719700, 2018 U.S. Dist. LEXIS 60138 (D. Haw. April 9, 2018), is a discrimination suit by an out gay deputy sheriff of the Hawaii Department of Public Safety, alleging that he was subjected to discrimination and hostile environment harassment because he is gay, and retaliation against him for filing an earlier lawsuit (which settled) and subsequent complaints. Keiron Pratt alleged in his complaint that he had been "open about his homosexuality" since receiving a "homosexual discharge by the military" in 1994, and this information was on his application when he applied to work for DPS, and thus was in his personnel file. However, he "did not talk about his homosexuality" at work until 2004, after his partner deputy sheriff told him that "everyone at the office, including his supervisors and fellow deputy sheriffs, knew he was gay." After he became more open about it, he began to experience the hostile environment in the form of ridicule, and unequal treatment. Although up to that time his career in the department was going smoothly with regular promotions, once he was out he was stalled and ultimately received transfers to less desirable assignments. There is really nothing about the merits in this opinion, which is mainly devoted to procedural and jurisdictional issues. Among other things, the court agreed with the defendants that many of the incidents recited in the complaint were time barred. There was discussion of the degree to which his claims were exhausted through the EEOC charge process, during which he made the elementary mistake of evidently thinking he could only check a box for one kind of discrimination on the charge form when he actually meant to raise multiple claims; the box he checked was retaliation, but District Judge Derrick K. Watson, using the lenient standard applied to discrimination complainants who complete their charge forms before they have counsel, found that his factual recitation on the form sufficiently put into play his sexual orientation claims. The court found 11th Amendment immunity required dropping the Hawaii state law claims, which is unfortunate since Hawaii bans employment discrimination because of sexual orientation, while federal law does not expressly do so. However, the court did not have to confront on this motion the question whether 9th Circuit law would allow Pratt to pursue his Title VII claims, just assuming that it did and giving him leave to amend the Title VII claims, while dismissing the state ones. Some of the retaliation claims may fall short for lack of proof that the adverse actions Pratt claims to suffer were due to his past protected

actions in protesting discrimination. At the end of the day, the court dismissed all state law claims without leave to amend, but allowed the Title VII-based claims to continue against the employer. Of course, with dismissal of the state law claims, individual defendants are out of the case, as Title VII liability runs only to the employer entity. Pratt is represented by Michael Jay Green and Peter C. Hsieh of Honolulu.

ILLINOIS – This is an odd one. The defendant in this case, Jaimie Hileman, a transgender woman who is a former employee of Internet Wine & Spirits Co., had sued IWS for discriminatory discharge. That case was settled under an agreement requiring that Hileman "not 'criticize, denigrate or disparage IWS' and that she would not make statements that would 'damage IWAS's reputation.'" Hileman subsequently sat for an interview with Mandy Murphey, a reporter for the local Fox 2 news channel, in which Murphey reported that Hileman was "fired" from her job as an executive in the "wine and spirits industry." This led to the present lawsuit, in which IWS sued Hileman for breach of contract, claiming that she had violated the non-disparagement clause by telling Murphey that she was fired for being transgender, which, according to the complaint, "directly criticizes, denigrates and disparages IWS because it discredits and damages IWS' reputation in the community." *Internet Wine & Spirits Co. v. Hileman*, 2018 IL App (5th) 170267-U, 2018 Ill. App. Unpub. LEXIS 695 (April 30, 2018). IWS back up its complaint by documenting reduced revenues in the period following the broadcast as compared to revenues of prior comparable periods. Within a month of this complaint being filed on April 3, 2017, Hileman had filed a motion for partial summary judgment on May 2, 2017, seeking a ruling that she had not breached the contract or caused injury to the plaintiff, but reserving for later determination her request for attorney's fees. Things move swiftly in the state courts in Illinois, evidently, because a hearing on the motion was held on June 21, 2017. Hileman introduced a DVD from the television station containing the broadcast in question, which the judge viewed and, upon finding that IWS was never mentioned on the air during the Fox 2 broadcast, St. Clair County Circuit Judge Robert P. LeChien granted the motion in favor of Hileman, who then promptly filed a motion for attorney's fees, which was subsequently denied. (Presumably Illinois follows the American rule under which each party bears their litigation expenses in ordinary civil litigation such as this.) Meanwhile, IWS appealed the summary judgment, which is affirmed by the 5th District Appellate Court, Justice James R. Moore writing: "In this case, it is undisputed that Murphey never stated in her on-the-air report that the plaintiff fired the defendant. In fact, it is undisputed that the plaintiff was not mentioned in the report at all. On appeal, the plaintiff abandons the contention made in the complaint that 'during the Fox 2 News report, Murphey reported that [the defendant] was 'fired' from her job as an executive in 'wine and spirits industry,' IWS, as a result of alleged transgender discrimination," and now instead claims that it is immaterial that Murphey never stated that the plaintiff fired the defendant and never mentioned the plaintiff during the broadcast at all. However, the plaintiff continues to claim it suffered damages, alleging that the defendant's 'material breach of the agreement proximately caused the plaintiff to suffer actual damages including lost profits." If there was a breach of contract here, hypothetically, it came when Hileman told Murphey that IWS fired her for being transgender. But, wrote the court, the plaintiff failed on the element of causation, since Murphey did not mention IWS on the air. "In the absence of any mention of the plaintiff in the broadcast," wrote Justice Moore, we conclude the plaintiff's theory, as pled in the complaint, that it lost profits because of the broadcast amounts to nothing more than the conjecture and sheer speculation rejected by the Illinois Supreme Court . . . " A case based on "conjecture and sheer speculation" does not get you damages.

MICHIGAN – The Michigan Supreme Court breathed a bit of new life into a lawsuit by a woman whose membership in a health club was cancelled after she made a fuss about the club's policy of allowing members to use locker room facilities consistent with their gender identity. On June 1, 2017, the Court of Appeals of Michigan affirmed the Midland Circuit Court's ruling rejecting Yvette Cormier's multi-count suit against the Midland facility of Planet Fitness gym, ruling against her on the merits on all counts save one: a claimed violation of the Michigan Consumer Protection Act. As to that, the Court of Appeals considered the claim to have been abandoned on appeal because of deficiencies in Cormier's appellate brief: "In her appeal brief, plaintiff does not cite to any particular subsection of the MCP but simply states that a policy allowing men full access to the women's facilities is a material fact that should have been disclosed and that she correctly pled how defendants violated each subsection of the MCPA by either misrepresenting the facts or omitting them entirely. Plaintiff cites to no authority or statute, or even her complaint, in support of her position. It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain of reject his position," stated the Court of Appeals' *per curiam* opinion. Cormier filed an application for leave to appeal to the

Michigan Supreme Court, which was denied except for her MCPA claim. In a *per curiam* Order in *Cormier v. PF Fitness-Midland, LLC*, 909 N.W.2d 266 (Mich. April 6, 2018), the court stated: "We vacate that part of the Court of Appeals judgment concluding that the plaintiff had abandoned her claims under the Michigan Consumer Protection Act (MCPA). The plaintiff attached her complaint to her brief, cited the governing statute, MCL 445.901 et seq., and provided a two-page discussion of her theory supporting her claims. Thus, the plaintiff did not simply announce her position and leave it to the court to rationalize her basis, nor did she require the court to search for authority either to sustain or reject her position in this statutory cause of action. Accordingly, the Court of Appeals erred in declining to consider the plaintiff's MCPA claims. Therefore, we remand this case to that court for consideration of the trial court's grant of summary disposition on those claims." The Court of Appeals decision can be found at 2017 WL 2390691.

NEW JERSEY – Consumer fraud on top of consumer fraud? In *Ferguson v. JONAH*, 2015 N.J. Super. Unpub. LEXIS 236, 2015 WL 609436 (N.J. Superior Ct., Hudson Co., Feb. 5, 2015), the court granted partial summary judgment to plaintiffs who claimed that the religiously-oriented "conversion therapy" provider was operating in violation of New Jersey consumer fraud law by representing that its therapy would "cure" homosexuality. In a subsequent settlement approved by the court after a jury verdict in favor of plaintiffs on December 18, 2015, JONAH agreed to terminate its operations, dissolve its corporate structure, and pay damages to the plaintiffs. But on March 28, 2018, the plaintiffs' lawyers filed a motion in Hudson County Superior Court, seeking enforcement of the original ruling, having discovered that the people behind Jonah had opened an organization under a new name (a variation on the old one), just days after the jury verdict, and that they had filed for non-profit status under JONAH's old address and phone number. The Southern Poverty Law Center sent a letter to JONAH's lawyers, asking for more information about the new organization, which drew the response that the organization is providing its clients with referrals to therapists under the new name, and that the clients "most likely" include individuals "seeking assistance with same-sex attraction," according to an April 18 posting online on *Quartz*. A response to the motion was due by April 27. If defendants are found to be in violation of the settlement, which was embodied in a court order, they may owe substantial legal fees in addition to whatever penalty the court might order. Of course, that would require a determination that they are in violation of the settlement.

NEW JERSEY – The N.J. Appellate Division's *per curiam* decision in *Shallcross v. State of New Jersey*, 2018 WL 1612589, 2018 N.J. Super. Unpub. LEXIS 765 (April 4, 2018), is a bit difficult to follow – perhaps not surprising given the court's criticism of the plaintiff's appellate filing: "Plaintiff's appellate brief is an amalgam of assorted errors with little citation to the actual motion record and even less legal argument. It contains no table of citations. We are reluctant to dismiss an appeal on procedural grounds, even though we would be justified doing so in this case." The plaintiff, a lesbian who is a sergeant with the New Jersey Division of State Police, was charged with violations of the Division's rules, went through an administrative trial process in the Office of Administrative Law (OAL) culminating in an Administrative Law Judge decision recommending certain discipline, which was upheld in a final agency decision by the State Policy Superintendent, Joseph R. Fuentes. She appealed to the Appellate Division, which affirmed. While the appeal was pending, Sergeant Shallcross filed a complaint in the Law Division of the Superior Court against Fuentes and other State Police officials, as well as the Office of the Attorney General and the State of New Jersey, claiming that her civil rights had been violated under the Law against Discrimination (which prohibits sexual orientation discrimination). "As best we can discern," wrote the Appellate Division in this opinion affirming the summary judgment against Shallcross by the Mercer County Superior Court, "plaintiff's fourth amended complaint, filed after we issued our decision, alleged: certain defendants conspired to violate plaintiff's 'civil rights protected by [the] law against discrimination' by suborning perjury or otherwise prosecuting the disciplinary charges; defendant [Alexis] Hayes maliciously prosecuted plaintiff in the OAL and in federal district court and other defendants refused to provide plaintiff with a defense in the federal action; plaintiff's suspension was without good cause and resulted in her physical and financial impairment; Fuentes and NJSP unlawfully discriminated against plaintiff because she was a 'gay female.'" Wrote the court: "The legal theory of the plaintiff's complaint, as explained by her counsel during oral argument on the summary judgment motion, was that defendants conspired against her because she was a homosexual woman. The conspiracy resulted in a biased investigation, leading to the disciplinary charges, which were in turn supported by false testimony before the ALJ, and ultimately Fuentes' final decision. As a result, plaintiff was denied the opportunity for promotion and transferred to another location requiring a two-hour commute each way in retaliation." Granting summary judgment. The trial complained about the state of the record: "I spent hours

scouring this record and going through the acts, facts, inferences, statement of material facts, opposition, responsive statement, trying to find the appropriate citations, reading the record, trying to understand what the allegations here by the Plaintiff – and I had a difficult time trying to understand the allegations at all because they are, in substance, based on conjecture, speculation, and improper inferences." Wrote the appellate division panel: "We agree completely with the judge's assessment of the record," stating that the plaintiff's claim that the disciplinary proceeding against her was because of "discriminatory animus" rather than because of her violation of NJSP rules and regulations was "untenable," finding "ample evidence in the record that explained why plaintiff was not considered for a promotion after her suspension and why she was transferred." Her malicious prosecution allegation failed, said the court, because such a claim requires showing that the underlying disciplinary action was resolved in her favor, which it was not. The tone of the Appellate Division's *per curiam* suggests some hostility toward the plaintiff; one wonders whether the claimed disorganization of the papers presented on the appeal may have undermined her case, or whether that characterization is not, itself, evidence of the same institutional homophobia that she argues infected the disciplinary proceeding against her. Hard to know just from reading the App. Div. opinion. Her counsel is George T. Daggett.

NEW YORK – In a lawsuit brought by the New York Civil Liberties Union on behalf of Byshop Elliot, a student at McKinley High School in the Buffalo School District, U.S. District Judge William K. Sessions III granted a motion by plaintiff to dismiss pending claims against co-defendant Crystal Boling-Barton, the principal of McKinley High School (on leave), who opposed dismissal, protesting that she was entitled to a trial of the allegations against her in order to clear her name and be able to bring a malicious prosecution claim against the plaintiff. *Elliot v. Buffalo City School District*, 2018 U.S. Dist. LEXIS 60787, 2018 WL 1726535 (W.D.N.Y., April 10, 2018). Elliot filed suit against the Buffalo City School District and Principal Boling-Barton on May 10, 2018, alleging 1st Amendment and Equal Protection violations, based on the refusal of the school to allow students to form a Gay-Straight Alliance (GSA) at McKinley High School. The complaint alleges that Boling-Barton ignored applications for the formation of a GSA, refused to consider such applications, and yet was willing to allow other clubs to form at the high school. Plaintiff's "main contention" against the principal, according to Judge Sessions, was that "she treated lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) students as 'second class citizens' and 'imposed ongoing policies and practices that openly discriminate against LGBTQ members of the school community,'" of which the complaint specified several examples, with particular emphasis on the school's action against same-sex couples who wanted to participate as couples at school dances. "Within days of the filing of this lawsuit, the District announced that a GSA would be forming at McKinley, and the GSA in fact began meeting before the close of the 2016-2017 school year." The plaintiff and the school district filed a proposed settlement agreement on September 1, 2017, under which the students got what they were looking for, including a non-discrimination policy, non-discrimination training for students and staff, posting of the policy around the school, and public reporting of LGBTQ bias incidents. The court dismissed all claims against the District on October 4, 2017. Settlement talks with Boling-Barton's counsel reached an impasse by February 8, 2018, and on February 20, counsel for Boling-Barton said that she would oppose dismissal. "This lawsuit has clearly had a very negative impact on Boling-Barton's career," wrote Sessions. "The lawsuit was widely covered by news outlets in the Western New York area, and these articles specifically highlighted the allegations that Plaintiff made against Boling-Barton in his complaint. Boling-Barton has been on paid administrative leave for nearly a year, and she asserts that the District has made no comment on when, if ever, it expects to allow her to return as Principal of McKinley High School." Her counsel claims that the lawsuit had caused irreparable injury to her reputation and character and pecuniary injury "because she has been unable to supplement her income by participating in activities that she traditionally participated in while Principal of McKinley High School." She seeks complete vindication, but she is not going to get it, as Judge Sessions concluded that her arguments for dismissal failed to meet the standard described by the 2nd Circuit in *Zagano v. Fordham University*, 900 F.2d 12 (2nd Cir. 1990). The only *Zagano* factor she cites is her expenditure thus far, which is actually the subject of a lawsuit she brought against the School District in state court, contesting its failure to subsidize her defense thus far, and the court noted that because the main case settled, at this point those costs are not substantial; this is hardly a dismissal on the eve of trial. Furthermore, the court is not willing to hold a trial solely for the purpose of enabling Boling-Barton to sue Elliot for malicious prosecution. Sessions wrote that "forcing the continuation of this act, when the Plaintiff himself has filed a motion to dismiss, is not appropriate" and Boling-Barton's "stated reasons for continuing this case have essentially no support in case law." Sessions also denied Boling-Barton's request that the court order plaintiffs to pay her costs and attorneys' fees and retain jurisdiction to entertain an application for such expenses.

Sessions found that plaintiff obtained the relief he was seeking (sounds like he is, in effect, the prevailing party) and "there has been absolutely no shoring of bad faith on his part." The question of paying for Boling-Barton's defense is left to the New York state trial court.

NEW YORK – New York County Supreme Court Justice Robert R. Reed granted a motion by the plaintiff in *Doe v. Spencer Cox Clinic*, 2018 N.Y. Misc. LEXIS 1165, 2018 N.Y. Slip Op 50461(U), 2018 WL 1722418 (April 6, 2018), to proceed anonymously with his lawsuit against Spencer Cox Clinic, St. Luke's Hospital, and Mount Sinai Health Network, on claims that defendants "are responsible for the improper public disclosure of certain protected patient health information, including, among other things, plaintiff's HIV status, history of STDs, history of sexual abuse and/or assault, and use of treatment-related prescription drugs." Plaintiff started the action by "summons with notice" and then filed an order to show cause, dated September 8, 2017, seeking the court's permission to file his formal complaint under the John Doe pseudonym and to seal from public access all court records in the case. Justice Reed found that the case fell within the category of "information of utmost intimacy" and, "significantly, involves a private individual and three private health care entities, and does not relate to the conduct of governmental agencies or offices." The court found that the public interest in "protecting patient health information, moreover, is manifest, in light of state and federal law on the subject," and that failing to grant the motion could "have a deterrent effect" on plaintiff's "willingness to file his complaint with appropriate factual specificity, or to continue this action through motion practice, conferencing, and trial." He found that defendants had not shown any prejudice to them by letting the plaintiff proceed anonymously. However, defendants opposed the motion, asserting that "no social stigma should attach to any disclosure of plaintiff's HIV status," but the judge was not impressed: "That hope does not reflect the actual reality that some with such status face as a result of prejudice and unenlightened attitudes by many in the community." Defendants claimed that plaintiff or his counsel had already disclosed his identity in the media in connection with this case, "but no factual documentation supporting such a claim was timely submitted in opposition to the motion," remarked Justice Reed," who continued, "Finally, the court has been able to divine no illegitimate ulterior motive disguised in plaintiff's request to proceed anonymously," which he granted, having found that there was "good cause" to support it. He also noted that "no member of the public, press or media raised any concern regarding the subject matter of the motion or the action at this time." In addition to permitting plaintiff to proceed as "John Doe," the court ordered the clerk to seal the file in the action "in its entirety" and to deny access to the file to anyone other than court staff, counsel of record for any party to the case, any party, and "any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from said counsel." The plaintiff is represented by Jeffrey Lichtman, of New York City.

OHIO – U.S. Magistrate Judge Chelsey M. Vascura granted a motion by three HIV-positive plaintiffs to proceed anonymously as John Doe 1, 2 and 3 in their lawsuit against various businesses asserting claims for unauthorized disclosure of medical records. *Doe One v. CVS Health Corporation*, 2018 U.S. Dist. LEXIS 70024 (S.D. Ohio, April 26, 2018). The brief opinion by Judge Vascura does not go into the factual allegations of the complaint, focusing solely on the decision to grant the motion. The judge found, applying 6th Circuit precedent, that this case implicated one of three grounds identified by the Circuit in *Doe v. Porter*, 370F.3d 558 (2004) as a factor to consider: "whether prosecution of the suit will compel the plaintiffs to disclose information 'of the utmost intimacy.'" Wrote Judge Vascura, "As Plaintiffs assert in their Motion, 'given the stigma that HIV still carries in much of the country, Plaintiffs would be severely prejudiced by having to publicly disclose their medical condition.' Moreover," she continued, "Plaintiffs correctly note that many courts throughout the country have found that the privacy interests of plaintiffs infected with HIV outweigh the presumption of openness." Thus, the court found "compelling reasons to protect Plaintiffs' privacy and shield them from discrimination and harassment."

OHIO – U.S. Magistrate Judge Stephanie K. Bowman has recommended that summary judgment be granted to the employer on many of the claims brought by a gay employee who was discharged from his job at a Chipotle restaurant, after an incident where he suffered from suicidal ideation as a response to bullying at his college, although the judge recommended that the case be allowed to continue on retaliation and public policy wrongful discharge claims. *Hoover v. Chipotle Mexican Grill, Inc.*, 2018 WL 1899166, 2018 U.S. Dist. LEXIS 66624 (S.D. Ohio, April 20, 2018). Adam Hoover lived with his mother and two younger siblings. He suffered bullying in high school and, later, in college, due to his sexual orientation. After he graduated from high school, he attended college at Miami University (Ohio), and obtained a part-time job at Chipotle to help support his family. He was promoted right along at Chipotle and was slated to begin training in early February 2015 to be a Kitchen Manager, working

virtually full-time and getting minimal sleep between his job and school. He experienced another incident of bullying at college in February that really set him back. When he left his closing shift job at the Chipotle store on March 2, he intended to commit suicide, but without informing anyone about this intention, he falsely posted on social media that he had been kidnapped and was trapped in the trunk of a car, and called 911 to report his situation. (Obviously a cry for help!) Co-workers who saw or heard about the social media post gathered to search for him. He was found, taken to the hospital by police, and released within a day, having been diagnosed with "adjustment disorder with emotional disturbance." He was off from work for a while and the Chipotle managers required a medical release before letting him come back. The condition with which he was diagnosed was expected to yield to counseling over a period of about four months. The hospital records reflected a recommendation that he reduce his work hours and pursue another job that would demand fewer hours, due to his exhaustion and mental upset. He felt that upon returning to work he was being treated differently by supervisors and managers, "treated as fragile." He was concerned that the possible promotion to Kitchen Manager in Training would be scuttled. He arranged to meet with some co-workers and told them about his plan to consult a lawyer to pursue his rights, and asked for their support. Word got back to management, and he was fired. He filed claims for disability discrimination, retaliation for protected activity and taking FMLA leave, "gender stereotypes" and violation of Ohio public policy in retaliation for his intention to seek legal redress against the employer. Magistrate Bowman concluded that he was not eligible for protection under federal and state disability discrimination laws, finding that the condition with which he was diagnosed did not meet the definition of the protected class. She also rejected his attempt to bring a gender stereotype claim as a variant of a sexual orientation claim, finding unconvincing his suggestion of ways in which the employer might perceive him as gender non-conforming. (In the 6th Circuit, there is not yet acceptance of the argument that sexual orientation is a prohibited ground for discrimination, thus his unsuccessful attempt to resort to stereotype theory, which has been supported in the 6th Circuit in cases involving transgender plaintiffs.) However, the judge concluded that Hoover's allegations were sufficient to survive summary judgment on the retaliation theories. It is clearly established in Ohio law that firing an employee because they plan to hire counsel and seek to vindicate their legal rights violates public policy. Furthermore, the judge found that the steps Hoover had taken of meeting with co-workers, trying to enlist their support, and planning to consult counsel would be protected activity under the federal and state anti-discrimination laws. Hoover is represented by Kelly Mulloy Myers, Elizabeth Asbury Newman, Erin M. Heidrich, and Randolph Harry Freking, of Freking Myers & Reul LLC, Cincinnati, OH.

OKLAHOMA – U.S. District Judge Robin J. Cauthron has doubled down – indeed, tripled down – on her refusal to order reinstatement for transgender academic Rachel Tudor to a faculty position at Southeastern Oklahoma State University as a remedy for the discrimination Tudor suffered in the tenure process at SOSU. *Tudor v. Southeastern Oklahoma State University*, 2018 U.S. Dist. LEXIS 62833, 2018 WL 1787889 (W.D. Okla., April 13, 2018). Tudor won a Title VII jury trial and sought reinstatement with back-pay as a remedy. Cauthron denied the reinstatement request, finding that "the relationship between the parties was so fractured as to make reinstatement infeasible." Tudor filed a motion to reconsider, which Cauthron denied. Tudor filed a second motion to reconsider, asking, if she was not to be reinstated, to be awarded "front-pay," based on her argument that SOSU's treatment of her essentially sabotaged her teaching career. Cauthron reiterates in this opinion the same reasoning that led her to deny the prior requests, and finds unconvincing Tudor's evidence that the relationship is not as fractured as Cauthron thought. Tudor relied on the fact that she had received an invitation to speak at the University, but Cauthron noted that the invitation emanated not from the University but from an outside group that was holding an event there. As to the front-pay request, the court agreed that Tudor was entitled to front-pay in lieu of reinstatement, but, noting that she had obtained a teaching position at another school 14 months after leaving SOSU, Cauthron opined that front-pay should be limited to 14 months based on a calculation of Tudor's last salary from the University. Along with her argument that SOSU had destroyed her academic career, Tudor had sought front-pay of $2,043,789.51, based on her estimate of what she would have earned in a career at SOSU extending to age 75. "Plaintiff's request is premised on unrealistic and unsupportable assertions about potential future performance at Southeastern had she remained there," commented Judge Cauthron, awarding her $60,040.77. The *National Law Journal* (April 19) reported that Tudor planned to appeal this order to the 10th Circuit. Tudor is represented by Brittany M. Novotny of Oklahoma City, Ezra Young of New York, and Marie E. Galindo of Lubbock, Texas. The EEOC participated in the case in support of Tudor's discrimination claim.

PENNSYLVANIA – In *G.M.I. v. A.M.I.*, 2018 WL 1835553, 2018 Pa. Super. Unpub. LEXIS 1224 (Pa. Super. Ct., April 18, 2018), the Superior Court (an appellate court in Pennsylvania)

ruled on the mother's appeal of the Huntingdon County Common Pleas Court's custody and visitation ruling. The son was born when the father and mother were married. After they divorced, mother formed a relationship with a woman, described in the opinion as her "paramour." The parents share custody, but father has primary residential custody and mother has liberal visitation rights. Mother sought to have custody modified, but the trial court ultimately rejected her request. The portion of the decision of most interest in terms of LGB issues is mother's contention that father was unduly rigid concerning gender roles, and the father's suggestion that the mother was forcing the son in an undesirable feminine direction. Wrote the court: "Mother further emphasizes that there is 'ample evidence of Father's inability and downright refusal to support child's emotional wellbeing, Father's attitude towards Mother and her paramour, and his rigidity towards gender conformity.' In support, Mother references several incidents. First, Father did not permit child to attend the civil ceremony for Mother and her paramour, S.S., during his custodial time. Mother emphasizes that Father provided inconsistent explanations for doing so, until he was confronted with his text message to Mother that read: 'I prayed on it. The answer is no. You can celebrate your event with him on the days you have him.' Second, Mother asserts that Father refused to distribute invitations to Child's birthday party because they had 'girl-influences.' Third, Mother states that Father accused her of dressing Child in 'girl-clothes' and refers to Father's angry reaction to Mother and S.S.'s purchase of a pink 'Pinkie Pie' sweatshirt for Child, which, S.S. testified, Child saw and like. Mother also notes that Father explained: 'My opinion is nothing should be forced on a child. If child is interested in something, he is. If he's not, he is not. My concern with that issue in general was she was forcing it, influencing him at that time, which was over a year ago. I do not believe it's of that severity as of now. I am just keeping an eye on it more or less.' Mother, in turn, concludes that father is attempting to impose his views on Child and turning Child against her." Ultimately, however, the Mother came up against the limited role of the appellate court in a custody dispute, in which the statute requires the trial judge to exercise discretion about the best interest of the child after weighing a long list of factors, no one of which is necessarily dispositive. The Superior Court wrote, "although the specific incidents raised by Mother portray Father's traditional views regarding gender issues, the record contained conflicts in the evidence on whether Father's views have impacted the Child's best interests or whether Father has attempted to turn Child against Mother. This Court's role does not include making independent factual determinations, and, with regard to issues of credibility and weight of the evidence, we must defer to the presiding trial judge, who viewed and assessed the witnesses first-hand. Here, we find that the trial court's conclusions are not unreasonable as shown by the evidence of record, and we find no error of law on the part of the trial court." In light of the mention that mother and her partner had a civil ceremony (a marriage?), we are bothered by the court's reference to S.S. as a "paramour," a word with illicit connotations, and the judicial attitude that might reflect. It is unclear whether the term was used by the trial judge and just picked up by the Superior Court from the trial court's opinion. In either event, it is troubling.

PENNSYLVANIA – In *Freeman v. Inter-Media Marketing, Inc*., 2018 WL 1615210, 2018 Pa. Super. Unpub. LEXIS 1059 (Pa. Super. Ct., April 4, 2018), the Superior Court (an intermediate appellate court in Pennsylvania) ruled that the Chester County Common Pleas court erred when it dismissed Eugene D.M. Freeman's Fourth Amended Complaint asserting a claim of negligent supervision against his former employer, Inter-Media Marketing, Inc., arising from alleged defamatory statements made about Freeman by co-workers. Wrote Justice Paula Francisco Ott for the appellate panel, "Freeman, a licensed insurance agent, was employed by IMM from August 1, 2015 through January 31, 2016. He worked at IMM's call center in West Chester, explaining the benefits of various health plans to existing and prospective clients of IMM's client, CareFirst Blue Cross Blue Shield. Freeman alleges that on September 10, 2015, in the lunch room, Carol Stewart, the assistant to IMM's president, 'called him a prostitute and said that [he] was . . . sneaking into the adjoining Executive Bathroom for homosexual prostitution.' Freeman further avers that the chief operations officer of the company overheard the comments and laughed at them. He contends Stewart, as well as other employees, continued to repeat the defamatory comments until his employment contract ended. Freeman also alleges he reported the 'accusers' to his supervisor who failed to investigate or take any action to stop the 'accusations of prostitution.'" A few weeks after his employment ended, Freeman filed a state court complaint, seeking to hold IMM vicariously liable for the defamatory comments made by his co-workers, and IMM filed a demurrer, disclaiming such liability, which provoked a series of amended complaints by Freeman as the trial court sustained IMM's objections to each complaint but gave Freeman leave to file amended complaints. The fourth amended complaint seems to have been the charm, since Freeman changed his theory of the case from vicarious liability to negligent supervision. Although this change did not impress the trial court, it caught the attention of

the Superior Court. Justice Ott wrote, "Accepting Freeman's allegations as true, as we must pursuant to our standard of review, we find that Freeman's complaint contains sufficient facts to satisfy the foreseeability requirement of his claim. Indeed, once he reported the defamatory comments to a supervisor, the employees' continued harassment was foreseeable to the employer." On this basis, the court found that cases relied upon by the trial court to dismiss the complaint were clearly distinguishable. "Therefore, we conclude Freeman alleged sufficient facts in his complaint to establish IMM knew or should have known of the harassment he suffered in the workplace at the hands of its employees. Accordingly, we are constrained to reverse the trial court's order dismissing Freeman's fourth amended complaint against IMM." Furthermore, the court rejected IMM's contention that the tort claim against it was barred by the Workers' Compensation Act. Although that Act states that it provides the exclusive remedy for an employee who suffers a "work-related injury," the term "injury" is not defined in the Act and, Ott observed, the Superior Court had in a prior case held that "a defamation claim lodged against an employer, seeking redress for injuries solely to the employee's reputation, is not barred by the exclusivity provisions of the Workers' Compensation Act." [We are a bit puzzled; we thought Freeman's claim against IMM is "negligent supervision," not "defamation." Workers' Compensation Laws generally are the exclusive remedy for negligence claims against an employer; defamation is an intentional tort, so it is natural that defamation claims would not be barred. The court never explains this glaring flaw in its reasoning, happily for Freeman at this point.] Thus, Freeman's suit is revived. There is no mention of counsel in either the Westlaw or Lexis report of this case, so it may be that Freeman is representing himself.

PUERTO RICO – On March 28, U.S. District Judge Carmen Consuelo Cerezo issued an Order in *Gonzalez v. Nevares*, a suit by Lambda Legal on behalf of transgender Puerto Ricans seeking new birth certificates showing the gender in which they are living and not revealing their transgender status. Judge Cerezo issued the order requested by Lambda and stated that she would issue a full opinion at a later date. The opinion in *Gonzalez v. Nevares*, 2018 U.S. Dist. LEXIS 67287, 2018 WL 1896341 (D.P.R.) was issued on April 20. As intimated in the March 28 Order, the basis for the court's ruling is a constitutional privacy claim. Judge Cerezo invoked both branches of constitutional privacy: autonomy in making significant personal decisions, and confidentiality of personal matters, and stated that this case involves both. "The Commonwealth's forced disclosure of plaintiffs' transgender status violates their constitutional right to decisional privacy," she wrote. "Much like matters related to marriage, procreation, contraception, family relationships, and child rearing, 'there are few areas which more closely intimate facts of a personal nature' than one's transgender status," she wrote. "Disclosing that one is transgender involves a deep personal choice which the government cannot compel, unless disclosure furthers a valid public interest." She found that in this case the government's policy of requiring that new birth certificates disclose the change and prior gender status "is not justified by any legitimate government interest," rejecting the government's "public safety" arguments. "Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgenders to protect themselves from the real possibility of harm and humiliation. The Commonwealth's inconsistent policies not only harm the plaintiffs before the Court; it also hurts society as a whole by depriving all from the voices of the transgender community." Granting summary judgment to plaintiffs, Judge Cerezo required the government to "permit forthwith that transgender individuals change the gender marker in their birth certificates, specifically, by issuing a new birth certificate with the applicant's true gender, without using a strike-out line or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate." She also specified how these application form should be set up and how the information should be treated. "The right to identify our own existence lies at the heart of one's humanity," she wrote. "And so, we must heed their voices: 'the woman that I am,' 'the man that I am.' Plaintiffs know they are not fodder for memoranda legalese. They have stepped up for those whose voices, debilitated by raw discrimination, have been hushed into silence. They cannot wait for another generation, hoping for a lawmaker to act. They, like Linda Brown, took the steps to the courthouse to demand what is due: their right to exist, to live more and die less." True eloquence from the bench!

CRIMINAL LITIGATION NOTES

By Arthur Leonard

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – Finding itself bound by precedent from the U.S. Court of Appeals for the Armed Forces, the USNMCCCA rejected a challenge by Aviation Maintenance Administrationman Second Class Lamar A. Forbes to his guilty plea and subsequent sentence on charges of sexual assault, making a false official statement, and the assimilated Virginia law of infected sexual battery, based on his having engaged in unprotected vaginal intercourse with several women without disclosing that he was HIV-positive. The opinion of the court in

U.S. v. Forbes, 2018 CCA LEXIS 194, 2018 WL 1917850 (April 24, 2018), does not mention whether any of the women became infected with HIV. It found that the governing precedent is *U.S. v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), which struck down a charge of aggravated assault on the ground that "exposure to the risk of HIV transmission was remote – at most a 1-in-500 chance – and unlikely to produce death or grievous bodily harm," but that nonetheless an HIV-positive person who engaged in sex without disclosure was depriving his partner of relevant information for purposes of informed consent, meaning that there remained a battery, a sexual assault, the harm being the "offensive touching" without informed consent. Thus, the court rejected Forbes' argument that because he had what he considered to be consensual sex with the women, there was no crime or harm. He was sentenced to 8 years, which he challenged as excessive by comparison to other cases where HIV-positive men had been convicted of having sex without disclosing their status. The court found those cases distinguishable, explaining: "The appellant deliberately put four different women at risk of contracting HIV. One of these women, LK, informed the appellant that she was taking medication that weakened her immune system as a result of a recent kidney transplant. The appellant assured her that he 'wouldn't do anything to . . . jeopardize it,' yet had sex with her anyway without disclosing his status. Another woman, AS, disclosed to the appellant that she had a family member that was HIV-positive, and discussed getting tested with the appellant prior to engaging in intercourse with him. But the appellant 'informed her that he was clean, when he was in fact HIV-positive.' These two situations betray the callousness and deceit of the appellant, and are particularly aggravating. Additionally, the appellant brazenly continued to have frequent, unprotected sexual intercourse with two of the women despite knowing he was actively being investigated by NCIS." In other words, he was engaged in deliberate "catch me if you can" activity. The court concluded that the sentence was not "inappropriately severe and is appropriate for the appellant and his offenses."

FLORIDA – The *Palm Beach Post* (April 12) reports that a jury has convicted former police officer Ervans Saintclair of exposing a female sex partner to HIV without disclosing his status, rejecting Saintclair's claim that he did not know he was infected when he had unprotected sex several times with a former neighbor. The neighbor testified that they were in an on-again, off-again relationship from 2009 to 2013, and that the "the two of them had unprotected sex throughout their relationship and at one point were trying to conceive a child together," according to the newspaper report. The prosecutor presented medical records and testimony from doctors that Saintclair knew he was infected as early as 2007. The defense, expected to be raised when Saintclair appeals the verdict, is that prosecutors did not present evidence sufficient to meet all the elements of the statute under which he was charged. Sentencing is to take place on May 31 before 15th Judicial Circuit Judge Samantha Schosberg Feuer. Saintclair had been free on $30,000 bond since he was arrested in 2014, but Judge Feuer ordered him taken to Palm Beach County Jail after the verdict over the objection of defense counsel. Media publicity about the case brought forward another woman who says she also had unprotected sex with Saintclair during the relevant time period. This woman told the newspaper that they initially had protected sex, but stopped using condoms after their relationship grew more serious. She said that "the two of them discussed sexually transmitted diseases before they stopped using condoms and 'Saintclair assured her that he was "good" and she did not have to worry about him," according to arrest records.

NEW YORK – In a ruling that received some surprised comment from the media, the New York Court of Appeals affirmed by a 6-1 vote a decision by Kings County Supreme Court Justice Vincent Del Giudice to assign sufficient points under the state's Sex Offender Registration Act (SORA) to a man who was acquitted of all the felony charges against him to place him in the category of level 2 sex offender, which requires lifetime registration and other restrictions under SORA. *People v. Britton*, 2018 WL 1952272, 2018 N.Y. Slip Op. 02830 (April 26, 2018). The defendant-appellant, Quinn Britton, was charged with first-degree rape, two counts of criminal sexual act in the first degree (felony charges), and one count of second-degree sexual abuse (a misdemeanor charge). The charges, based largely on the testimony of the Britton's teenage niece, stemmed from a Thanksgiving visit by the victim and her mother to the victim's grandmother, who is Britton's mother. The claim is that grandma dosed off and the defendant invited the 13-year-old victim into his bedroom, where he induced her to undress, fondled and kissed her breasts, performed oral sex on her, had "penetrative sex" with her, and then had her perform oral sex on him. The victim's older brother testified that she came to him in December upset, and told him about the incident, although her account on that occasion said that defendant "attempted" to have penetrative sex but could not because his penis "wouldn't fit." The police were notified, and a detective made notes of statements the defendant made after waiving his Miranda rights, but there is no signed confession and the notes differ from the victim's account. The only sexual acts to which the defendant clearly admitted

were fondling and kissing the victim's breasts, the subject of the misdemeanor charge. All of the other evidence presented at trial was circumstantial, there was no physical evidence of sexual assault, and the case came down to "she said, he said." The jury struggled with the case, sending out three notes concerning deadlock – an inability to reach a verdict – but ultimately convicted on the misdemeanor charge and acquitted on the felony charges. At the subsequent sentencing and SORA hearing, Justice Del Giudice announced that based on the victim's grand jury and trial testimony, he found clear and convincing evidence that the defendant engaged in the charged conduct for which he had been acquitted by the jury, and assigned 25 points on the SORA scale, which put Britton into the level 2 offender category, mandating lifetime registration and other restrictions. On appeal, Britton protested that the acquittal meant that the jury had chosen to credit his testimony and to reject that of the victim, so there could not be a finding of clear and convincing evidence that he committed the charged acts, but the Appellate Division affirmed, noting that "clear and convincing evidence," a civil standard of proof, is a less demanding standard than "proof beyond reasonable doubt" required for a criminal conviction, and that New York precedents allowed judges to assign SORA points based on grand jury testimony and trial testimony that had not convinced the jury of criminal guilt. The Court of Appeals affirmed in a one paragraph memorandum, stating "Contrary to defendant's argument, his acquittal of charges at his criminal trial relating to such conduct, does not foreclose the hearing court from finding, by clear and convincing evidence, that he engaged in such acts." The court provided no further explanation, and did not respond to the lengthy dissenting opinion by Judge Jenny Rivera, who contended that the prosecution "failed" to meet the "heavy burden" of showing by "clear and convincing evidence" that the defendant had engaged in the felony conduct of which he was charged but not convicted. "Defendant's trial turned on competing narratives of the complainant and the defendant as the People had no physical evidence or eyewitnesses to the crimes charged," wrote Rivera. "Despite the acquittal of the felony charges, the SORA court assessed defendant points for having committed the specific conduct on which these charges were based. On the particular facts of this case, in which the only evidence of the conduct for which defendant was assessed these points was rejected by the jury, the SORA court erred in finding clear and convincing evidence of the alleged sexual contact. Therefore, I would reverse the order adjudicating defendant a risk level two offender, and dissent from the majority's contrary determination on this appeal." In support of her dissent, Judge Rivera noted that cases cited by the court in support of its decision were not really on point, because they involved situations where the defendants entered guilty pleas and the record upon which the SORA court had to rely in assigning points was necessarily based on grand jury testimony and victim statements that were not made in court under oath and subject to cross-examination. This case is different; the victim's testimony was subject to cross-examination and failed to persuade the jury. Britton was represented on appeal by Denise A. Corsi.

OHIO – A jury in Warren County Court of Common Pleas convicted Lisa Buell of "patient abuse" for hitting a disabled patient in the back. During the trial, a witness testified that he saw Buell hit the patient in the back through an open window. Buell, who denied having hit the patient, argued that the witness could not have seen through the window because it was blocked by a Christmas tree and fake snow that had been sprayed on the window. She appealed her conviction unsuccessfully. A year later, she filed a motion for a new trial, claiming newly-discovered evidence, but the trial court denied the motion, and Buell did not appeal. Six months later, she filed a second motion, also alleging newly-discovered evidence. The opinion of the Court of Appeals of Ohio, 12th District, in *State v. Buell*, 2018-Ohio-1350, 2018 Ohio App. LEXIS 1483, 2018 WL 1719378 (April 9, 2018), rules on this second motion. The "newly discovered" evidence offered by Buell was that she is a lesbian and that the witness who testified against her was biased against her for that reason and because she was in a relationship with a woman. Her affidavit in support of the motion says that she gave that information to her trial counsel, but counsel did not use it at trial to impeach the witness's testimony. Buell also claimed that the witness had "tried to get her partner terminated from her employment based on his discriminatory views against same-sex couples, three months before Buell was tried. The trial court against rejected the motion for new trial, and Buell again appealed. The court of appeals pointed to an Ohio Rule of Criminal Procedure, 33(b), which says that a claim of newly-discovered evidence must be raised within 120 days of the day upon which a verdict is rendered, unless the court finds by clear and convincing evidence that the defendant was unavoidably prevented from discovering the evidence within the given time frame. Of course, she could not make this claim with respect to the discovery that the witness against her was biased against gay people, since that was a fact she communicated to her trial counsel, who had decided for whatever reason not to use it. As to the witness's attempted interference with the employment of Buell's partner, the court said, "This attempted termination occurred three months before Buell was tried. Thus, Buell cannot show

by clear and convincing evidence that she was prevented from discovering the evidence before trial." That sound reflexively simplistic to us; perhaps Buell could show that although the termination attempt predated the trial, the information did not become available to her until much later on. But that would not have necessarily moved this court, which concluded by stating: "Additionally, the witness's alleged bias is not material and does not demonstrate a strong probability of a different result if a new trial was granted. The witness's account of what he saw through the window was corroborated by other evidence, such as the victim's distraught behavior after the incident and photographs of redness and marks on the victim's back the day after the incident. This evidence cannot be vitiated even if the witness was biased against lesbians." The court found no abuse of discretion by the trial judge in denying the motion for a new trial. Buell is represented by George A. Katchmer, of Bloomingburg, Ohio.

PENNSYLVANIA – A transgender woman pled guilty to shooting a co-worker in a dispute about transgender issues, reported the *Meadville Tribune* on April 19. "Zachary T. McClimans, who also is referred to as Claire Wolfever in court records, pleaded guilty this week in Mercer County Court of Common Pleas to attempted first-degree murder for shooting and wounding Jayson Hall at the Walmart in Hermitage on November 3, 2017." According to the article, "McClimans told investigators he had been threatened by Hall after McClimans had informed co-workers, including Hall, of his choice to transition from male to female . . . McClimans said Walmart management was aware of threats by Hall, but as of approximately one week before the shooting no decision had been made by store management on Hall's employment status . . . . McClimans said he began thinking of a way to prevent Hall from hurting or threatening him – and that shooting Hall was one of the solutions." As part of a plea agreement, charges of attempted murder in the third degree, aggravated assault, theft, carrying a firearm without a license and reckless endangerment were dropped, but McClimans faces up to 40 years in jail at sentencing on June 7. Before approving the plea agreement, Common Pleas Judge Robert G. Yeatts had the caption of the case amended to identify the defendant as "Zachary T. McClimans aka Claire Wolfever," and directed that McClimans be referred to as female in court document. Attorneys for McClimans and the prosecution agreed that this was the first time a Mercer County judge had made such an order.

TEXAS – U.S. District Judge John McBryde denied a *pro se* petition for habeas corpus filed by an HIV-positive man who had pled guilty in state court to several charges in connection with his engaging in unprotected sex with a woman who subsequently tested positive for HIV. *Billingsley v. Davis*, 2018 WL 2013046, 2018 U.S. Dist. LEXIS 71562 (N.D. Tex., April 27, 2018). Unlike similarly-situated defendants who have sought to raise questions about the science of HIV transmission risk in an age of effective anti-viral treatments, Jimmy Bernard Billingsley's petition focuses mainly on his contention that his defense counsel rendered ineffective assistance. This had brought forth from the defense counsel a lengthy affidavit (filed in response to Billingsley's unsuccessful state court habeas corpus petition) describing his representation of Billingsley in great detail, countering every claimed fault advanced by Billingsley. Judge McBryde also quotes at length from the opinion by the state habeas judge, in the opinion rejecting the petition at that level. Nothing to learn about HIV/AIDS law here, but an interesting look into the performance of defense counsel in a hopeless losing case. Defense counsel Abe Factor pointed out that he had succeeded in negotiating a plea that removed some of the charges, thus resulting in a shorter sentence (15 years) than might otherwise have been imposed. Furthermore, as Judge McBryde points out, several of the points raised by Billingsley in this federal habeas petition would have to be deemed as having been waived by his guilty plea before the trial judge in a ceremony that included all the necessary advisories and questions to ensure that the plea was voluntarily entered by the defendant.

TEXAS – *Huffington Post* (May 2) reports that two Texas men were sentence to federal prison on April 30 after pleading guilty to hate crime charges for using Grindr to rob and assault gay men. Cameron Ajiduah, 19, was sentenced to 15 years, and Anthony Shelton, 20, was sentence to 20 years. According to the *Huffpo* report, "The two men admitted they participated in four separate home invasions in the Dallas-Fort Worth area. Along with two other men, Ajiduah and Shelton passed themselves off as single gay men and made arrangements to meet at their victims' homes in January and February of 2017. Once inside the homes, the four men assaulted their victims, tied them up and shouted anti-LGBTQ epithets." They admitted targeting their victims because of their sexual orientation, thus grounding the hate crime charges. Earlier this year the two other men, Nigel Garrett, 21, and Chancler Encalade, 20, also pleaded guilty and received sentences of 15 and 10 years, respectively.

TEXAS – There was national outrage at the report that a Texas jury had apparently accepted a "gay panic" defense from James Miller, who admitted that he murdered his gay

neighbor, Daniel Spencer, but claimed it was "self-defense" because the man had "come on" to him. Miller killed Spencer in 2015 by stabbing him twice in the back. He claimed that Spencer "came on" to him, then was angered at being turned down. Although there was no physical altercation, Miller's lawyers successfully argued that he felt in danger because at age 66 he was older and shorter than his 32-year-old victim. The jury issued a sentence of ten years' probation, so Miller faces no prison time for the murder, instead spending six months in a local jail. He lives in East Austin. So far, only two states have statutes banning the use of the gay panic defense – California and Illinois – although proposals to do away with it are pending in other state legislatures. In 2013, the American Bar Association's House of Delegates passed a resolution condemning the use of "gay panic" and "trans panic" defenses in criminal litigation. *people.com* (April 30).

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.

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT – Gay *pro se* federal prisoner Jonathan-Michael Trevari brought a *Bivens [v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] suit, raising some 23 causes of action. They were trimmed by U.S. Magistrate Judge Janet F. King and U.S. District Judge Amy Totenberg of the Northern District of Georgia to seven claims. In *Trevari v. Deyton Detention Center*, 2018 WL 1603097 (11th Cir., April 3, 2018), the court heard an appeal from the dismissal by Judges King and Totenberg of all remaining claims. The not-for-publication *per curiam* opinion by Circuit Judges William H. Pryor, Jr., Beverly B. Martin, and Senior Circuit Judge R. Lanier Anderson remanded the case for further proceedings. Trevari was incarcerated in one of the remaining private federal institutions (President Trump has vowed to stop their phase-out) run by The GEO Group, Inc. Relying on *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (holding that a federal prisoner cannot use *Bivens* for a cause of action where the conduct amounts to an Eighth Amendment violation that also falls within traditional state tort law), the Circuit affirmed dismissal of Trevari's medical care and protection from harm claims. Presumably Trevari could proceed under the Federal Tort Claims Act (which also incorporates Georgia tort law), if he is neither time barred nor has missed other procedural hurdles. The court found it need not reach the issue of whether *Minneci* also bars First Amendment and Equal Protection claims (here, a kosher diet and religious observation, as well as receipt of adult gay publications), because there remained an issue of whether Trevari had exhausted administrative remedies under the Prison Litigation Reform Act ["PLRA"]. *See Alexander v. Hawk*, 159 F.3d 1321, 1322, 1324–25 (11th Cir. 1998) (holding that PLRA § 1997e(a) applies to *Bivens* claims). Although Trevari filed approximately a dozen grievances, he conceded that he did not follow technical appeal procedure in protesting their denials. Some were heard anyway, others were addressed informally, and some were ignored. The Court of Appeals found that the record and opinion (which runs for pages on this point) was inadequate for ruling on appeal. The court raised two points: (1) the internal grievance procedure said inmates not satisfied with initial grievance responses "may" appeal, leaving a question as to whether an appeal was mandatory for exhaustion [note: they will cure this before the ink dries]; and (2) whether Trevani's informal "appeals" that were answered or his grievances that were never answered were tantamount to a "functional equivalent of exhaustion" under *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016). Because the district court did not make "explicit" findings on these points, a remand is necessary. Once again, the PLRA has shown itself to exhaust judicial resources without satisfying its stated purpose of streamlining internal resolution of disputes on the merits.

ARKANSAS – Simon David Hendrickson was an inmate in a jail in Washington County, Arkansas, when he was assaulted and raped by another inmate. U.S. District Judge Timothy L. Brooks granted summary judgment against him on failure to protect claims in *Hendrickson v. Schuster*, 2018 WL 1597711 (W.D. Ark., April 2, 2018). Hendrickson had a mental health history and various physical ailments. Because of his sex offender charges, he was placed in a unit with other sex offenders per county policy. Judge Brooks recites his history in the jail in detail. Unfortunately, the only defendants left at the time of summary judgment were the Detective who investigated the rape and the sheriff, in their personal and official capacities. Hendrickson's attorneys deposed the Detective and the officer in charge of PREA [Congressionally-mandated system to avoid prison rape under the Prison Rape Elimination Act]. PACER shows that funds for same were approved by leave of Court. It does not appear that the attorneys presented expert testimony. Although the Detective's investigation could be faulted as incomplete (he did not interview the assailant), and the Sheriff did not have the jail committee required to be in place to prevent rapes under PREA, the personal liability of the Detective and the Sheriff was dropped by Hendrickson's attorneys, citing the state of the law in the Eighth

Circuit regarding lack of personal involvement by the Sheriff and the fact that the failures of the Detective occurred after the rape. Judge Brooks echoed the last point with unfortunate citations and quotes from the Eleventh Circuit. *See Vinyard v. Wilson*, 311 F.3d 1340, 1356 (11th Cir. 2002) (the plaintiff had no substantive or procedural right to an internal investigation of her claim of police brutality); *Jacoby v. PREA Coordinator*, 2017 WL 2962858, *4-5 (N.D. Ala. Apr. 4, 2017) (an alleged failure to investigate the plaintiff's allegations of being held hostage, beaten, and raped by other inmates, combined with a failure to properly collect evidence and comply with PREA's requirements, were insufficient to state any constitutional violations – the Constitution "does not require officials to investigate or otherwise correct wrongdoing after it has happened." 2017 WL 2962858, at *5). This left Hendrickson's claim of official liability, which Judge Brooks treated as a policy, practice, and procedure claim akin to *Monell* liability – as "functionally equivalent to a suit against the employing governmental entity." *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010). The problem was that a lot of the paper policy looked okay. One needed to show that it was not carried out in fact. Conversely, Hendrickson needed to show that the policy or custom was unconstitutional on its face. He failed on both theories. There was evidence that officers patrolled as required and admissions from Hendrickson that he declined to be interviewed without his public defender present – from which Judge Brooks inferred that Hendrickson's own interview could not be coordinated. As to policy and custom, Hendrickson challenged the county's placing all sex offenders together, arguing that this particularly put him in danger because he was accused of sexually assaulting children and had a mental health history. In this writer's opinion, an expert could have demolished the county's custom of placing all sex offenders together and letting nature take its course as almost assuring deliberate indifference to safety will occur. Without approval to hire an expert, however, Hendrickson's attorneys were left with argument and citing *The Nation* and *The New York Times* in their nine-page brief. Judge Brooks declined to hear Hendrickson's claims under Arkansas state law, dismissing them without prejudice. Hendrickson was represented by Keith, Miller, Butler, Schneider & Paulik, PLLC, Rogers, AR.

CALIFORNIA – *Pro se* transgender inmate Lamar McQueen, a/k/a Nina Shanay McQueen, sued for violation of her constitutional rights to be free of deliberate indifference to her serious health care needs and to Equal Protection of the Laws in *McQueen v. Brown*, 2018 WL 1875631, 2018 U.S. Dist. LEXIS 66377 (E.D. Calif., April 19, 2018). U.S. Magistrate Judge Allison Claire's Report and Recommendation [R & R], found that McQueen stated claims on both theories, but there is no explanation in PACER why this case, filed in 2015, languished for 25 months before it was screened. McQueen has been on hormone therapy for eight years. Her treating physicians in corrections have all recommended sex reassignment surgery [SRS]. California removes the choice for such surgery from treating providers and places it before a DOC central office committee, which has twice overruled the recommendation for SRS. McQueen sued Governor Brown, the California Corrections Secretary, the Deputy Director of Risk Management, and the Deputy Medical Executive – all in their official capacities – seeking only injunctive and declaratory relief. Judge Claire found that the proper defendants were the Corrections Secretary and the Medical Executive, since they were the ones who would implement injunctive relief; and the R & R recommended dismissal of the Governor and the Risk Management Director – the Governor, as unnecessary; and the Risk Manager, as also unnecessary and also more akin to an intermediate official denying a grievance. In this writer's view, the Risk Director's Dismissal is questionable in light of the request for declaratory relief and Judge Claire's recommended handling of the Equal Protection claim. The R & R first notes that denial of SAS can constitute deliberate indifference, citing *Rosati v. Igbinosos*, 791 F.3d 1037, 1040 (9th Cir.2015); and *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N. D. Cal. 2015) (*passim*). Most interesting, however, is the R & R's acceptance of the argument that an Equal Protection claim can be stated not only on the basis of transgender discrimination (for which there is much authority) but also on the basis of discrimination by approval method for surgical procedures: one approval procedure for vaginoplasties for cisgender, another for transgender. This is a direct attack on California's committee review under its "Guidelines for Review of Requests for Sex Reassignment Surgery," which Judge Claire ordered incorporated into McQueen's complaint. Allowing this Equal Protection challenge to the committee system imposed by California for transgender care based on the nature of the care itself broadens the opportunities for expert testimony regarding patient-oriented medical approaches to corrective and reconstructive surgery, and it adds an Equal Protection theory that may not even pass rational basis review. It would justify keeping the risk management defendant in the case for declaratory relief. This is one to watch as the R & R is likely to be appealed.

CALIFORNIA – The origins of the phrase "the law is an ass" were lost in British antiquity before Dickens dusted it off in *Oliver Twist* (1837), but it certainly applies to the odyssey of

transgender inmate Thomas Clinton and to the opinion in particular of U.S. District Judge David O. Carter in *Clinton v. Marshall*, 2018 WL 1449387, 2018 U.S. Dist. LEXIS 49861 (C.D. Calif., March 5, 2018). Clinton, originally described as "an effeminate gay male" but now identified as a transgender woman, first sued in 2006 after being raped in a California prison. Clinton was transferred to another prison after the rape, where she encountered defendant Sergeant Roger Giovannetti, who subjected her to some of the most extreme homophobia this writer has encountered. In addition to verbal, which Judge Carter recounts in detail, Giovannetti facilitated hate crimes against gay and transgender inmates, hoping assaults would result in their transfer, according to the complaints. He directed sexual predators to Clinton, according to the allegations. On at least one occasion he intentionally destroyed Clinton's evidence, although he knew it was relevant to her litigation. Other officers warned Clinton to avoid dealing with Giovannetti as much as possible and to "watch her back." This conduct continued for at least a decade, and Clinton suffered another sexual assault (arranged by Giovannetti, according to the pleadings) in 2016, leading to a current diagnosis of rape-related post-traumatic stress disorder. Originally *pro se*, Clinton faced multiple dismissals. She filed more than six amended complaints and two separately-docketed filings (because of misjoinder issues) before finally reaching the Ninth Circuit, where the court appointed *pro bono* counsel for the appeal and the case went to mediation. Counsel agreed to a remand, and Giovannetti agreed not to file another motion to dismiss under F.R.C.P. 12(b)(6). Instead, he filed a motion for judgment on the pleadings under F.R.C.P. 12(c), asserting that Clinton had procedurally defaulted against him by failing to name him in one of her amended complaints. Judge Carter writes for pages on *res judicata*, collateral estoppel, judicial notice of filings in both cases, and related issues (identity of parties and claims, issue preclusion, privity, and the like) before finally denying Giovannetti judgment on the pleadings. It is law review quality analysis for counsel facing these issues, but it will not be repeated here, except to note it. Giovannetti also argues that the case against him should be dismissed as "frivolous" under 28 U.S.C. § 1915(e), which Judge Carter likewise denies (although he does not sanction counsel for the audacity of it). Twelve years after filing, it appears that Clinton can now proceed to discovery. In his final words, Judge Carter wrote that the opinion was influenced by the court's "preference for deciding issues on their merits." The State of California, its attorney general's office, and the federal judiciary should be ashamed of this case. The number of lives shattered by Giovannetti during his tenure, if even some of the allegations are proven, is incalculable. Clinton is represented by Christina N. Goodrich and Megan Katherine Lollar, of K&L Gates LLP, Los Angeles.

COLORADO – Transgender inmate Lindsay Alexandria Saunders-Velez, a/k/a Elias Alexander Saunders-Velez, made an *ex parte* application for a temporary restraining order in *Saunders-Velez v. Colorado DOC*, 2018 WL 1887979, 2018 U.S. Dist. LEXIS 66921 (D. Colo. April 20, 2018), to remove her from the "punishment pod" at an institution of the Colorado Department of Correction because of her fear of assault and lack of privacy from other inmates. Chief U.S. District Judge Marcia S. Krieger denied the TRO, given its procedural posture, but set the matter for an almost immediate conference 3 days later, with counsel, to address the need for a hearing. Saunders-Velez originally sued over her health care, clothing, commissary, refusal to address her with female pronouns, physical searches by male guards, and safety. The matter had been pending about 8 months when Saunders-Velez was found guilty of an unspecified disciplinary offense and sent to the "pod." Judge Krieger notes the "irony" that Saunders-Velez feels less safe in the disciplinary pod with supposedly higher security than in population. Saunders-Velez claims that the "pod" in fact is less frequently supervised than population and that inmates who have sexually requested "favors" or assaulted her in the past reside in "pods." She has threatened to self-harm. Judge Krieger finds that housing assignment is not within the underlying complaint and therefore not a proper subject for a TRO, plus Saunders-Velez's allegations are too "vague" to constitute irreparable injury or show the likelihood of prevailing on the merits to justify affirmative preliminary relief. Saunders-Velez's "oblique" reference to an assault in 2017 does not identify a perpetrator or his presence in the current "pod." Judge Krieger likewise rejects the privacy screen argument as justifying a TRO. The judge also finds the possible threat of self-harm to be "too slender a reed" for a TRO and says: "To hold otherwise would be to suggest that inmates may, by virtue of threats of self-harm, dictate their own conditions of confinement." But, Saunders-Velez got the court's attention. According to PACER, she had a conference on April 23rd, at which time, the court ordered her records produced and directed counsel to confer as to whether an evidentiary hearing on a preliminary injunction is needed. Saunders-Velez is represented by King & Greisen, LLP, Denver.

DELAWARE – Hermione Kelly Ivy Winter, former known as David Allen Allemandi, a/k/a June Woods, a/k/a Abdullah Abdullah AlFaruq Abdullah, *pro se*, is a frequent litigato, who identifies as female. Cases involving hormone therapy and safety (which passed screening) and mandatory

participation in sex offender treatment (which failed screening on the same day, without prejudice) were reported in *Law Notes* previously – *see Allemandi v. Munoz*, 2018 U.S. 718986 (D. Del., February 5, 2018), reported March 2018 at page 142; and *Allemandi v. Hyde*, No. 17-1280 (D.Del., February 5, 2018), reported April 2018. Now, in *Winter v. Mills*, 2018 U.S. Dist. LEXIS 50310. 2018 WL 1475799 (D. Del., March 26, 2018), U.S. District Judge Leonard P. Stark (who also presided over both earlier cases) denies a preliminary injunction on demands for hormone treatment, a vegan diet, a television, and a "greeman witch talisman" to "keep her focused" in her observance of her beliefs (which are not Wiccan, but "of the blood"). Winter threatens to self-castrate and commit suicide by hunger strike if her demands are not met. By now, the Delaware Attorney General has appeared and has filed opposition papers, including medical affidavits. Relying on a "comprehensive summary" of Winter's condition prepared by the psychologist chair of the Delaware "Gender Dysphoria Consultation Group," Judge Stark found no basis for preliminary relief. The report said that Winter has gender dysphoria but also multiple other serious psychological disorders that are not under control. She does not meet the criteria for greater hormonal intervention under WPATH standards, primarily because she is unstable and believes (falsely) that transition will solve all of her other problems. She is in individual psychotherapy twice weekly and re-evaluated monthly. She is under close observation for suicidal ideation. The psychologist opines that it would be unethical to proceed with more rapid gender transition under the present circumstances. Judge Stark finds this a case of disagreement with proffered treatment, which provides no basis for a preliminary injunction – and, in this writer's view, without more, is probably not even actionable under the Eighth Amendment. *Spruill v. Gillis*, 372 F.3d 218,235 (3d Cir. 2004). Judge Stark also finds that there is no basis for a preliminary injunction regarding Winter's request for a vegan diet or a "talisman." The institution provides a vegetarian diet, discontinued for Winter after her condition worsened due to her documented history of gastrointestinal problems. Prisoners have a First Amendment right to practice their religion under *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Here, however, "other than to state that she is a hereditary witch," Winter has not tied her beliefs to a religion, nor alleged a religious belief, such that it "cannot be determined whether her belief is both sincerely held and religious in nature." Judge Stark does not mention the television in his preliminary injunction analysis. He concludes by warning Winter, who had submitted more than half a dozen motions for a preliminary injunction, that future repetitive filings would be docketed but not considered by the court.

FLORIDA – Transgender federal inmate Christopher Shorter is a frequent litigator. *See, e.g., Shorter v. Romero*, 2017 U.S. Dist. LEXIS 168920 (S.D. Fla., October 11, 2017), reported in *Law Notes* (November 2017 at page 461). In this case, *Shorter v. United States*, 2018 U.S. Dist. LEXIS 65425 (S.D. Fla., April 17, 2018), also before U. S. Magistrate Judge Patrick A. White, Shorter claims both violation of her constitutional right to health care, and negligence under the Federal Tort Claims Act ["FTCA"]. Judge White screens her *pro se* complaint, which concerns primarily delays in treatment for a lump in her breast, which was a "clinically palpable mass [that] should be aggressively pursued and biopsied." A health technician, defendant Lupe Sierra, initially refused to schedule an outside consultation because "she hated transgender inmates." When the appointment got scheduled by others (after Shorter filed a grievance), it was cancelled 2-3 times for non-medical security staffing reasons, according to the complaint. Shorter sued several people allegedly responsible. After approximately four months, Shorter had a biopsy and lumpectomy. The mass was benign. The Department of Justice, responding to her FTCA claim, said that the mass had not grown during the duration and that the reason it appeared larger at the time of the lumpectomy was the need to remove additional tissue to test the margins for malignancy. Judge White also notes that the medical staff acceded to the security requests for rescheduling, saying that Shorter failed to show that security staff knew of the urgency of her needs; and security was entitled to rely on medical acquiescence. This, according to Judge White, distinguished the numerous Eleventh Circuit cases based on delay and administrative interference with medical orders. He writes: "Whether the reason the appointment was rescheduled for medical or nonmedical reasons is irrelevant. People reschedule doctor's appointments for non-medical reasons all the time. It would be absurd to suggest that the prison context should be any different. Instead, the relevant inquiry is whether rescheduling the appointment, for whatever reason, caused a delay that amounted to deliberate indifference to serious medical needs." What planet does he live on? Of course, patients and doctors reschedule in the free world, but they are free to make that choice themselves. It is not imposed on the patient, who has no alternative to seek alternative care in corrections. As the Supreme Court wrote in *West v. Atkins*, 487 U.S. 42, 56 n.15 (1988): "[P]risons and jails are inherently coercive institutions that for security reasons must exercise nearly total control over their residents' lives and the activities within their confines . . . . These factors can, and most often do, have a significant impact on the practice of medical services

in prisons." No expert testimony was presented by either side – nor should it be necessary in a "screening" – but it is clear that the reliance on the FTCA administrative record in Judge White's "screening" amounts to something like summary judgment. He dismisses all constitutional claims against all supervisory defendants, leaving only Technician Sierra, whose transphobic remarks show animus. He makes a similar ruling regarding liability of the United States for the conduct of Sierra under the FTCA. Judge White then proceeds to discuss damages – a ruling unnecessary to "screening" and one that effectively precludes any counsel from taking an interest in the case. He rules that Shorter is limited to "nominal" damages of $1-$100, because the Prisoner Litigation Reform Act, 42 U.S.C. § 1997(e)e – and a similar provision of the FTCA – (28 U.S.C. § 1346(b)(2)) – require physical injury before emotional distress damages can be awarded. Judge White does not discuss whether Shorter's surgery to remove the mass was more invasive than it would have been had it been done when ordered. The allegations of nausea, vomiting, and migraines in the pleadings should have been enough to satisfy screening on this point, even if they are insufficient in some cases on a developed record at summary judgment. There is no reason to rule on this point on the flimsy record before the court for screening purposes. On these facts, this ruling on a *pro se* case pushes the limits of §§ 1997(e)e and 1346(b)(2). Finally, on the constitutional claims, Judge White rules that Shorter has no right to consideration of punitive damages, because the claim against Sierra is "nothing more than a garden-variety claim of deliberate indifference to serious medical needs" that Shorter has not shown to be "motivated by evil motive or intent." Wrong! Sierra's conduct was motivated by "hatred" of transgender people. Judge White does not attempt to explain how "hatred" can be distinguished from "evil motive or intent." [Hint: he cannot.] Judge White also fails to follow the very cases he cited on this point. *Smith v. Wade*, 461 U.S. 30, 56 (1983), specifically allowed punitive damages for deliberate indifference in civil rights cases. *Wright v. Sheppard*, 919 F.2d 665, 670 (11th Cir.1990) (quoting *Smith*), not only reversed on the point but remanded for the awarding of punitive damages for their deterrent effect. Punitive damages may be awarded without a finding of compensatory damages. *See Williams v. Kaufman County*, 352 F.3d 994, 1015 (5th Cir. 2003) ("a punitive award may stand in the absence of actual damages where there has been a constitutional violation"). The screening of this case violates the Supreme Court's prime directive in *pro se* cases: No case should be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief." *Haines v. Kerner*, 404 U.S. 519, 520-1 (1972).

FLORIDA – Apparently heterosexual inmate Noel Arnold sought a *pro se* injunction from the federal court to prevent or reverse his transfer to another prison where he would be in danger because the transfer was caused by his association with a transgender inmate. *Arnold v. Dobbs*, 2018 U.S. Dist. LEXIS 64516 (S.D. Fla., April 16, 2018). The transgender inmate was Christopher Shorter. U. S. Magistrate Patrick A. White denied Arnold's application, writing that it was "not associated with any underlying civil matter in this Court." Arnold pleaded that he was told by Warden Romero and others: "If you back away from Inmate Shorter all these things will stop happening to you. Nobody likes Inmate Shorter because of all the grievances and lawsuits he has filed. We are going to stop Shorter and You are going to keep getting caught up in it [if] You continue hanging out with Shorter." Inmate Shorter and Warden Romero are well-known to Judge White. Both were involved in an opinion he wrote about Shorter's claims in 2017, and on the day after he recommended dismissal of Arnold's case in *Shorter v. United States*, reported in this issue of *Law Notes*; directly above. Yet, Judge White writes in the *Arnold* case: "As a threshold matter, Plaintiff's motion is not related to the conduct complained of in *any* complaint – there is no underlying action" (emphasis by Judge White). Judge White's myopic inability to connect the dots is a shame, since Shorter could probably use a friend. This writer is reminded of the case of *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147-8 (1970), which, although usually cited for civil rights conspiracies involving private and public parties, actually started when a Mississippi restaurant refused service to a mixed-race table of patrons. There is a First Amendment right to association that survives incarceration, *Overton v. Bazzetta*, 539 U.S. 126, 123 (2003), albeit a limited one after *Turner v. Safley*, 422 U.S. 78, 89 (1987). Judge White traces the law of prisoner association and finds that there is no basis to conclude that Arnold will prevail on the merits sufficient to justify a preliminary injunction. He then recommends that injunctive relief be denied with prejudice and the case closed. This appears to be a non-sequitur. Denials of a preliminary injunction under F.R.C.P. 65 are without prejudice unless the Court gives notice that the matter is consolidated with the merits and also preserves the right to a jury trial. Simply throwing out the case under the guise of Rule 65, while refusing to recognize its relationship to other cases pending before the same judge, appears, once again, to be an abuse of the screening process by Judge White.

INDIANA – U.S. District Judge Robert L. Miller, Jr., screening the *pro se* filing of transgender inmate Michael

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E. Inman in *Inman v. Neal*, 2018 U.S. Dist. LEXIS 61837 (N.D. Ind., April 11, 2018), found that it stated a constitutional claim. According to the complaint, Corrections Officer Joseph Bauer approached Inman's cell, engaged in sexually explicit conversation, and demanded that Inman touch Bauer's erect penis. Inman complied "out of fear." On other occasions, Bauer conducted searches of Inman's cell and demanded that Inman "get on his knees and bend over" while the search was conducted. Judge Miller found the first act to be actionable under *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012) ("An unwanted touching of a person's private parts, intended to humiliate the victim or gratify the assailant's sexual desires, can violate a prisoner's constitutional rights whether or not the force exerted by the assailant is significant.") Judge Miller found the bending over during the searches not to state a claim, because there was no touching and no "harm." [What about an Equal Protection violation if this humiliating gymnastic is only used for transgender inmates' cell searches – or only for Inman's?] The warden is dismissed from the case because he is not mentioned in the body of the complaint and there are no allegations of his personal involvement.

KENTUCKY – *Pro se* transgender inmate Rodger Williams alleged two claims: violation of the Prison Rape Elimination Act [PREA] when inadequate investigation ensued following her report that another inmate exposed himself to her; and constitutional violations by searching her using male officers. Williams sued only the Jailer as a defendant. In *Williams v. Daley*, 2018 U.S. Dist. LEXIS 68337. 2018 WL 1937339 (E.D. Ky., April 24, 2018), U.S. District Judge David L. Bunning dismissed her case for failure to state a claim. First, there is no private right of action under PREA, as courts have nearly universally ruled. Second, there were no allegations of personal involvement of the Jailer in the allegedly unconstitutional searches. In fact, after Williams initially objected to searches by male officers, she was told that the jail would search her in the future using female officers. Williams objected that on an occasion thereafter a male officer conducted the search. Judge Bunning finds no constitutional violation. Moreover, he finds no allegations that the Jailer was involved. Construing the claim as one against the Jailer in an official capacity (i.e., a claim against the County), Judge Bunning finds that there was no policy, practice, or custom alleged that could create municipal liability. In fact, it appears that custom, by Williams' own admission, was not to use male officers; and the incident was a "one-off" – insufficient to establish municipal liability. It appears that this plaintiff did not have much of a legal case, but Judge Bunning treated her respectfully, using female pronouns, and not belittling her claims.

KENTUCKY – Joshua Haley, *pro se*, is a "30 year old gender nonconforming male that has an extremely feminine appearance housed within [a Kentucky] male prison." He is classified as "at risk" of assault because of his appearance and a previous assault. U.S. District Judge David A. Hale has already allowed his case to proceed, describing his history as a "sex slave" and rape victim in detail in *Haley v. Arnold*, 2017 U.S. Dist. LEXIS 161813 (W.D. Ky., October 2, 2017), reported in *Law Notes*, November 2017 at pages 462-3. The most serious assault included dousing him with boiling water, breaking his jaw, beating him unconscious, and leaving him for dead – while correctional officers watched. This writer's report ended with a plea for counsel to come forward. Now, in *Haley v. Arnold*, 2018 U.S. Dist. LEXIS 49407, 2018 WL 1476680 (W.D. Ky., March 26, 2018), Judge Hale denied the state defendants' motion for summary judgment on exhaustion of administration remedies under the Prison Litigation Reform Act ["PLRA"]. Haley filed three grievances, at least one of which he took through all stages of exhaustion. The state tried to argue that exhaustion was not satisfied because some of the procedural deadlines of the Kentucky grievance procedures were not met. Judge Hale was not having it. He found that, in the Sixth Circuit, when the state issues a final grievance decision on the merits, overlooking timeliness issues, the court will not look further under the PLRA. "When prison officials decline to enforce their own procedural requirements and opt to consider otherwise-defaulted claims on the merits, so as a general rule will we," citing *Reed-Bey v. Pramstaller*, 603 F.3d 322, 325-6 (6th Cir. 2010); *Vandiver v. Correctional Med. Servs.*, Inc., 326 F. App'x 885, 891 (6th Cir. 2009). Judge Hale notes that this is also the rule in the Third, Seventh, and Tenth Circuits. Judge Hale's ruling means that the state could still attempt a trial on exhaustion, but it is unlikely to succeed, since they have the burden of proof. If Haley finds counsel, this case should settle.

LOUISIANA – In a relatively rare case, U.S. District Judge Judge Elizabeth Erny Foote rejected U. S. Magistrate Judge Mark L. Hornsby's Recommendation that *pro se* plaintiff Albert Magee's deliberate indifference case be dismissed on screening – even though Magee filed no objections – in *Magee v. Williams*, 2018 WL 1934072 (W.D. La., April 24, 2018). Magee alleged that his HIV medication was not monitored despite multiple requests, resulting in deterioration that adjustments in medication could have avoided, and that his treatment for a painful chlamydia infection was cured after a ten months'

wait by a "short course of penicillin." Judge Hornsby recommended that the case be dismissed *with prejudice* [emphasis supplied], but Judge Foote ruled that he was wrong as a matter of law (the standard, as opposed to *de novo* review when objections are filed). Hornsby had ruled that, because Magee was seen by medical personnel, there could not be deliberate indifference. This is contrary to basic "deliberate indifference to medical care" law under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); and it violates Fifth Circuit precedent. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 422 (5th Cir. 2017) (*per curiam*) (citing *Easter v. Powell*, 467 F.3d 459, 464–65 (5th Cir. 2006)) ("pain suffered during a delay in treatment" for a serious medical need is actionable under the Eighth Amendment). The case was sent back to Judge Hornsby for further proceedings.

MICHIGAN – Transgender inmate Scott Blevins, *pro se*, passed screening on her claims of deliberate indifference to her safety in *Blevins v. Naeyaert*, 2018 U.S. Dist. LEXIS 64272, 2018 WL 1804573 (W.D. Mich., April 17, 2018). U.S. District Judge Paul L. Maloney dismisses the remaining claims against more than a dozen defendants on various grounds. An officer's throwing Blevins' food on the floor in a single incident does not constitute an Eighth Amendment violation. Failure to respond adequately to grievances likewise is not actionable, and Blevins failed to show in her pleadings that she was denied access to court (something that is difficult to do in the same case as one where the plaintiff is obviously receiving permission to proceed, at least in part). Blevins adequately pleaded that she was the victim of sexual assault and was forced by a prison gang to prostitute herself – all within knowledge of the remaining officer defendants, who failed to take action to prevent or stop it.

NEW JERSEY – Transgender federal prisoner, Christopher Shorter, *pro se*, sued under *Bivens [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] and the Federal Tort Claims Act ["FTCA"] after she was sexually assaulted, in *Shorter v. United States*, 2018 U.S. Dist. LEXIS 60270, 2018 WL 1734061 (D.N.J., April 9, 2018). U.S. District Judge Renée Marie Bumb denied (without prejudice) permission for her to proceed *in forma pauperis* because she failed to submit a copy of her prison account records to show indigency. In *dicta*, Judge Bumb then proceeded to screen the complaint anyway and found that the *Bivens* claims qualified for *sua sponte* dismissal. Shorter has female characteristics, and she has been assaulted at another federal prison. She was designated "at risk" upon arrival at FCI Fort Dix. Nevertheless, her first housing assignment was with eleven other men in a single room. In a few days she was moved to a two-inmate cell, at the end of the corroder on a floor above the officer's station. The cells did not lock, and officials forbade her from putting a "makeshift" lock on the door. She complained about the assignment and about comments made by inmates about her nipples. She was assigned a known sex offender as a cellmate, and recommendations that her cellmate be changed were overruled. Later she was assaulted, receiving seven knife wounds. She thought she could identify her assailant, who covered his head; but no rape kit was performed, despite her request and as required by the Prison Rape Elimination Act; and no evidence, such as clothing or body fluids, was preserved. An investigation, concluded without forensic testing and made after a cursory inquiry (according to Shorter), found sexual assault "unsubstantiated." Judge Bumb found sufficient evidence of negligence both in failing to protect Shorter from assault and in failing to preserve evidence of the assault to proceed under the FTCA. The opinion suggests that failure to follow PREA procedures could be evidence of negligence. Judge Bumb wrote, however, that the constitutional claims were insufficient. Taking the Due Process Claim first, Judge Bumb wrote that Shorter had no cause of action under PREA and that the sloppy investigation did not sufficiently "shock the conscience" to establish a substantive due process violation of the Fifth Amendment. Under protection from harm under the Eighth Amendment and *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), however, Judge Bump recognized that *Farmer* allows a claim to be stated based on obvious risk, but she found that (1) knowledge that Shorter was transgender and had been assaulted previously; (2) Shorter was placed in a cell with a sex offender far from the officer's station; (3) Shorter complained about her safety; (4) Shorter alerted defendants about inmates' comments about her breasts; and (5) defendants refused to allow Shorter to use a "makeshift" lock on her cell – all were insufficient to raise an "obvious" risk, even at the screening stage. In this writer's view, this is a pinched reading of *Farmer*. Judge Bumb makes passing reference to new restrictions on *Bivens* claims under *Ziglar v. Abbassi*, 137 S. Ct. 1843, 1859 (2017), but she reserved "ruling" in her *dicta* until such time as a constitutional claim is properly pleaded. Judge Bumb told Shorter in legalese that she could amend to try to assert a constitutional claim or could proceed on her FTCA alone. Shorter has 30 days to establish IFP and file a proper pleading.

NEW YORK – New York City jails will soon be allowing transgender inmates to house with fellow inmates of the gender with which they identify, accordingly to an article in the *New York Law Journal* (April 16, 2018).

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It will join San Francisco as the only county jails in the nation with this policy. The announcement came from the office of Mayor Bill De Blasio and the New York City Commission on Human Rights. "Respecting gender identity or gender expression is key in making sure that everyone in New York City is living with dignity and respect," said Human Rights Commissioner Carmelyn Malalis, a former president of LeGaL. De Blasio's 2016 order regarding transgender use of city facilities had a partial exemption for Corrections that is now being lifted. According to the article, the DOC will house inmates consistent with their gender identity unless the outcome of a federally required safety assessment or the preferences of the inmate require alternative housing. A transgender housing unit will remain an option for some inmates. The DOC has six months to implement the changes. Perhaps this will lead to the day when transgender inmates can more realistically choose between safety and separate but unequal housing in protection units.

NEW YORK – After initial screening, *pro se* HIV-positive plaintiff Angel Rodriguez was left with two claims: a Fourteenth Amendment privacy claim for unauthorized disclosure of his HIV status, and a discrimination claim under Title II of the Americans with Disabilities Act (ADA) for denying him a job in the jail's kitchen. In *Rodriguez v. Heit*, 2018 U.S. Dist. LEXIS 55891 (N.D. N.Y., March 30, 2018), U.S. Magistrate Judge Andrew T. Baxter's Report and Recommendation [R & R] granted the defendants summary judgment on these claims because Rodriguez failed to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA] before filing a federal lawsuit. It seems that he did exhaust *after* filing, by obtaining final decisions through the last stage of the administrative process; but, this was insufficient because the exhaustion must *precede* federal filing under *Woodford v. Ngo*, 548 U.S. 81, 90-103 (2006). A dismissal under these circumstances would normally be without prejudice, but the R & R proceeds to make a recommendation on the merits: summary judgment should be granted on the substantive claims as well. While inmates in the Second Circuit have a privacy right in undisclosed sensitive medical information under *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999), Rodriguez does not meet the standards for this protection. The nurse who disclosed the HIV status says she referred to Rodriguez's "condition" in front of an officer without saying what it was. Even assuming she mentioned HIV, however, Judge Baxter found that the officer's presence at the medical encounter served a legitimate security interest and noted Rodriguez's admission in his deposition that this officer already knew about Rodriguez's HIV status because Rodriguez had told him. As to the kitchen job, Judge Baxter relied on Rodriguez's admission that he did not really want the job and that many other jobs were open to him, for which he applied. It all seems a bit too much fuss to write a plenary opinion on these facts, making one wonder what else was going on. It is impossible to tell from the opinion. According to PACER, Rodriguez was not fluent in English, and his requests for appointment of counsel were repeatedly denied, as was his request for additional time and discovery to respond to the motion for summary judgment on the merits. The record shows that he was moved to numerous jails, prisons, and finally federal custody (where he now resides) during the period of the litigation.

NEW YORK – This prisoner case primarily concerns the efforts over several years of *pro se* plaintiff Michael Tammaro to retrieve property seized by the City of New York at the time of his arrest. These aspects of the case, most of which are dismissed by U.S. District Judge William J. Pauley, III, are not part of this report. Tommaro also alleged that he suffered discrimination and assaults as a result of his race and sexual orientation, in *Tammaro v. City of New York*, 2018 WL 1621535, 2017 U.S. Dist. LEXIS 54729 (S.D.N.Y., March 30, 2018). The defendants moved to dismiss the prison abuse claims because Tammaro did not specify the exact time, date, and place of each alleged discriminatory and assaultive act, as referred to in F.R.C.P. 9(f). Judge Pauley ruled that the provisions of Rule 9(f) are designed to screen out claims that are time barred by the statute of limitations and have no bearing on a test of the merits under F.R.C.P. 12(b)(6). *See Rosen ex rel. Egghead.com v. Brookhaven Capital Mgmt. Co.*, 179 F. Supp. 2d 330, 334 (S.D.N.Y. 2002) ("Rule 9(f) does not require the pleader to set out specific allegations of time and place; it merely states the significance of these allegations when they are actually interposed"); *Matthew v. United States*, 452 F.Supp.2d 433, 446 (S.D.N.Y. 2006) ("screening device . . . when the averments in the complaint make clear that the claim is time-barred"). Since the moving defendants did not address the merits of the alleged prison abuse, neither did Judge Pauley.

NEW YORK – Transgender plaintiff LeslieAnn Manning achieved what her lawyers are describing as the highest money settlement for sexual assault on a New York State transgender inmate to date. The Department of Corrections and Community Supervision ["DOCCS"] agreed to pay Manning the sum of $100,000 to settle claims of failure to protect her while she was assigned to work in an unsupervised area of Sullivan Correctional Facility in 2013. The settlement, which is not officially reported, came in *Manning v. Griffin*, No. 15-cv-003 (KMK)(S.D.N.Y.), and

it carries no DOCCS admission of liability. The area in question, known as "Sublevel E" at the prison, is a series of rooms with no clear lines of observation, regular security rounds, or video surveillance. Manning was assigned to work there to assist other inmates with sensory impairments. In 2016, *Law Notes* reported a decision by U.S. District Judge Kenneth M. Karas to dismiss Manning's case (along with searing criticism of his ruling) in *Manning v. Griffin*, 2016 WL 1274588 (S.D.N.Y., March 31, 2016), in "Federal Judge Dismisses 'Failure to Protect' Claim of Transgender Inmate Raped in Unsupervised Area" (May 2016 at page 183). He granted Manning's attorneys leave to file a Second Amended Complaint, which eventually resulted in this settlement after two more years of litigation. Her assailant had been transferred to Sullivan after raping another prisoner at a different prison, and he had access to Sublevel E and Manning, despite her expressions of fear. Following the assault, Manning was placed in isolation, supposedly for her protection, which compounded her mental distress, according to her lawyers. This practice in DOCCS and throughout Corrections, of taking away the liberty of vulnerable victims rather than protecting them in population, is very common. Kudos to Manning and to her legal team: Susan Hazeldean, LGBT Advocacy Clinic, Brooklyn Law School; Betsy Ginsberg, Cardozo Civil Rights Clinic, New York City.

NORTH CAROLINA – *Pro se* bisexual inmate Derek Shane Goodson sued because of deliberate indifference to his serious medical needs. Goodson also alleged that a particular officer offered to pay other inmates to hurt him because of the nature of his charges. He alleges that another officer threatened to transfer him to a maximum facility where he would be killed because of his charges unless he dropped the officer from a different lawsuit he had filed. (He never mentions the nature of his charges.) He further alleges a serious medical condition, causing blood in his urine; and he claims that officers refused to honor a medical referral to an urologist. Finally, Goodson alleges verbal harassment because of his sexual orientation. Chief U.S. District Judge Frank D. Whiting denied Goodson's request that the state produce a copy of his medical records as "premature," because the case had not yet been screened and discovery had not started. On screening, Judge Whiting (who did not sign the opinion) dismissed the case for failure to state a claim that could survive screening, in *Goodson v. Cable*, 2018 U.S. Dist. LEXIS 68833 (W.D.N.C., April 23, 2018). This writer reviewed the case on PACER (because one could not really tell what happened from the cursory opinion published in LEXIS). The *pro se* pleading is disjointed and poorly written, but it alleges serious constitutional violations, which Judge Whiting did not take seriously. The threats alleged here go beyond verbal abuse. Goodson says his referral to an urologist for blood in his urine was prevented by officers. The violates established Fourth Circuit law. *Soserbee v. Murphy*, 797 F.2d 179, 182-3 (4th Cir. 1986). There are also First Amendment and Equal Protection issues that could be developed, but Judge Whiting gives Goodson no analysis that could help him improve the complaint. Yet, he expects (or perhaps does not expect) Goodson to file a better pleading without guidance or access to his own medical records.

OKLAHOMA – This is largely a hatchet job by U.S. District Judge Ronnie L. White on the *pro se* civil rights case of transgender inmate Johnny L. Hardeman, a/k/a Lo're Pink. The opinion in *Hardeman v. Smith*, 2018 U.S. Dist. LEXIS 51236, 2018 WL 1528160 (E.D. Okla., March 28, 2018), uses Pink's former name (although admitting it has been legally changed), refers to her with male pronouns, and notes Pink's grammar and spelling errors with "[sic]" – but not those of defendants. After exhaustive discussion, Judge White determines that defendants are all entitled to summary judgment because Pink failed to exhaust administrative remedies under the Prison Litigation Reform Act ["PLRA"]. Judge White discusses nearly a dozen separate grievances and applications, most of which were denied for procedural reasons. Some were ignored; others were returned unanswered. Pink was challenging her health care, denials of jobs and programming, indefinite retention in solitary confinement, and other discrimination. She sued both line and supervisory employees. One defendant told Pink: "[A]s long as you are transgender, I will never take you serious, and will leave your ass on lock-up and single celled" with no release date. Pink was faulted for asking for multiple relief in the same grievance and for appealing two grievances at the same time. She was faulted for not attaching the original grievance showing the merits complaint with her appeal (when procedure said that prison staff should scan and attach it); and for including the merits in another appeal, when the appeal should have complained only that the merits were not addressed. She was held to strict deadlines, some as short as 3 days. Judge White ordered a *Martinez* Report [*Martinez v. Aaron*, 570 F.2d 317, 318 (10th Cir. 1978)], designed by the Tenth Circuit before the PLRA was enacted to help a district court evaluate a *pro se* Complaint. Since the PLRA, the Tenth Circuit has cautioned that *Martinez* reports are not designed to be a fast track to summary judgment and are not a substitute for discovery. "Courts order the *Martinez* report not to provide discovery, but to aid in screening the case." *Rachel v. Troutt*, 820 F.3d 390, 396 (10th Cir. 2016); *see also, Gee v.*

Estes, 829 F.2d 1005, 1009 (10th Cir. 1987) ("The purpose of the *Martinez* report is to ascertain whether there is a factual as well as a legal basis for the prisoner's claims"). Judge White found that there were actually two separate grievance procedures applicable to Pink's claims during the period at issue, but he made no findings as to whether Pink was aware of the difference. The opinion does not mention *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016), which sets forth three exceptions to the PLRA's exhaustion rule – vagueness of procedures; unavailability of the grievance system to the plaintiff; and thwarting of the plaintiff's efforts to use the grievance system — all three of which are suggested by the facts of this case. Nevertheless, Judge White grants summary judgment for failure to exhaust under 42 U.S.C. § 1997e(a). Normally, a district judge should stop there. One of the key purposes of the PLRA was to give a grievance a chance to be resolved without the need for a federal judge to adjudicate the merits. Judge White does so anyway. First, applying only boilerplate law, he finds on the basis of the *Martinez* report (since there are no affidavits or references to same) that none of the defendants had personal involvement with Pink's claims – although some of the supervisory signatures on the documents are illegible and defendant Heather Diaz (a psychologist) made session entries in Pink's chart – things suggestive of deliberate indifference to requests for transgender care, like "complaint noted," or "request made." Similarly, Judge White granted summary judgment on Pink's Eighth Amendment claims. He found, lifting sections verbatim from defendants' brief, that Pink's claim that her transgender medication was abruptly stopped was a mere disagreement on treatment, because there were numerous notes that medical personnel discussed it with her. He criticized Pink's case as an attempt to obtain a gender identity diagnosis from the court, after she claimed she was denied access by the prison to a person qualified to make one. Judge White essentially finds that the *Martinez* Report's hundreds of pages of unchallenged notes by medical, administrative, and security staff contradict Pink's claims that she did not receive "any" treatment for her transgender condition because she talked about it with staff. He then rules that summary judgment is mandated by *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), citing *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976), which held that *Estelle* did not overrule the Fifth Circuit's holding that declining to order an x-ray did not violate the Constitution. This and other cases Judge White cites from the 1970's is the most perverse usage of *Estelle's* progeny this writer has seen in forty years. Judge White then turns to Pink's solitary confinement, denial of programs, and retention in high security claims, granting summary judgment against her on all counts. Even if her confinement was "atypical" under *Sandin v. Conner*, 515 U.S. 472, 484 (1995), her history of sexual activity mandated a single cell and none was available at lower security. There was no "sham or pretext" review under *Sandin*'s requirement that a hearing be "meaningful," even though Pink has "routinely been overridden to maximum security since 2007." The opinion has no discussion of the Equal Protection Clause, despite Pink's claims of discrimination. Finally, leaving no stone unturned, Judge White finds that, since none of Pink's constitutional rights have been violated, all defendants are entitled to summary judgment on qualified immunity. The case is on appeal *pro se* to the Tenth Circuit, where we can only hope that the *pro se* staff seeks *pro bono* counsel.

OREGON – Oregon law gives parties 180 days to provide notice of intent to file a claim against state officials. O.R.S. 30.275. Regulations provide that a prisoner's grievance will be aborted if the inmate files a notice of intent to sue the state on the same subject while the grievance is pending. Or. Admin. R. 291-109-1060(4). *Pro se* Plaintiff Jason W. Dunn was removed from a job in food services because of his HIV status, even though he had been medically cleared to work there. He filed several grievances, and he was on an appellate tier of one of them several months later, when he filed a notice of intent to sue the state. Correctional officials dismissed the grievance. In *Dunn v. Myrick*, 2018 WL 1833875 (D. Ore., February 20, 2018), Dunn sued for violation of his rights under the Americans with Disabilities Act and the Equal Protection Clause. The state moved to dismiss because of failure to exhaust administrative remedies under the Prison Litigation Reform Act ["PLRA"]. U.S. Magistrate Judge Thomas Coffin recommended that summary judgment be granted to the defendants under the PLRA for failure to exhaust administrative remedies, citing to other cases in Oregon where an inmate filed a state notice of intent while a grievance was in the process of being exhausted and the grievance was aborted. Judge Coffin found that the failure to exhaust, although occurring by operation of administrative law, was attributable to the behavior of the inmate. This and the other cases rely on *Woodford v. Ngo*, 548 U.S. 81, 85, 90 (2006), which requires compliance with substantive and procedural state rules to achieve PLRA exhaustion, but it does not deal with a competing statute of limitations by the state court of claims act. In this case and those cited, the judges did not have to consider what would happen if the inmates' grievances were delayed until the eve of 180 days. Would the inmate then have to forfeit a state court of claims action to exhaust a grievance appeal in order to satisfy the PLRA and remain in federal court? Some states, like New York, have

shorter notice of claims provisions – *see* N.Y. Court of Claims Act, § 10(3) (90 days). This appears to be a collision waiting to happen in some jurisdiction.

PENNSYLVANIA – *Moore v. Mann*, 2018 U.S. Dist. LEXIS 60690 (M.D. Pa., April 9, 2018), presents the issue of verbal abuse+. The staff verbal abuse (here, calling *pro se* plaintiff Brian C. Moore a "snitch," a homosexual and a pedophile), was previously found to state a claim when the case was screened, because the danger was heightened and the verbal abuse was allegedly part of a smear campaign against Moore. It started after Moore saw an officer engaging in inappropriate sexual conduct with other inmates, and it was designed to discredit Moore and to silence him through fear about what he had seen. At that time, the court rejected the defense that Moore had not yet been assaulted. Now, U.S. Magistrate Judge Martin C. Carlson, applying detailed analysis of the "law of the case," recommends that defendants' motion for summary judgment be denied. Their arguments had already been rejected, and Moore had raised more than enough to take his claim of failure to protect (indeed, intentionally creating a dangerous situation) to the jury. Absent "extraordinary circumstances," not shown here, the court will not revisit a prior ruling on what states a claim. What strikes this writer as extraordinary is that Moore came up with affidavits from other inmates saying they wanted to assault him, even though they did not. There will be a jury trial on whether defendants deliberately placed Moore in harm's way, regardless of whether he was actually assaulted.

SOUTH DAKOTA – U.S. District Judge Roberto A. Lange dismissed the complaint of transgender inmate Kody Dean Butterfield for medical treatment and gender feminizing products on screening in *Butterfield v. Young*, 2018 WL 1640594, 2018 U.S. Dist. LEXIS 58177 (D.S.D., April 5, 2018). Basically, Judge Lange found that, because the Eighth Circuit affirmed the granting of summary judgment against a transgender inmate's hormone access claim in *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015), he should just as well do so here, without service, discovery, a motion, or hearing from any of the parties beyond the *pro se* complaint. Butterfield alleges that she has a diagnosis of gender dysphoria, that she receives no treatment other than psychotherapy, that she is denied feminizing products, and that she suffers discipline if she even applies make-up. In *Reid*, by Judge Lange's own description, the plaintiff was diagnosed and was not denied treatment completely. She therefore failed to establish "deliberate indifference" under the law. Comparing applications of *Reid* by district courts in Arkansas (dismissing) and Nebraska (declining to dismiss), he sides with the Arkansas analysis (patient disagreed with diagnosis) over the Nebraska analysis (defendants refused evaluation and treatment) – even though the facts here more closely resemble those of the Nebraska case. These two decisions –*Derx v. Kelley*, 2017 WL 2874627 (E.D. Ark., June 18, 2017); and *Brown v. Dep't of Health & Human Services*., 2017 U.S. Dis. LEXIS 84518, 2017 WL 2414567 (D. Nebr., June 2, 2017) – are reported in *Law Notes* (Summer 2017 at pages 273 and 277-8). Judge Lange does not mention the recent Missouri grant of a preliminary injunction against Missouri's "freeze frame" policy and other deliberate indifference treatment of transgender inmates claims in *Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516, 2018 WL 806764 (E.D.Mo, February 9, 2018), reported in *Law Notes*, as "U.S. Magistrate Orders Hormones, Hair Patten Treatment and Feminizing Canteen Items for Missouri Transgender Inmate, Rejecting MoDOC's 'Freeze Frame' Policy" (March 2018 at 108-9). This tendency to reach out to address the merits in screening transgender inmate claims is the subject of a larger article in this issue of *Law Notes*, "A Tale of Two Circuits: Variation in Screening Transgender Prisoner Cases." To add to insult, Judge Lange also assessed a "strike" against Butterfield under the Prison Litigation Reform Act.

VIRGINIA – Christopher Nelson Payne *pro se* sued wardens of a county jail and a state correctional facility and two nurses, alleging deliberate indifference to his HIV/AIDS in *Payne v. Wilson*, 2018 U.S. Dist. LEXIS 51282, 2018 WL 1528220 (W.D. Va., March 28, 2018). U.S. District Judge Elizabeth K. Dillon granted summary judgment to all defendants for Payne's failure to present a triable issue on an Eighth Amendment violation. Judge Dillon's lengthy recitation of the facts shows that Payne refused medication on multiple occasions. Payne had received advice (source unclear) that all medicine (consisting of some seven pills) had to be taken together, with food. It also appears that some of the medication he thought had been ordered for him had been discontinued and that he had swallowing and reflux problems. So, he refused all medications for a period, leading to a hospitalization, where he was also non-compliant and signed himself out against medical advice. The record is unclear as to which physician was in charge of Payne's care and there appears to be a lack of consultation between physician's assistants, correctional physicians and the hospital – but Payne did not sue any of these people, only wardens and nurses. There also appears to be a glaring lack of psychiatric involvement in this case, but one of the nurse defendants tried to make a mental health referral and even took the unusual step of calling

Payne's attorney about his refusals of medicine. Judge Dillon found no personal involvement by the wardens and no deliberate indifference by the nurses, who were following the medical orders as written. Payne's failure to name any prescribing physicians or to offer an expert opinion in his support doomed his case. It seems clear to this writer that Payne needed mental health intervention, but the lack of this is not pled in the *pro se* case.

VIRGINIA – Contractual psychiatrist Everett McDuffie may wish to reconsider supplementing his income with work in Corrections. Last month, he was the only defendant left standing in a report about transgender treatment in Red Onion State Prison in Virginia. *See "Federal Judges Issue Mixed Decisions on Transgender Inmate's Physical and Mental Health Care Claims; Ignore Issue of Unreasonable Restraints," Law Notes* (April 2018 at 182-3). Now, in *Delk v. Moran*, 2018 U.S. Dist. LEXIS 50534, 2018 WL 1513296 (W.D. Va., March 27, 2018), the same judge, U. S. District Judge Norman K. Moon, kept McDuffie as a defendant in another transgender case, in which other defendants got at least a temporary dismissal. Plaintiff Steven R. Delk, a/k/a Ja-Quitha "Earth" Camellia, sued for violation of her constitutional rights arising from discrimination, denial of medical and mental health care, failure to protect, sexual assault and conspiracy. Most of her claims are found too vague to proceed or are brought against the wrong defendants, but Judge Moon explains the deficiencies in detail. He grants her leave to amend, staying his dismissal order during the time to amend (thus preventing a strike under the Prison Litigation Reform Act). Meanwhile, McDuffie stays in the case. He was charged with operating a mental health screening system in which he approves the denial of all mental health services "without any personal diagnosis or evaluation [of Delk]." McDuffie then had the audacity to argue that his lack of personal involvement should result in his dismissal, even though on these facts it comprised the constitutional violation itself. It has been unconstitutional to deny access to a physician without personal examination since the earliest cases implementing *Estelle v. Gamble*, 429 U.S. 97 (1976). *See Todaro v. Ward*, 565 F.2d 48, 50-1 (2d Cir. 1977) (unconstitutional to screen sick call patients based on cryptic notes on request slips). Interestingly, Judge Moon also found that Delk stated a 14th Amendment Due Process claim based on her allegations that McDuffie's denials of mental health care, sought to help her cope with sexual assault and being transgender in prison, were "atypical and significant" and denied her a protected liberty interest, citing *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). "Delk plausibly states that Dr. McDuffie denied Delk mental health treatment despite knowing that Delk sought it to cope with [her] ongoing sexual abuse in the prison." As such she states a plausible 14th Amendment liberty interest claim against McDuffie. *See Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011) (ruling that inmates have a clearly established constitutional "right to be free from deliberate indifference to assault and sexual abuse."). Judge Moon also denied McDuffie's motion for a stay of discovery against him.

WEST VIRGINIA – *Pro se* gay inmate Jason A. Perry was injured while operating machinery in industry in a West Virginia prison. Most of his claims concern that injury, the safety of the work environment, and the treatment of his hand, which never healed properly. U.S. District Judge Frederick P. Stamp adopted the Report and Recommendation of Magistrate Judge Robert W. Trumble that these claims be dismissed as stating no more than negligence, which is not unconstitutional. Although it is never mentioned, readers should be aware that cases like this for the unincarcerated are handled through the workers' compensation system. Injured inmate workers, however, are left with the pre-workers' compensation state tort system, which often has not been updated since early in the 20th century, when workers' compensation began to replace the old fault-based tort recovery system, for all injured workers except inmates. Judges Stamp and Trumble, however left Perry the right to proceed on his Equal Protection claims, at least at the screening stage, that the work environment was homophobic once his sexual orientation was discovered by other inmates and corrections staff. He alleges that he was also denied promotion, bullied, and paid lower prison wages than his heterosexual counterparts with similar jobs in *Perry v. W. Va. Corr. Indus.*, 2018 U.S. Dist. LEXIS 51202. 2018 WL 1518353 (N. D. W. Va., March 28, 2018).

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES – The Trump Administration has announced plans to rescind a rule adopted in 2016 by the Obama Administration under which doctors, hospitals and health insurance companies were required under the Affordable Care Act to refrain from discrimination because of gender identity in providing health care services. The rule provided that discrimination because of sex, expressly prohibited by the ACA, would be construed to include discrimination because of gender identity and "stereotypical notions" of how men

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or women should present themselves or behave. This tracked the language of existing court decisions that had accepted the Supreme Court's holding in *Price Waterhouse v. Hopkins* (1989) that discrimination because of gender non-conformity could violated Title VII's ban on sex discrimination. At the time of its adoption in 2016, the policy was criticized in some quarters for not making more explicit a requirement that health insurance to be qualified under the ACA would have to cover gender transition-related expenses. According to a report in the *New York Times* (April 21), "Under the existing rule, health insurers cannot place arbitrary limits or restrictions on health services that help a person transition from one gender to another. These services may include counseling, psychotherapy, hormone therapy and a variety of surgical treatments." We are not certain that this description is totally accurate as to how the ACA regulation has been interpreted, but it is clear that progress has been made, especially among employer-sponsored group insurance plans, in extending coverage to cover such treatment. Litigation initiated by some states had resulted in a preliminary injunction issued by a federal judge in Texas, providing the justification cited by Trump Administration officials for revising the rule to drop the gender identity coverage policy. A draft of a proposed new rule, not yet published for comment, has been submitted to the White House for clearance, according to a statement by the Justice Department to the Texas judge during an April status conference. The same judge had preliminarily enjoined the Obama Administration from enforcing its interpretation of Title IX to bar schools receiving federal money from discriminating against transgender students.

U.S. SENATE – Senator Tammy Baldwin (D-Wis) was joined by seventeen other senators in a letter of protest to the White House concerning the removal of LGBT health data from government websites. The letter, dated April 12, "decried the recently reported removal of information on LGBT health data from the Department of Health & Human Services website for the Office of Women's Health as well as the removal of LGBT population-based data reports from the Federal Committee of Statistical Methodology website for the Office of Management & Budget, reported the *Washington Blade* on April 16.

ALABAMA – The Montevallo City Council voted 4-2 on April 23 to amend the city's anti-discrimination law to add sexual orientation and gender identity as forbidden grounds of discrimination. Montevallo was only the second municipality in Alabama to take such action. The ordinance applies to housing, public accommodations and employment. The city attorney cautioned that legal challenges to the council's authority to pass the amendments would probably occur, pointing to the lack of such express anti-discrimination bans in federal and state law. The enactment followed several years of discussion and debate, including in meetings open for public input. *AL.com* (Birmingham) (April 25).

ALASKA – Anchorage voters rejected an initiative that would have repealed the recently enacted municipal ban on gender identity discrimination in public accommodations. The focus of the initiative campaign was, of course, on restrooms and lockers rooms, with proponents arguing that they were seeking to ensure public safety, mainly by making sure that men did not use restroom facilities designated for women. Such campaigns are based on mythology and fear. The measure, designated Proposition 1, lost by a six-point margin, after an expensive campaign waged by both proponents and opponents. The *Anchorage Daily News* (April 6) reported that this was "apparently one of the country's first 'bathroom bills' to appear on a ballot as an initiative."

CALIFORNIA – On April 19, the California Assembly approved a bill that would classify the sale or advertising of conversion therapy as a fraudulent business practice, on the ground that the practice is ineffective and can be harmful. Out gay Assemblymember Evan Low (D-Campbell), lead sponsor of the bill, said the purpose was to provide legal recourse to those who are harmed or defrauded by conversion therapy practitioners. Unlike laws in California and a few other states that ban licensed practitioners from providing this therapy to minors, the new bill would apply to any setting in which the therapy is provided to anybody for a fee. *Seattle Times*, April 19.

COLORADO – The Greeley-Evans School District 6 Board of Education has updated its hiring practices to prohibit discrimination based on gender identity, including transgender, or pregnancy status. *Greeley Tribune*, April 11.

FLORIDA – The Charlotte County School Board has revised the county schools' code of conduct to add protection against bullying for LGBTQ students by including "sexual orientation" as "something that cannot be negatively spoken or acted against with 'the purpose or effect of creating an intimidating, hostile or offensive educational environment," reported the *Charlotte Sun* (April 25).

LEGISLATIVE & ADMINISTRATIVE *notes*

HAWAII – The legislature gave final approval on April 27 to a bill that would bar health care practitioners from providing conversion therapy to minors. It awaited approval from the governor at the end of April. An online report by *Hawaii News Now* (April 27) suggested that Hawaii may become the 12th state to ban the practice.

ILLINOIS – The Oak Park and River Forest High School Board of Education endorsed at an April 17 meeting a policy to require that students "be treated and supported in a manner consistent with their gender identity" and allowed "access to restrooms and locker rooms that correspond to their gender identification." The action responded to a petition signed by 700 parents, alumni, current students and community members urging the district officials to do more to protect transgender students. Reporting on April 26, *Forest Leaves* noted that the high school already has five unisex bathrooms, and that the policy was scheduled for formal adoption at the board's regular meeting that night.

MARYLAND – Both houses of the legislature have passed bills by comfortable margins (Senate, 34-12; House, 95-27) that would ban the practice of conversion therapy on minors by licensed health care providers. The bill defines "conversion therapy" as "practice or treatment by a medical health or child care practitioner that seeks to change an individual's sexual orientation or gender identity . . . any effort to change the behavioral expression of an individual's sexual orientation, change gender expression, or eliminate or reduce sexual or romantic attractions of feelings toward individuals of the same gender." Practitioners who violate the ban would be subject to professional discipline by the appropriate professional or certifying board. The measure awaits approval from Governor Larry Hogan, a Republican. *Legal Monitor Worldwide*, 2018 WLNR 103477800 (April 6).

NEW HAMPSHIRE – On April 19 the Senate voted 14-10 to approve HB 587, which bans licensed health care practitioners from performing conversion therapy on minors. The measure had previously passed the House in February by a vote of 179-171, but some amendments necessitated negotiations to achieve a uniform bill to send to Governor Chris Sununu. *New Hampshire Union Leader*, April 20.

NEW JERSEY – Governor Phil Murphy signed into law a measure extending the state's ban on pay discrimination. The existing law bans discrimination because of sex, similar to the federal Equal Pay Act, but the new measure, named the Diane B. Allen Equal Pay Act, adds the following forbidden grounds of discrimination in pay: race, nationality, marital status, sexual orientation, gender identity, age, disability." It adopts a modified version of the traditional Equal Pay Act standard, banning unequal pay for "substantially similar work, when viewed as a composite of skill, effort and responsibility." New Jersey now joins with Iowa, Ohio, South Carolina and Utah (and Washington, D.C.) in extending existing equal pay laws to categories beyond sex. Making it harder for employers to win cases in which their pay practices are challenged, it shifts the burden of proof to employers to show that plaintiffs do not perform substantially similar work to higher-paid colleagues. Affirmative defense for employers include seniority and merit systems and other "bona fide factors" such as experience and training. A prior version of the bill had passed the legislature but was vetoed by Governor Chris Christie, who wanted to limit the forbidden grounds to race and sex and to exempt religious employers. *Reuters Legal*, April 25.

NEW YORK – Mayor Bill De Blasio and Human Rights Commissioner Carmelyn Malalis announced on April 16 that the city's jail system would be housing transgender inmates with fellow inmates of the gender with which they identify. The mayor had signed an Order in 2016 directing that all city-owned buildings that have single-sex bathrooms and locker rooms must allow people to use bathrooms of the gender with which they identify, but carved out an exemption for the Department of Corrections due to inmate safety concerns. Under the new policy, reported the *New York Law Journal* (April 16), Corrections will "house inmates consistent with their gender identity unless the outcome of a federally required safety assessment or the preferences of the inmate require alternative housing." Depending on the facility in question, transgender inmates may have the option of being housed in a designated transgender unit. De Blasio gave the Department six months leeway to make any necessary changes to implement the policy. The *Law Journal* noted that San Francisco had announced such a policy in 2015.

OKLAHOMA – A bill that would permit adoption "faith-based" adoption agencies to follow their religious beliefs in deciding whether to facilitate adoptions by LGBT people and couples has passed the legislature and as of the beginning of May was pending before Governor Mary Fallin, who had not stated a public position on the bill. State Senator Greg Treat, a Republican, was credited as author of the bill, who claimed his purpose was not to authorize discrimination but rather to expand the opportunities for kids

to find adoptive homes. At present, the Oklahoma Department of Human Services would not confirm a shortage of adoption providers, but was known to be seeking adoptive families for approximately 500 children. *Canadian Press*, May 5.

PENNSYLVANIA – The Pennsylvania Supreme Court has approved a recommendation by the Minor Court Rules Committee to amend the Governing Standards of Conduct of Magisterial District Judges to include gender identity or expression among the prohibited grounds for bias or prejudice or harassment, binding on the judges, the lawyers who appear before them. Also, judges are supposed to refrain from associating with organizations that engage in discrimination on grounds listed in these rules. The text can be found at 2018 Pa. LEXIS 2024 (April 25, 2018).

LAW & SOCIETY NOTES

By Arthur Leonard

A spokesperson for the **U.S. CENSUS BUREAU** confirmed for NBC News that the 2020 census will allow respondents to specify whether they are living with a partner of the same sex, as the question about household formation has been expanded to include the possibility of same-sex spouses and partners. The development responds, in part, to the Supreme Court's decisions in *Obergefell* and *Windsor*, under which states must allow same-sex partners to marry and the federal government must recognize such marriages. However, the census will not ask whether people identity as LGBTQ. *Washington Times*, April 25.

The U.S. Senate confirmed **RICHARD GRENELL**, an extremely conservative out gay man, to be U.S. Ambassador to Germany on April 26. A handful of Democratic senators crossed the aisle to join the unanimous vote of Republican Senators who were present, resulting in a 56-42 vote. President Trump nominated him in September 2017. Trump apparently applied his general standard of nominating people who seem particularly ill-suited to their positions: Grenell is notorious for posting offensive comments about women on social media, but is being dispatched to conduct diplomatic relations with a government headed by Chancellor Angela Merkel, the world's most prominent female head of government. He does have the "paper" credentials for the job, having served as a foreign policy expert in the Bush administration as a spokesperson for several U.S. ambassadors to the United Nations. The *Los Angeles Blade* (April 26) reported that he describes himself as a gay conservative Christian, and has a same-sex partner of 15 years, a conservative Christian who is a graduate of Liberty University. Grenell had served briefly as a foreign policy spokesperson for Mitt Romney during the 2012 presidential campaign, but resigned under pressure from social conservatives unhappy about Romney's employment of an out gay man in that role. Upon his confirmation, Grenell became the highest ranking out gay member of the Trump Administration.

The Trump Administration strikes again: President Trump's new majority on the **SECURITIES AND EXCHANGE COMMISSION** has backed away from the agency's approach to handling shareholder proposals, broadening the "micromanaging" doctrine under which companies are not required to allow shareholders to vote on corporate policies that, in management's judgment, are not material to investor decisions about where to park their money. Most of the recent communications by the SEC to corporations have responded to shareholder environmental resolutions, but on March 29, the agency informed CATO, a fashion retailer, that it could block a shareholder proposal to bar discrimination based on sexual orientation or gender identity or expression. *WashingtonPost.com*, April 9.

Researchers from the **UNIVERSITY OF TEXAS AT AUSTIN** have published a study in the *Journal of Adolescent Health* showing that allowing transgender youth to use their chosen or preferred names "improves" their "mental health." One of the researchers, Amanda Pollitt, stated: "If you could use your chosen name in just one additional context, the probability that you would engage in suicidal behavior will drop by half." The study surveyed 129 transgender youths age 15 to 21 from three different regions. Participants were surveyed four times with follow-ups every nine months. This is claimed to have been the "largest and most diverse sample of transgender youth" to be studied to date. *The Daily Texan*, April 12.

INTERNATIONAL NOTES

By Arthur Leonard

BELGIUM – *RadioFreeEuropeNews.com* reports that Belgium has given humanitarian visas to five gay men from Chechnya. Belgian State Secretary for Asylum and Migration Theo Francken stated on April 6 that the five men received visas from the Belgian Embassy in Moscow, and that more such visas may be issued to LGBT people from Chechnya in the future. When confronted with reports about persecution of gay people in Chechnya, the court's ruler, Ramzan Kadyrov, denied the allegations,

INTERNATIONAL *notes*

stating: "We don't have those kinds of people here. We don't have any gays."

BERMUDA – OutBermuda and Maryellen Jackson filed an action in the Bermuda Supreme Court, seeking an order that provisions passed by the legislature that "have the effect of revoking same-sex marriage" are unconstitutional. The matter was expected to be heard by the Chief Justice during May. Carnival Cruise Lines, preeminent among the country's tourist industry, is actively supporting OutBermuda's efforts to reinstated marriage equality. *BerNews*, April 3.

CHILE – On April 30 the government of new President Sebastian Pinera said it would adhere to an agreement signed with the LGBT group by its predecessors in office to settle a marriage equality case pending before the Inter-American Commission on Human Rights. The agreement commits the government to modifying existing law to allow for same-sex marriages, gay adoptions, antidiscrimination protection for LGBTQ people, and modernizing gender identity policies, repealing homophobic laws, and implementing related policies around education, health care, work, and women. Reported by U.S. journalist Rex Wockner based on an article in *El Mostrador.*

COSTA RICA – A heated presidential election in which the leading candidates took opposite sides on the question of Costa Rica's compliance with an opinion issued by the Pan American Human Rights Court on marriage equality ended with the election of Carlos Alvarado Quesada, who supports marriage equality. It had been widely predicted that he would lose, in light of public opinion polls showing 70% opposed to same-sex marriage. So much for polls. Alvarado Quesada won by a 20-point margin. An article reporting the result *Daily Mail Online*, April 2, observed: "His decisive 20-point margin of victory offers hope to fellow progressives elsewhere in Latin America working to defeat an evangelical-led backlash that has grown alongside expanding acceptance of gay and lesbian rights."

INDONESIA – In Aceh Province, where Islamic Shariah law is in effect, activists called on April 3 for the government to release four people who had been detained on suspicion of having homosexual sex. The detained individuals, if convicted, could face up to 100 lashed in public as punishment. The head of Shariah police in the province stated, "We are completing their files and will soon had over to prosecutors." Last year, Aceh authorities administered public caning for the first time under a law passed in 2014. *Straits Times*, April 3.

ITALY – A lesbian city council member in Turin, Chiara Foglietta, attempted to register her newborn, conceived abroad through donor insemination, but was turned down by City officials, pursuant to an Italian statute that makes fertility treatments available only to heterosexual couples; the law specifies that a child born to an unmarried woman must have been conceived through sexual intercourse. Conception through donor insemination is not officially recognized. *AP Online*, April 20.

NORTHERN IRELAND –The Supreme Court of the United Kingdom came to Belfast to hear arguments in the case against Ashers Bakery, which had declined an order by a gay activist to make a cake with the slogan "Support Gay Marriage" inscribed on it. Gareth Lee sued, winning the support of the Equality Commission for Northern Ireland and prevailing in the Court of Appeal. Five justices were scheduled to hear the argument in Belfast during the first week that the court would initiate the practice of hearing arguments in Northern Ireland. Ashers is mounting a religious liberty defense. In an opinion accompanying the Court of Appeal ruling, Northern Ireland's Lord Chief Justice, Sir Declan Morgan, stated: "The supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds. In the present case, the appellants might elect not to provide a service that involves any religious or political message. What they may not do is to provide a service that only reflects their own political or religious message in relation to sexual orientation."

PARAGUAY – No advance for marriage equality in Paraguay as a result of April 22's presidential election, as the winner, Mario Abdo Benitez, is a conservative whose party opposes same-sex marriage. *New York Times*, April 22.

JAPAN – On April 2 the city government of Fukuoka began recognizing same-sex partnerships. The southwestern Japanese city was the 7th municipality to issue partnership documents to same-sex couples since the first such system was established in Tokyo's Shibuya Ward in 2015. *Kyodo News*, April 2.

SINGAPORE – A couple whose marriage was solemnized at the Registry of Marriages have sued the Registrar for deleting their marriage from the official records after one had sex reassignment surgery. Pro bono lawyers Jeanette Chong-Aruldoss and

Suang Wijaya from the firm Eugene Thuraisingam LLP are seeking a High Court review of the Registrar's decision to void the marriage, and an order restoring it to the books, claiming the Registrar exceeded her powers. The Registrar had challenged them at the time of the marriage, noting the "husband"'s appearance and use of a feminine name, but the husband then declared he would "not be marrying someone of the same sex and would not undergo any sex reassignment surgery to become a woman before the marriage date." Several months after the marriage was solemnized, the husband applied to have the surgical procedure, which was completed by June 2016, after which, now identified now as Ms. Faith Volta, she applied to the Immigration and Checkpoints Authority and was issued a new identity card stated female gender. Six months later, the Registrar contacted the couple to get an explanation, and then told them that their marriage would be "revoked," subsequently sending them a letter with the finding that Ms. Faith had intended to undergo sex reassignment surgery at the time the marriage was solemnized. The Registrar deemed the marriage void because at the time it was performed, the couple did not plan to live as man and woman. *Straits Times*, April 2.

TRINIDAD AND TOBAGO – Attorney General Faris Al Rawi has given instructions to appeal the April 12 High Court ruling in *Jones and Attorney General of Trinidad & Tobago*, Claim No. CV2017-00720, that held unconstitutional the colonial-era Sexual Offences Act, which as used to prosecute participants in consensual gay sex. The opinion by Mr. Justice Devindra Rampersad stated, "There is no doubt in the court's mind that the impugned sections infringe upon the claimant's fundamental rights or that they are likely to be contravened . . . To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies . . . The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act impinges on the right to respect for a private and family life." The law is still technically in effect despite the High Court decision, as the appellate process goes forward. *newsday.co.tt*, April 13.

UNITED KINGDOM – Judge Christine Henson of Brighton Crown Court imposed a lifetime sentence on Daryll Rowe, convicted last November on five charges of causing grievous bodily harm and five charges of attempting to do so. In what the judge characterized as a "determined hateful campaign of sly violence," Rowe, a gay man infected with HIV, apparently sought revenge after learning he had been infected by trying to infect other men through unprotected sex. After being diagnosed in April 2015, he refused treatment and medication, and told his victims, who he met through Grindr, that he was uninfected, and then would try to use "tampered condoms" during sex in an attempt to infect his victims. Stated the judge: "With the full knowledge of the risk you posed to others and the legal implications of engaging in risky sexual practices, you embarked on a deliberate campaign to infect other men with the HIV virus [sic]. Unfortunately for five of the men you met, your campaign was successful." Under British law, he will have to serve at least 10 years and 253 days before he can be considered for parole, but the judge expressed doubts about whether he would ever be let free: "Given the facts of this case and your permissive predatory behavior, I cannot see when you would no longer be a danger to gay men." *Express (UK)*, April 19; *Sky News*, April 18.

NEW ZEALAND – The Parliament passed legislation expunging historic convictions for engaging in gay sex. Consensual gay sex was decriminalized in 1986, but men convicted before then continued to have criminal records. The bill passed unanimously on April 3 will allow those who were convicted of consensual offenses to have the records expunged. Passage of the bill was accompanied by an apology by Justice Minister Andrew Little to "all the men and members of the rainbow community who have been affected by the prejudice, stigma and other negative effects caused by convictions for historical homosexual offences. This bill sends a clear signal that discrimination against gay people is no longer acceptable, and that we are committed to putting right wrongs from the past." The convictions in question relate to three offences under prior law: sodomy, indecency between males, and keeping a place of resort for homosexual acts. The Justice Department estimated that about 1,000 people will be eligible to apply for expungement of records when the law goes into effect next year. *Agence France Presse English Wire*, April 4.

PROFESSIONAL NOTES

By Arthur Leonard

NATIONAL CENTER FOR LESBIAN RIGHTS is conducting a national search for a new Executive Director, to take over when Kate Kendell retires at the end of this year. For information, see http://www.nclrights.org/about-us/jobs-fellowships/#ExecutiveDirector.

DANA NESSEL, an out LGBT lawyer, has received the endorsement of

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the Michigan Democratic Party's convention for the nomination for state Attorney General. She is best known for representing plaintiffs in the Michigan marriage equality case that eventually became part of *Obergefell v. Hodges*, the Supreme Courts 2015 marriage equality ruling. The formal endorsement decision will be made in August, but this endorsement vote usually predicts the outcome. *malive.com*, April 15.

The *National Law Journal* reported as a "Notable Bar Admission at the Supreme Court" that on April 17, **ASSISTANT SOLICITOR GENERAL JEFFREY SANDBERG** moved the admission to the Supreme Court Bar of his husband, **ELLIOTT MOGUL**, "a fellow Yale Law School graduate," and then proceeded to argue a case on behalf of the government. Wrote the NLJ, "It all happened quickly and without fanfare, but it may be the first time – or one of the first – that a lawyer has moved the admission of his or her same-sex spouse to the Supreme Court bar in the court chamber. The episode takes on special meaning because it was the Supreme Court that declared in *Obergefell v. Hodges* in 2015 that same-sex marriages were protected by the Constitution." Chief Justice John Roberts, who vociferously dissented in *Obergefell*, granted Sandberg's motion, mentioning the applicant by name. "Neither court officials nor a spokeswoman for the Solicitor General's office could confirm whether it was a first, but there was a sense that something rare had happened," reported NLJ.

We sadly report the death on April 14 of **DAVID BUCKEL**, who worked as a staff attorney for more than a decade at Lambda Legal, during which time he played a key role in such major cases as *Nabozny*, in which the 7th Circuit recognized a cause of action under Title IX against school districts that knowingly failed to protect gay students from aggravated bullying, and the successful marriage equality litigation in New Jersey and Iowa, where the goal was achieved using state constitutional arguments as part of Lambda Legal's state-by-state strategy to achieve the circumstances in which an eventual Supreme Court decision would be feasible. Buckel also successfully sued a Nebraska county sheriff for knowingly failing to protect Brandon Teena, a transgender man who was murdered in a horrendous hate crime. The Teena case was made into a movie, "Boys Don't Cry," in which Hilary Swank won an Oscar for her portrayal of Teena. Predictably, mainstream media saw this as Buckel's most notable case. News media reported that Buckel had set himself on fire early on that Saturday morning in Brooklyn's Prospect Park, leaving a note (which he had also emailed to various media shortly before his suicide) stating that he was taking this step to bring attention to environmental concerns, concluding, "Honorable purpose in life invites honorable purpose in death." Since leaving Lambda, Buckel had become deeply involved in environmental causes. His action sparked debate about his mental state while he was systematically plotting out this step without disclosing his intention to family and friends.

The **NATIONAL CENTER FOR TRANSGENDER EQUALITY** will present its 2018 Trans Equality Now Awards on May 17 to **SARAH MCBRIDE**, the Obama Administration (represented by **VALERIE JARRETT**), and **ANDREA MARRA**. The ceremony will take place in Washington, D.C., at Hamilton Live.

"Asylum" cont. from page 226

Judge Pryor found that as the panel may not "re-weigh the evidence from scratch," Petitioner's arguments with respect to the weight given to record evidence could not be raised. The court ruled that the petition for review should be denied. The panel in light of upholding the decision that Petitioner had not established a well-founded fear of persecution further upheld the denial of Petitioner's withholding of removal and Convention against Torture claims, which both required Petitioner to establish a significantly higher level of probability of harm to him if returned.

Petitioner is represented by Ronald Darwin Richey, Rockville, Maryland. ■

"Name change" cont. from page 239

Ultimately, because the court found no evidence of fraudulent intent by the petitioner or desire to misrepresent herself or to encroach on the rights of others, it granted the petition. Significantly, the court noted that "[t]his Court has no reason to doubt the assertion by petitioner's counsel that name changes are frequently part of life for transgender individuals."

Another New York case from 2009 held that a statutory requirement to publish a legal name change in local newspapers could be waived in the case of a young transgender individual petitioning for a name change. *In re E.P.L.*, 26 Misc. 3d 336, 891 N.Y.S.2d 619 (N.Y. Sup. Ct. 2009). Here, the court did not say whether the petitioner requested a similar exemption from the publication requirement. Instead, the court noted that the statutory publication requirement ameliorates DOCCS' concern for victims' rights, and so specified three publications in which the petitioner would have to provide notice of the name change. Although not directly dealt with in this opinion, the implication for future cases is likely that, in at least some circumstances, a transgender inmate may not be able to benefit from a waiver of service by publication. ■

Joseph Rome, Maria Khoury, and Robert Watson are attorneys at Kobre & Kim.

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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.

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