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LAW NOTES
June 2018

LET US EAT CAKE

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Masterpiece Cakeshop Ruling Reversed; Supreme Court Finds Impermissible "Hostility to Religion" in Colorado Commission Proceeding

By Arthur S. Leonard

The United States Supreme Court ruled on June 4 that overt hostility to religion had tainted the decision process in the Colorado Civil Rights Commission when it ruled that baker Jack Phillips and his Masterpiece Cakeshop had unlawfully discriminated against Charlie Craig and Dave Mullins in 2012 by refusing to make them a wedding cake. *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 6-111, 2018 U.S. LEXIS 3386, 2018 WL 2465172. Writing for the Court, Justice Anthony M. Kennedy reaffirmed the right of the states to ban discrimination because of sexual orientation by businesses that sell goods and services to the public, but insisted that those charged with discrimination are entitled to a respectful consideration of their religious beliefs when charges against them are being adjudicated. Five other members of the Court – Chief Justice John Roberts and Justices Stephen Breyer, Samuel Alito, Elena Kagan and Neil Gorsuch – joined Kennedy's opinion.

Writing for the Court, Justice Anthony M. Kennedy reaffirmed the right of the states to ban discrimination because of sexual orientation by businesses that sell goods and services to the public.

Kennedy found that the particular circumstances of this case fell short of the requirement that government be neutral in matters of religion. During the oral argument of the case in December, he had signaled this concern, making a troubling observation during the argument by Colorado's Solicitor General, Frederick Yarger, who was defending the state court's decision against the baker. Kennedy said, "Counselor, tolerance is essential in a free society. And tolerance is most meaningful when it's mutual. It seems to me that the State in its position here has been neither tolerant nor respectful of Mr. Phillips's religious beliefs." In his opinion for the Court, Kennedy, noting comments made at the public hearing in this case by two of the state Commissioners, said, "The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."

At the first public hearing, wrote Kennedy, "One commissioner suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state.'" This commissioner also said, "If a businessman want to do business in the state and he's got an issue with the – the law's impacting his personal belief system, he needs to look at being able to compromise." At the second hearing, a different commissioner spoke disparagingly about how "freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." Kennedy found these remarks to constitute disparagement of religion by commissioners who were supposed to be neutral when acting for the government in deciding a case. He emphasized that the record of the hearings "shows no objection to these comments from other commissioners" and that the state court of appeals ruling affirming the Commission's decision did not mention these remarks.

Kennedy also noted that as of 2012, Colorado neither allowed nor recognized same-sex marriages, so Phillips could "reasonably believe" that he could refuse to make a cake for such a purpose. The factual record suggests that Phillips cited the state ban on same-sex marriage as a reason for his refusal, in addition to his own religious beliefs.

Kennedy invoked a 1993 decision by the Supreme Court, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, in which the Court held that overtly anti-religious bias by a legislative body that had enacted a ban on ritual slaughter of chickens directly aimed at the practices of a minority religious sect violated the Free Exercise Clause.

Even though the statute, on its face, was neutral with respect to religion, and thus would normally be enforceable against anyone who engaged in the prohibited practice regardless of their religious or other motivation, the Court found that the openly articulated anti-religious sentiments of the legislative proponents had undercut the requirement of government neutrality with respect to religious practices. The only reason the municipality had passed the ordinance was to forbid ritual slaughter of chickens by members of this particular religious sect. Thus, it was not a neutral law, since it specifically targeted a particular religion's practice. Similarly, in this case, Kennedy said, evidence of hostility to religion by the Commission members tainted the decisional process.

Kennedy observed that when the Court decided in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that same-sex couples have a fundamental right to marry, it had also noted that "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." At the time, dissenting Justices Alito and Antonin Scalia had emphasized the inevitable clashes that might occur in future as those with religious objections confronted the reality of same-sex marriages, and Scalia – as was his usual practice in dissents from Kennedy's opinions in gay rights cases – ridiculed Kennedy's statements as falling short of dealing with the clashes that were sure to occur. In this opinion, Kennedy develops the *Obergefell* dictum about religious objections further, but does not suggest that religious objectors enjoy a broad exemption from complying with public accommodations laws. Indeed, he said quite the opposite in dicta.

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason, the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts," wrote Kennedy. Although the Court did not expressly rule out 1st Amendment exemptions for wedding vendors with religious objections to same-sex marriage, Kennedy's statement of general legal principles came close to doing so. "At the same time," he continued, "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.

"As this Court observed in *Obergefell v. Hodges*, 576 U.S. ––– (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Id., at ––– (slip op., at 27). Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggy Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

"When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."

Thus, the Court's opinion appears to hold that a state can refuse to recognize a 1st Amendment objection to providing goods and services, provided that it affords defendants a neutral form to evaluate those constitutional claims in the context of a discrimination enforcement action.

Justice Kagan filed a concurring opinion, joined by Justice Breyer, generally joining the Court's reasoning but disavowing Kennedy's reliance on evidence from a stunt conceived by William Jack, a religious opponent of same-sex marriage who filed an amicus brief in the case. Upon hearing about the Masterpiece Cakeshop discrimination charge, Mr. Jack had approached three other Colorado bakers, asking them to make a cake decorated with pictures and Biblical quotations derogatory of same-sex marriage and gay people, and all three bakers refused his request because they found the desired product to be offensive. Jack filed charges of religious discrimination against them, but the Colorado Commission rejected his charges, finding that the bakers had a right to refuse to make cakes conveying messages they found offensive. Jack then argued – persuasively, in the view of Kennedy, Roberts, Alito and Gorsuch – that the Commission's different treatment of the charges against the other bakers as compared to its treatment of Jack Phillips showed the Commission's hostility to religious beliefs. Justice Clarence Thomas, whose separate concurring opinion was joined only by Gorsuch, also found Jack's arguments persuasive.

Kagan's concurring opinion argued that the other baker cases were distinguishable. She pointed out that

Jack had asked the bakers to make a cake that they would have refused to make for any customer, regardless of their religion or sexual orientation. By contrast, Phillips refused to make a wedding cake that he would happily have sold to different-sex couples but refused to sell to same-sex couples. In the former case, there is no discrimination on grounds prohibited by the Colorado statute. Gorsuch, in his separate concurrence (with which Justice Alito joined), insisted that the three bakers were discriminating against Jack based on his religious beliefs, and insisted on distinguishing between a cake to "celebrate a same-sex marriage" and a generic "wedding cake."

Interestingly, the Court's opinion focused on free exercise of religion and evaded ruling on the other main argument advanced by Jack Phillips: that requiring him to bake the cake would be a form of compelled speech prohibited by the First Amendment freedom of speech clause. The Trump Administration had come into the case in support of Phillips' appeal, but limited its argument to the free speech contention, which Gorsuch and Thomas also embraced in their concurring opinions.

Justice Ruth Bader Ginsburg dissented in an opinion joined by Justice Sonia Sotomayor. She minimized the significance of the statements by the two Colorado commissioners. "Whatever one may think of the statements in historical context," she wrote, "I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, the Division had to find probable cause that Phillips violated [the statute]. Second, the [Administrative Law Judge] entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council."

Ginsburg focused her dissent on a series of statements from Kennedy's opinion which make clear that the Court's ruling does not endorse some sort of broad exemption for religious from complying with anti-discrimination laws, including the following: "It is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." "Purveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.'" Gay persons may be spared from "indignities when they seek goods and services in an open market." She pointed out that all of these statements "point in the opposite direction" from the Court's conclusion that Phillips should win his appeal. It is worth noting that these quotations are from an opinion that was joined by Chief Justice Roberts and Justices Alito and Gorsuch. (Perhaps the inclusion of these quotations helps to explain by Justice Thomas did not sign it.)

The narrowness, and possibly limited precedential weight of the Court's opinion were well expressed by Kennedy, when he wrote, "the delicate question of when the free exercise of [Phillips'] religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires." Taking together the date of the incident (2012), the inconsistency Kennedy saw with the Commission's treatment of the bakers who turned down Jack's order for the gay-disparaging cakes, and the comments by the commissioners at the hearing, Kennedy wrote, "it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause, and its order must be set aside." Justice Kagan agreed that in this case the State's decision was "infected by religious hostility or bias," although she (and Breyer) disagreed that the Commission's treatment of Jack's complaint against the three bakers supported this conclusion, finding that situation distinguishable.

Gorsuch and Thomas would have gone beyond the Court's opinion to find a violation of Phillips' freedom of speech as well. Kennedy wrote, "The free speech aspect of this case is difficult, for few persons who have

Justice Ruth Bader Ginsburg dissented in an opinion joined by Justice Sonia Sotomayor.

seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning." But he took this issue no further, instead focusing on the hostility to religion he found reflected in the Colorado commission record. Thus, the Court's holding is narrowly focused on the requirement of neutrality toward religion by government actors. Gorsuch and Thomas, by contrast, found the compelled-speech argument compelling.

The next shoe to drop on the possible significance of this ruling may come quickly. Also on June 4, the Court listed for conference distribution the petition and responses filed with the Court in *State of Washington v. Arlene's Flowers, Inc*., 187 Wash.2d 804, 389 P.3d 543 (Wash., February 16, 2017), petition for certiorari filed, July 21, 2017, for discussion at its June 7 conference, the results of which will probably be announced on June 11. Arlene's Flowers refused to provide floral arrangements for a same-sex wedding, and was found by the state civil rights agency and the Washington state courts to be in violation of the public accommodations statute. Arlene's petition was filed last summer, but no action was taken by the Court pending a decision of *Masterpiece Cakeshop*. If the Court denies the petition, that would reinforce the view that the *Masterpiece* ruling is narrowly focused on the evidence of "hostility to religion" by the Colorado Civil Rights Commission, and that absent similar evidence in the Washington state adjudication record, the Court is willing to leave the Washington Supreme Court ruling against Arlene's Flowers in place. However, the Court might grant the petition and remand the case to the Washington Supreme Court for reconsideration in light of *Masterpiece*. This could respond to Justice Kennedy's observation that the Colorado Court of Appeals decision did not even mention the commissioner remarks that aroused Justice Kennedy's ire at oral argument and that were a significant factor in the Supreme Court's decision. A remand to the Washington court could implicitly direct that court to examine the adjudication record for any signs of hostility to religion at any stage in that proceeding.

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason, the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights."

Interestingly, the Oregon Supreme Court recently heard oral argument in a similar wedding cake case, *Klein d/b/a Sweetcakes by Melissa v. Oregon Bureau of Labor and Industries*, 410 P.3d 1051 (Court of Appeals of Oregon, December 28, 2017), *appeal pending before the Oregon Supreme Court* (argued in May, 2018). A ruling by the Oregon court could provide the first sign of how lower courts will interpret *Masterpiece Cakeshop*, depending whether the Oregon adjudication record shows signs of hostility to religion. Interestingly, this case was instigated not by the same-sex couple who were denied service but rather by the state's attorney general, reacting to press reports about the denial.

It is occasionally difficult when the Supreme Court issues a ruling in a controversial case to determine exactly what the ruling means for future cases. Ultimately, the meaning of a case as precedent will depend on the factual context of subsequent cases, and on which statements by the justices are seized upon by lower court judges to support their conclusion about how the later cases should be decided. Kennedy's own words suggest that these analyses will necessarily be heavily influenced by the facts of those cases. As he wrote in conclusion: "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." In the next issue of *Law Notes*, we will discuss a ruling by the Arizona Court of Appeals in *Brush & Nib Studio, LC v. City of Phoenix*, 2018 WL 2728317 (Court of Appeals of Arizona, Div. 1, June 7, 2018), which relied on and quoted from *Masterpiece Cakeshop* to deny a business's claim to a constitutional exemption from proving services or goods for a same-sex wedding.

At the oral argument, Phillips and Masterpiece Cakeshop were represented by Kristen K. Waggoner of Alliance Defending Freedom, the Scottsdale, Arizona, based religious advocacy firm whose donors are funding this appeal. Donald Trump's appointee as Solicitor General, Noel J. Francisco, made his first appearance before the Court in this capacity to argue the Administration's freedom of speech position. As noted above, Colorado Solicitor General Frederick R. Yarger appeared in support of the Commission's ruling, and David D. Cole, an ACLU attorney, argued on behalf of Craig and Mullins. ■

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Third Circuit Rejects Challenge to Pennsylvania School District's Policy Allowing Transgender Students to Use Facilities Consistent with Their Gender Identities

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 3rd Circuit took the unusual step on May 24 of announcing about an hour after hearing oral argument that it would unanimously affirm U.S. District Judge Edward G. Smith's ruling from last summer denying a motion for a preliminary injunction by a group of parents and students seeking to stop the Boyertown (Pennsylvania) Area School District from continuing to implement a policy allowing transgender students to use locker rooms and bathrooms corresponding to their gender identities. *Doe v. Boyertown Area School District*, 2018 WL 2355999 (3rd Cir., May 24, 2018), affirming 276 F. Supp. 2d 324 (E.D. Pa., August 25, 2017).

Later that day, the court issued a brief "Judgement" written by Circuit Judge Theodore A. McKee, so brief that it can be quoted in full here: "We agree Plaintiffs have not demonstrated a likelihood of success on the merits and that they have not established that they will be irreparably harmed if their Motion to Enjoin the Boyertown School District's policy is denied. We therefore Affirm the District Court's denial of a preliminary injunction substantially for the reasons that the Court explained in its exceptionally well-reasoned Opinion of August 25, 2017. A formal Opinion will follow. The mandate shall issue forthwith. The time for filing a petition for rehearing will run from the date that the Court's formal opinion is entered on the docket." There was some suggestion in press reports that after hearing argument the court was concerned that the affirmance be effective immediately, since the school year would shortly end.

This is one of several similar cases filed around the country by Alliance Defending Freedom (ADF), an organization formed to advance the freedom of Christians to assert the primacy of their beliefs over any conflicting obligations imposed by law. ADF is a staunch opponent of LGBT rights, battled on the ramparts to oppose marriage equality and to support the ability of businesses operated by Christians to refuse to sell their goods and services for same-sex weddings. ADF has inserted itself into the "bathroom wars" by filing lawsuits on behalf of parents and allegedly cisgender students who oppose allowing transgender students to use single-sex facilities consistent with their gender identities. When Judge Smith issued his decision last August, a federal magistrate judge in Illinois, Jeffrey T. Gilbert, had issued a report and recommendation to U.S. District Judge Jorge L. Alonso, which recommended denying ADF's motion for a preliminary injunction against a similar school district policy in *Students & Parents for Privacy v. United States Department of Education*, 2016 WL 6134121 (N.D. Ill., Oct. 18, 2016), and Judge Smith cited and relied on Judge Gilbert's analysis at various points in his decision. Judge Alonso subsequently adopted Judge Gilbert's Report and Recommendations, over the objections of ADF, on December 29, 2017, in *Students & Parents for Privacy v. United States Department of Education*, 2017 WL 6629520.

ADF has inserted itself into the "bathroom wars" by filing lawsuits on behalf of parents.

The plaintiffs in the Boyertown case argued three legal theories: first, that the district's policy violates the constitutional privacy rights of non-transgender students under the 14th Amendment; second, that the school district's policy violates Title IX's requirement, as fleshed out in Education Department regulations, to provide separate restroom and locker room facilities for boys and girls; and third, that the policy violates Pennsylvania's common law tort of invasion of privacy by intruding on the right of seclusion of non-transgender students. Judge Smith found that the record compiled by the parties in response to the plaintiffs' motion for preliminary injunction showed that the plaintiffs were unlikely to prevail on any of these claims. The bulk of his lengthy opinion (which runs 83 pages, including about six pages of headnotes, in Lexis) is devoted to a careful delineation of the factual record upon which he based his legal analysis.

Judge Smith explored each of the three theories at length, rejecting ADF's argument that high school students have some sort of fundamental constitutional right not to share restroom facilities with transgender students because of the possibility that a transgender student would see them in their underwear, and noting particularly that factual allegations by individual plaintiff students who had found themselves in restrooms with transgender students showed that even if such a "right" existed, it had not been violated in any instance.

As to the Title IX argument, plaintiff insisted that allowing transgender students to use the restrooms created

a "hostile environment" for the non-transgender students, but Judge Smith, recurring to Judge Gilbert's ruling in the Illinois case, observed that "the School District treats both male and female students similarly," undercutting the argument that the District is discrimination in education opportunity "because of" the sex of the individual plaintiff students. "The practice applies to both the boys' and girls' locker rooms and bathrooms," wrote Smith, "meaning that cisgender boys potentially may use the boys' locker room and bathrooms with transgender boys and cisgender girls potentially may use the girls' locker room and bathrooms with transgender girls. In addition, with regard to the transgender students, both transgender boys and transgender girls are treated similarly insofar as they, upon receiving permission from the School District, may use the locker rooms and bathrooms corresponding with their gender identity. Moreover, the School District is not discriminating against students regarding the use of alternative facilities if students are uncomfortable with the current practice insofar as those facilities are open to all students who may be uncomfortable using locker rooms or multi-user facilities . . . The School District's similar treatment of all students I fatal to the plaintiffs' Title IX claim." Concluding on the Title IX point, Judge Smith wrote, "The plaintiffs have failed to cite to any case holding that a plaintiff can maintain a sexual harassment hostile environment claim when the allegedly sexually harassing party treats all individuals similarly and there is, as such, no evidence of gender/sex animus." Simply put, the District was not "targeting" any student for particular adverse treatment because of his or her sex. Judge Smith also pointed out that the law of "hostile environment" as it has been developed under Title VII of the Civil Rights Act of 1964, to which courts refer in Title IX cases, sets a very high evidentiary bar for establishing a hostile environment, which he concluded could not be met by the plaintiffs' factual allegations in this case.

As to the tort of invasion of privacy claim, Judge Smith noted that there were no allegations that any of the named defendants had personally invaded the privacy of any of the plaintiffs, as the plaintiffs' factual allegations all related to two transgender students, identified as Student A and Student B, whose presence in locker rooms or restrooms was the subject of individual plaintiffs' angst. But, of course, Students A and B were only present in those facilities because the District's policy allowed them to be. "The court does not deny that an individual seeks seclusion in a bathroom toilet stall from being viewed by other people outside of the stall," wrote Judge Smith, pointing out that the cases cited by the plaintiffs in support of their common law privacy claims "involve alleged invasions of privacy in bathroom stalls," usually involving police surveillance of public restrooms. "Here," Smith pointed out, "there are no allegations and the plaintiffs presented no evidence that any transgender student invaded their seclusion while they were in a bathroom stall. And similarly, although the plaintiffs indicate that viewing a person while in a bathroom would be 'considered "highly offensive" by any reasonable person,' the case cited involved an intrusion into a single bathroom stall and not the presence of someone in the common area of a multi-user facility." After noting how the plaintiffs' factual allegations about particular incidents involving transgender students in restrooms fell short of supporting the plaintiffs' contentions about unwanted exposure of their bodies, Smith wrote, "the court does not find that a reasonable person would be offended by the presence of a transgender student in the bathroom or locker room with them, despite the possibility that the transgender student could possibly be in a state of undress more significant than Student A was in this case when the male plaintiffs same him." He concluded similarly regarding the other incidents described by the plaintiffs, and concluded they had not shown a likelihood that they would be able to establish liability under Pennsylvania's invasion of privacy tort.

That could be the end of Smith's analysis, since a finding that plaintiffs are likely to prevail would be necessary to ground a preliminary injunction against the District's policy, but Smith, to be thorough, analyzed the irreparable harm factor that courts consider, concluding that because the District was providing single-user alternatives the individual plaintiffs would not be irreparable harmed if the policy was allowed to continue in effect. He concluded as well that because these two factors weighed against granting the injunction, there was no need to perform the "balance of harms" analysis that would necessarily follow if the plaintiffs had prevailed on the first two factors.

As noted above, the 3rd Circuit's brief Judgement issued on May 24 described Judge Smith's opinion as "exceptionally well-reasoned," so it is likely that the "formal opinion" to follow will run along similar lines and probably quote liberally from Judge Smith. Also, it would not be surprising were the court of appeals to give persuasive weight to decisions from other courts ruling on claims by transgender students to a right under Title IX and the 14th Amendment to use facilities consistent with their gender identity. In the course of deciding those cases, the courts necessarily considered the same factual and legal issues presented by the Parents & Students cases. In light of the judicial rulings so far in these "bathroom wars" cases, a consensus seems to have emerged in the federal judiciary that is part of a larger movement in the law in the direction of recognizing transgender civil rights claims under both the Equal Protection Clause in constitutional law and the statutory bans on discrimination because of sex.

In addition to ADF's attorneys and the attorneys defending the school district, the court heard from ACLU attorneys representing the interests of transgender students in the Boyertown School District, including lead attorney Leslie Cooper with the ACLU LGBT Rights Project, lead attorney Mary Catherine Roper with the ACLU of Pennsylvania, and cooperating attorneys from Cozen O'Connor, a Philadelphia law firm. ■

Supreme Court Receives Two New Certiorari Petitions on Title VII Sexual Orientation Discrimination Claims

By Arthur S. Leonard

At the end of May the Supreme Court had received two new petitions asking it to address the question whether the ban on employment discrimination "because of sex" under Title VII of the Civil Rights Act of 1964 can be interpreted to apply to claims of discrimination because of sexual orientation.

Altitude Express, the former employer of the late Donald Zarda, a skydiving instructor who claimed he was dismissed because of his sexual orientation in violation of Title VII, has asked the Court to reverse a February 26 ruling by the U.S. Court of Appeals for the 2nd Circuit. The 2nd Circuit ruled in *Zarda v. Altitude Express*, 883 F.3d 100 (*en banc*), that the district court erred in dismissing Zarda's Title VII claim as not covered under the statute, and sent the case back to the U.S. District Court, holding that sexual orientation discrimination is a "subset" of sex discrimination.

Gerald Lynn Bostock, a gay man who claims he was fired from his job as the Child Welfare Services Coordinator for the Clayton County, Georgia, Juvenile Court System because of his sexual orientation, is asking the Court to overturn a ruling by the 11th Circuit Court of Appeals, which reiterated in his case its recent ruling in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017), that an old precedent requires three-judge panels within the 11th Circuit to dismiss sexual orientation claims under Title VII. As in the *Evans* case, the 11th Circuit refused Bostock's request to consider the question *en banc*. *See Bostock v. Clayton County Board of Commissioners*, 2018 U.S. App. LEXIS 12405, 2018 WL 2149179 (11th Cir., May 10, 2018).

The question whether Title VII can be used to challenge adverse employment decisions motivated by the worker's actual or perceived sexual orientation is important as a matter of federal law, and even more important nationally because a majority of states do not forbid such discrimination by state statute. Although Title VII applies only to employers with at least 15 employees, thus leaving regulation of small businesses to the states and localities, its applicability to sexual orientation discrimination claims would make a big difference for many lesbian, gay and bisexual workers in substantial portions of the country where such protection is otherwise unavailable outside those municipalities and counties that have local ordinances that cover sexual orientation claims. It would give them both a federal forum to litigate their employment discrimination claims and substantive protection under Title VII. For example, not one state in the southeastern United States forbids sexual orientation discrimination by statute. In Georgia, individuals employed outside of a handful of municipalities are, like Gerald Bostock in Clayton County, out of luck unless the federal law can be construed to protect them. Thus, an affirmative ruling by the Supreme Court would be especially valuable for rural employees who are unlikely to have any state or local protection. (The question whether a county or city ordinance provides protection depends on where the employer does business, not where the employee lives, so somebody living in Birmingham, Alabama, but working in a factory or a retail business outside the city limits, would not be protected by the city's ordinance.)

During the first several decades after Title VII went into effect on July 2, 1965, every attempt by LGBT plaintiffs to assert sexual orientation or gender identity discrimination claims was rejected by the Equal Employment Opportunity Commission (EEOC) and the federal courts. Two Supreme Court decisions adopting broad interpretations of the meaning of discrimination "because of sex" have led to a movement to reconsider that old position. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court accepted the argument that an employer who discriminates against a worker because of the worker's failure to comport with stereotypes the employer holds about sex and gender may have acted out of a forbidden motivation under Title VII. And in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), holding that the interpretation of "because of sex" was not limited to the factual scenarios envisioned by Congress in 1964, the Court rejected the 5th Circuit's holding that Title VII could not apply to a case where a man was being subjected to hostile environment harassment of a sexual nature by male co-workers. In that case, the Court (speaking unanimously through Justice Antonin Scalia) said that Title VII could be applied to "comparable evils" to those envisioned by Congress. Taking these two cases together as precedents, lower

The Supreme Court received two new petitions asking it to address whether the ban on employment discrimination "because of sex" under Title VII applies to sexual orientation claims.

federal courts began to interpret federal laws forbidding sex discrimination to be susceptible to broader interpretations, first in cases involving transgender plaintiffs, and then more recently in cases involving lesbian, gay or bisexual plaintiffs.

The EEOC embraced this movement in the lower federal courts during the Obama Administration in rulings reversing half a century of agency precedent to extend jurisdiction to gender identity and sexual orientation claims. The key sexual orientation ruling is *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), issued just weeks after the Supreme Court's marriage equality ruling, *Obergefell v. Hodges*. The EEOC's rulings are not binding on the federal courts, however, and the agency does not have the power to enforce its rulings without the courts' assistance. It does have power to investigate charges of discrimination and to attempt to persuade employers to agree to settle cases that the agency finds to be meritorious. The decision that the statute covers sexual orientation also provides a basis to ground retaliation claims under Title VII when employees suffer adverse employment actions because they oppose discrimination or participate in enforcement proceedings.

Plaintiffs bringing these sexual orientation cases in federal courts have had an uphill battle because of the weight of older circuit court decisions rejecting such claims. Under circuit court rules, old appellate decisions remain binding not only on the district courts in each circuit but also on the three-judge circuit court panels that normally hear appeals. Only a ruling *en banc* by an expanded (eleven judges in the huge 9th Circuit) or full bench of the circuit court can overrule a prior circuit precedent, in addition, of course, to the Supreme Court, which can overrule circuit court decisions. Some have argued, as the petition recently filed in *Bostock* argues, that *Price Waterhouse* and *Oncale* implicitly overrule those older precedents, including the case that the 11th Circuit cites as binding, *Blum v. Golf Oil Corporation*, 597 F.2d 936 (5th Cir. 1979), a case from the old 5th Circuit. (Congress subsequently split the 5th Circuit, separating off its eastern half to create a new 11th Circuit, which treats as binding old 5th Circuit precedents that have not been overruled *en banc* by the 11th Circuit.) The 2nd Circuit ruling in *Zarda* specifically looked to *Price Waterhouse* and *Oncale* as well as the EEOC's *Baldwin* decision to overrule several earlier panel decisions and establish a new interpretation of Title VII for the federal courts in Vermont, New York, and Connecticut.

Before the *Zarda* decision, the only circuit court to issue a similar ruling as a result of *en banc* review was the 7th Circuit in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). At the time of *Hively*, two out of the three states in the 7th Circuit – Wisconsin and Illinois – already had state laws banning sexual orientation discrimination, so the ruling was most important for people working in Indiana. A three-judge panel of the 8th Circuit, covering seven Midwestern states, most of which do not have state laws banning sexual orientation discrimination, will be hearing argument on this issue soon in *Horton v. Midwest Geriatric Management*, 2017 U.S. Dist. LEXIS 209996, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017), in which the U.S. District Court dismissed a sexual orientation discrimination claim in reliance on a 1989 decision by an 8th Circuit panel.

Bostock's petition argues that circuit courts should not be treating as binding pre-*Price Waterhouse* rulings on this issue. Under this logic, the 8th Circuit panel in *Horton* should be able to disclaim that circuit's 1989 ruling, although it is more likely that an overruling would require an *en banc* hearing, unless, of course, the Supreme Court grants one of the new petitions and sides with the plaintiffs in these cases.

Altitude Express's petition, by contrast, relies on the Supreme Court's general disposition against recognizing "implied" overruling, arguing that the 2nd and 7th Circuits have erred in interpreting Title VII to apply to claims that Congress did not intend to address when it passed Title VII in 1964, and that neither *Price Waterhouse* nor *Oncale* has directly overruled the old circuit court precedents. While the Altitude Express petition states sympathy, even support, for the contention that sexual orientation discrimination should be illegal, it lines up with the dissenters in the 2nd and 7th Circuits who argued that it is up to Congress, not the courts, to add "sexual orientation" through the legislative process.

A similar interpretation battle is playing out in the circuit courts of appeals concerning gender identity discrimination claims. However, plaintiffs are having more success with these claims than with sexual orientation claims because it is easier for the courts to conceptualize gender identity – especially in the context of transition – as non-conformity with gender stereotypes, and thus encompassed directly within the scope of *Price Waterhouse*. Although only one circuit court – again the 7th – has gone so far as to embrace the EEOC's determination that gender identity discrimination claims can be considered discrimination "because of sex" without resorting to a stereotyping theory, most of the courts of appeals that have considered the question have agreed that the stereotyping theory can be put to work under Title VII to allow transgender plaintiffs to pursue their claims in federal court, and many have also applied it under Title IX of the Education Amendments Act of 1972 to find protection for transgender students. If the Supreme Court were to take up the sexual orientation issue, a resulting decision could have significance for gender identity claims as well, depending on the Court's rationale in deciding the case.

The timing of these two petitions, filed late in the Term and after all oral arguments have been concluded, means that if the Court wants to take up this issue, the earliest it could be argued would be after the new Term begins on October 1, 2018. As of now, nobody knows for certain what the composition of the Court will be when the new term begins. Rumors of the possible retirement of Justice Anthony Kennedy (who will turn 82 in July), likely to be the "swing" voter on this as on all LGBT rights

cases, are rife, and although Justices Ruth Bader Ginsburg (recently turned 85) and Stephen Breyer (turning 80 in August) have expressed no intentions of stepping down, they are – together with Kennedy – the oldest members of the Court. Justice Clarence Thomas, a decisive vote against LGBT rights at all times, who was appointed by George H.W. Bush in 1991, is the second-longest serving member of the Court after Kennedy (a Reagan appointee in 1987), but Thomas, who was relatively young at his appointment, will turn 70 on June 23, and most justices have continued to serve well past that age, so occasional speculation about his retirement is probably premature. With the exception of Jimmy Carter, who did not get to appoint any Supreme Court justices during his single term, every president in modern times has gotten to appoint at least two justices to the Court during their first (or only) term. So there is considerable suspense as to the composition of the Court for its 2018-2019 Term. If the Justices are thinking strategically about their certiorari votes on controversial issues, they might well hold back from deciding whether to grant these petitions until they see the lay of the land after the Court's summer recess.

The Altitude Express petition was filed by Saul D. Zabell and Ryan T. Biesenbach, Zabell & Associates, P.C., of Bohemia, N.Y. The Zarda Estate is represented by Gregory Antollino and Stephen Bergstein, of Bergstein & Ullrich, LLP. The Bostock petition was filed by Brian J. Sutherland and Thomas J. Mew IV of Buckley Beal LLP, Atlanta, Georgia. The Trump Administration Justice Department sided with Altitude Express in the *en banc* argument before the 2nd Circuit in *Zarda*, while the EEOC sided with the Estate of Zarda. The Bostock petition seizes on this divided view from the government representatives in the *Zarda* argument as yet another reason why the Supreme Court should take up the issue and resolve it once and for all. Numerous amicus briefs were filed for the 2nd Circuit *en banc* argument. The Bostock 11th Circuit appeal attracted little notice and no *amicus* briefs.■

9th Circuit Requires Board of Immigration Appeals to Reconsider Transgender Mexican's Refugee Case

By Arthur S. Leonard

The 9th Circuit Court of Appeals has doubled down on its campaign to get the Board of Immigration Appeals (BIA) to understand the distinction between sexual orientation and gender identity and to separately analyze whether transgender persons seeking refugee status in the United States would qualify based on their transgender status, apart from any questions about sexual orientation. This is the lesson from *Medina v. Sessions*, 2018 U.S. App. LEXIS 12675, 2018 WL 2244732 (May 16, 2018). The panel's memorandum opinion, not selected for publication in F.3d, is not attributed to any individual member of the panel, which consisted of Circuit Judges Carlos Bea and Mary H. Murguia and U.S. District Judge Donald W. Molloy (D. Montana), sitting by designation.

The court refers back to its decision in *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015), in which it had concluded that "the unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, withholding of removal, or CAT claim. Here, while the BIA addressed Flores's sexual orientation, it did not address the effect of her transgender identity as to her claims . . . It must do so on remand." In *Avendano-Hernandez* and other cases, the 9th Circuit has accepted the proposition that while conditions have improved for gay people in Mexico, they are still substantially adverse for transgender people, so the BIA should not be denying refugee claims by transgender petitioners based on the current situation for gay people in Mexico.

The Petitioner, a native and citizen of Mexico identified as male at birth but who now identifies as female, sought asylum, withholding of removal, and protection under the Convention against Torture, all three of which were denied by the Immigration Judge, affirmed by the BIA. "She testified that as a second grader her hand was burned by bullies and her foot broken, but that the culprits were suspended 'for a few days' as punishment," wrote the court. "Assuming the injuries and bullying were 'on account of' her sexual orientation, the record does not compel the conclusion that 'the persecution was committed by the government, or by forces that the government was unable or unwilling to control."

The court also found that substantial evidence supported the BIA's conclusion "that Mexican police arrested Flores in 2010 because she was yelling and acting out in the street, not because she was gay and dressed as a woman, nor because she suffers from schizophrenia. Although the incident occurred while Flores was dressed as a woman outside a gay dance, these facts alone do not compel the conclusion that her sexual orientation was one central reason she was targeted," wrote the court. "Nor does the evidence compel the conclusion that one central reason for her arrest was because she suffers from schizophrenia, as Flores testified she had been mixing alcohol with her Haldol and Cogentin. But Flores also testified that she was unlawfully detained for several hours and beaten by the Mexican police. Substantial evidence supports the BIA's conclusion that Flores's initial arrest was not based on a protected ground. However, on remand, the BIA must consider whether the Mexican police's actions after arrest constituted past persecution based on her asserted

protected grounds, especially her claim of transgender identity."

Similarly, the court found that although the facts would not support a finding on threat of future persecution due to her sexual orientation or "mental illness," the BIA "must consider whether the detention and beating after Flores's arrest constituted past persecution that might also support her argument of specific targeting on account of her sexual orientation and gender identity."

Flores's petition for withholding of removal and CAT protection would turn heavily on proof of country conditions. As to this, wrote the court, "The BIA conducted an adequate analysis of country conditions in Mexico as to mentally ill and gay persons. To the extent the BIA was required to discuss explicitly those conditions, the record does not compel the conclusion that Flores will be persecuted on account of her sexual orientation or mental illness." Although the court found that Flores' evidence about her treatment by the Mexican police did not rise "to the level of 'severe pain or suffering' necessary for a torture finding," the court continued, "However, as to future torture, while the record does not compel the conclusion Flores faces torture because of her mental illness and sexual orientation, the BIA erred by failing to assess the effect of Flores's transgender identity."

Thus, while the court denied the petition as it related to claims based on sexual orientation or mental illness, it granted the petition "for the limited purpose of assessing the effect of Flores's transgender identity on her claims for asylum, withholding of removal, and CAT protection, and for considering whether her treatment following arrest by the Mexican police constituted past persecution or showed a reasonable possibility she would be targeted in the future."

The petitioner is represented by Michael Raymond Devitt, of the University of San Diego School of Law, and David Andrew Schlesinger, Jacobs & Schlesinger LLP, San Diego. ■

Federal Magistrate Rejects Retroactive Marital Privilege Claim for Connecticut Couple in Antitrust Case

By Arthur S. Leonard

In *Antech Diagnostics, Inc. v. Veterinary Oncology and Hematology Center, LLC*, 2018 U.S. Dist. LEXIS 82947, 2018 WL 2254543 (D. Conn., May 17, 2018), U.S. Magistrate Judge Sarah A. L. Merriam had to deal with a claim by defendants that certain correspondence between two men (one of them a named defendant) that was sought in discovery by the plaintiffs was protected by marital privilege. Judge Merriam's opinion does not set out the underlying facts of the lawsuit, focusing solely on two contested discovery issues, one of which is the marital privilege issue. However, from references in the opinion discussing the question of applicable law, it appears that this case is in federal court under federal question jurisdiction invoking the Sherman Anti-Trust Act, with a host of supplementary state law claims that also might qualify for diversity jurisdiction. As a preliminary matter, Judge Merriam determined that the source of law governing the privilege question would be Connecticut common law.

The plaintiffs sought to compel production of 26 communications between Dr. Gerald Post, a defendant, and David Duchemin. Dr. Post and Mr. Duchemin were legally married in Connecticut on December 20, 2013, five years *after* the Connecticut Supreme Court issued its marriage equality ruling in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), and about six months *after* the U.S. Supreme Court struck down the federal Defense of Marriage Act, under which, *inter alia*, same-sex marriages performed in Connecticut could not be recognized by the federal government. However, Post and Duchemin's relationship dated back to 1995, and they claimed that they considered themselves effectively to have been married back to then. The communications in question, for which they sought to invoke marital privilege, dated from 2009-2013. They argued to the court that it should consider the men to have been married, for purposes of this privilege claim, retroactively to 1995, asking the court to "extend the privilege on public policy grounds to communications made prior to the issuance of a valid marriage license."

First, Judge Merriam rejected their claim that their relationship could be deemed a common law marriage, inasmuch as the Connecticut Supreme Court stated in *McAnerney v. McAnerney*, 334 A.2d 437 (1973), "Although other jurisdictions may recognize common-law marriage or accord legal consequences to informal marriage relationships, Connecticut definitely does not." Furthermore, the judge noted that plaintiffs had introduced evidence to contradict the claim that the men had considered themselves to be married prior to their legal marriage in 2013, including deposition testimony in which Dr. Post testified, in response to the question of what year he and Duchemin had married, "2013," identifying their anniversary date as December 20. "There was no confusion, and no attempt to explain, the anniversary date in light of Dr. Post's purported consideration that he and Mr. Duchemin had been married since 1995." The judge also referred to an email offered in evidence, dated January 2014, in which Duchemin responded to a friend's congratulations on the wedding by stating, "It's so weird calling another man my husband but it is nice." If they had considered themselves to be spouses since 1995, perhaps this would presumably not

have felt "weird" in 2014, but we do not think that necessarily follows. Two men might have considered themselves to be virtually married but have not adopted the convention of calling themselves husbands until they had legally tied the knot . . . .

"Regardless," wrote Merriam, "under Connecticut law, it is well-established that for a legally valid marriage to exist, there must be a marriage contract 'with certain formalities.' Accordingly, because the marital communications privilege attaches only to those communications made during a legally valid marriage, and leaving aside for the moment the date on which same-sex marriage became legal, the privilege here would only attach to those communications made after December 20, 2013."

However, defendants argued that the court should, as some other courts have done in varied contexts, take account of the fact that in 1995 Connecticut was unconstitutionally denying these men the right to marry, that they swear that they would have married then had the option been available, and thus it was equitable to treat them as married for that period of time when same-sex marriage was denied to them. A decent argument, especially in light of *Mueller v. Tepler*, 95 A.3d 1011 (Conn. 2014). "There," wrote Merriam, "the Connecticut Supreme Court recognized a loss of consortium claim by unmarried partners in a same-sex relationship, where at the time the claim arose the partners would have been married, but for the existence of a state law barring same-sex marriage." The Connecticut court premised its ruling on public policy concerns, stating that "marriage cannot logically serve as a proxy for the existence of the commitment that gives rise to the existence of consortium in the first instance when marriage is not an option." Thus, there is Connecticut precedent for retroactive recognition of a marital relationship in certain circumstances.

But Judge Merriam found that the argument did not work in this case due to issues of timing. "*Mueller* is plainly distinguishable from the current facts," she wrote. "There, the individual in a same-sex relationship sought to assert a loss of consortium claim for a tort that occurred in 2001, some seven years before same-sex couples had a right to marry in the State of Connecticut. At the time the claim arose in *Mueller*, legal marriage between a same-sex couple was not an option. Here, by contrast, the [defendants] claim privilege for communications between Dr. Post and Mr. Duchemin from 2009 to 2013. During that time period, Dr. Post and Dr. Duchemin were able to marry in the State of Connecticut. There was no obstacle to legal marriage in this state at that time, as there was at the time the claim in *Mueller* arose. Accordingly, the holding and rationale of *Meuller* are not persuasive, nor entirely applicable, to the facts presently before the Court."

While disclaiming any ruling on whether the men could claim privilege in any communications between them *before* marriage equality was established in Connecticut in 2008 by the *Kerrigan* opinion, Merriam pointed out that "the only communications implicated in the current dispute date from 2009 to 2013. Additionally, the Court is not adjudicating the general rights of same-sex couples. Rather, it is constrained to consider the specific facts of the current dispute before it – which simply does not implicate the 'bewildering and unjust anomaly' suggested by the [defendants]."

Judge Merriam mentioned that Dr. Post claimed that he and Duchemin had not married as soon as it was possible in Connecticut "out of solidarity with those to whom this recognition was still denied." While she said that this "is certainly a noble position," it carried "real legal consequences. Although the [defendants] present an emotionally compelling argument with respect to extending the marital communications privilege to a date before Dr. Post and Mr. Duchemin's legal marriage, the Court must apply the law as it stands . . . . Here, Dr. Post and Mr. Duchemin were not legally married until December 20, 2013. They had the legal right, in Connecticut, to marry as early as 2008. Therefore, communications between Dr. Post and Mr. Duchemin between 2009 and December 20, 2013, are not protected by the marital communications privilege." In a footnote, she added, "The Court notes the discrepancy between the statement that Dr. Post and Mr. Duchemin delayed obtaining a marriage license 'out of solidarity with those to whom this recognition was still denied,' and the date on which marriage became legal through the United States. Dr. Post and Mr. Duchemin married on December 20, 2103. The Supreme Court ruled in *Obergefell* on June 26, 2015, about a year and a half *after* Dr. Post and Mr. Duchemin obtained a marriage license."

Although not stated by Judge Merriam, it seems likely that the decisive timing factor for Post and Duchemin was probably the June 2013 *U.S. v. Windsor* decision, after which it became clear in the ensuing months that same-sex couples who had refrained from marrying under state law because they had diminished practical incentive to do so in light of lack of federal recognition, should now get married in order to obtain whatever advantages they might derive from federal recognition of their marriage. By December 2013, the Obama Administration had issued enough guidelines, advisories, and other pronouncements in response to *Windsor*'s impact on federal rights that those holding back may have decided the time was right to proceed without awaiting the next step of a marriage equality ruling under the 14th Amendment binding on all the states.

Judge Merriam ordered the defendants to produce the challenged 26 communications, with a June 11 deadline to do so.

Dr. Post's legal representative on this issue is Edward D. Altabet (lead attorney), Gerard Fox Law P.C., New York, with Richard J. Buturla and Ryan Driscoll (local counsel) from Berchem, Moses & Devlin P.C., Milford, CT. ■

California Appeals Court Changes Its Mind: If a Juror's Sexual Orientation Was in Any Way Used to Strike Them, The Selection Process is Tainted

By Eric Lesh

As with other groups targeted with discrimination, far too often discrimination against LGBT people has found its way into the courtroom. In a victory for sexual orientation fairness in California courts, the California 3rd District Court of Appeal changed its mind about using what is known as a "mixed-motive" analysis when a peremptory strike is used to eliminate a juror based on sexual orientation, in *People v. Douglas*, 2018 Cal. App. LEXIS 403, 2018 WL 2057237 (Cal. 3rd Dist. Ct. App., May 3).

In the new opinion, written by Judge Elena J. Duarte, the court held on reconsideration that a mixed-motive analysis is not appropriate — if the potential juror's sexual orientation was a factor in the prosecutor's decision to strike them, the process is tainted.

The male defendant in this case was convicted of charges related to a high speed car chase where he shot at the car of a man who allegedly had short-changed his boyfriend, who was working as a sex-worker. The prosecutor used peremptory challenges to strike two openly-gay men from the jury panel. The defense correctly challenged the strikes. The prosecutor admitted that one of the reasons for the strike was that he felt that openly gay men might be biased against the victim because he was "not out of the closet." The prosecutor also articulated a non-discriminatory reason for each strike.

The 1986 Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79, prohibits excluding potential jurors from service based solely on their race, a holding that has been extended to other classifications such as sex and ethnicity. In *People v. Wheeler*, 22 Cal.3d 258 (1978), the Supreme Court of California held prior to *Batson* that striking prospective jurors on the sole basis of group membership violated the right to an impartial jury, as guaranteed by the California Constitution. The U.S. Supreme Court has not addressed whether *Batson* extends to sexual orientation. However, in a landmark ruling issued just after the Supreme Court's ruling in *United States v. Windsor*, the 9th Circuit held that it does. *SmithKline Beecham Corp. v. Abbott Labs*., 740 F.3d 471 (2014). In *SmithKline*, the 9th Circuit explained the many ways that lesbians and gay men have been systematically excluded from our most important institutions: "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve." In order to apply *Batson* in a sexual orientation context, the 9th Circuit found that the Supreme Court had, *sub silentio*, used heightened scrutiny to decide in *Windsor* that a federal statute that discriminated against married same-sex couples violated the 5th Amendment's equal protection. When a litigation party seeks to exclude a potential juror because of a characteristic that gets heightened scrutiny, it comes within the *Batson* requirements.

Although the Court of Appeals' vacated opinion in *Douglas* originally agreed with *SmithKline* that strikes based solely on sexual orientation were impermissible, the court originally held that the trial court should use a "mixed-motive" approach to determine whether the strike was ultimately improper. As the court then explained, "under the mixed-motive analysis, the Court allows those accused of unlawful discrimination to prevail, despite clear evidence of discriminatory motivation, if they can show that the challenged decision would have been made even absent the impermissible motivation, or, put another way, that the discriminatory motivation was not a 'but for' cause of the challenged decision."

After the original ruling, Lambda Legal, through its Fair Courts Project (where the author of this piece served as Director for six years) filed a letter with the Court urging reconsideration of the original opinion. As Lambda Legal's amicus letter explained: "This mixed-motive approach means that if a prosecutor can justify the strike with other, permissible reasons, the strike will stand — regardless of whether it was also motivated by an unlawful reason (such as on the basis of race, gender, or sexual orientation)." Lambda Legal's amicus letter urged the court to issue a revised opinion, to hold that the prosecutor's use of peremptory strikes of the only two openly gay jurors in the venire — "strikes that the panel correctly concluded were improperly based on their sexual orientation," "cannot be rectified on remand by accepting the prosecutor's assertion that he would have made the same decision for other reasons." And, to hold that this use of the strikes violated the constitutions of California and the United States.

The letter explained the implications of such a holding by taking a closer look at the facts of this case. "Take this case, for example. The Appellant, Brady Dee Douglas, is an openly gay man. As previously noted, at Douglas's trial the prosecutor struck both openly gay men in the venire, giving both putatively

non-discriminatory reasons (friendship with the public defender and demeanor, respectively) and a discriminatory one (i.e., that an openly gay man would ipso facto likely be unfair to a prosecution witness who was in the closet) that would have resulted in striking any openly gay juror. The prosecutor relied on a stereotype that is particularly invidious: a biased (and unfounded) belief that openly gay jurors are hostile to closeted gay witnesses. The idea that openly gay jurors feel superior to closeted witnesses, or that they find their failure to publicize their sexual orientation so distasteful that it taints."

The court agreed with Lambda Legal. "This case is about fairness and equality in our criminal justice system," wrote Judge Duarte. "When a party exercises a peremptory challenge against a prospective juror for an invidious reason, the fact that the party may also have had one or more legitimate reasons for challenging that juror does not eliminate the taint to the process.

The court concluded: "We reject the application in these circumstances of the so-called 'mixed motive' or 'dual motive' analysis, which arose in employment discrimination cases as a way for defendant-employers to show that they would have taken an adverse action against a plaintiff-employee whether or not an impermissible factor also animated the employment decision. We hold it is not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of *any* bias."

Discriminatory practices in jury selection undermine trust in the court system. Legal practitioners who are interested in learning more about how to challenge discriminatory peremptory challenges based on sexual orientation or gender identity can read Lambda Legal's guide "Jury Selection and Anti-LGBT Bias: Best Practices in LGBT-Related Voir Dire and Jury Matters," which was also written by the author of this article. ■

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

Transgender Mexican Asylee Seeks Supreme Court Review of 7th Circuit's Refusal to Consider His Constitutional Challenge to Indiana's Citizenship Requirement for Legal Name Changes

By Arthur S. Leonard

The Supreme Court has received a petition for certiorari seeking review of the 7th Circuit's March 28 decision in *Doe v. Holcomb*, 883 F.3d 971, petition for certiorari, No. 17-1637 (filed June 4, 2018), a dispute over the constitutionality of Indiana's limitation of the right to obtain a legal change of name to U.S. citizens.

The "John Doe" plaintiff is a transgender refugee from Mexico, who was brought to the U.S. as a child by his parents, where they have lived in Indiana. Doe was awarded asylum in the United States, consistent with a developing body of case law recognizing the dangerous situation for transgender people in Mexico. Identified as female at birth, Doe now lives consistently with his male gender identity, and has obtained many of the necessary documents, but he was advised by the Marion County Clerk's office that it would be futile for him to file a name-change petition, because Indiana's name-change law has an inflexible requirement of U.S. citizenship as a prerequisite, not subject to waiver. Doe has encountered practical difficulties due to the discordance between his obviously-female legal name on identification documents and his male appearance both in person and in photo IDs. Imagine the difficulty for a transgender man of dealing with a police stop, the presentation of an ID to enter an office building or to board an airplane or to be admitted to a hospital, if an obviously female name appears on the document. Among other things, every time Doe presents identification, he is being "outed" as transgender, raising serious privacy concerns.

Represented by the Transgender Law Center (Oakland, CA), the Mexican American Legal Defense & Educational Fund (Los Angeles) and Indianapolis attorney Barbara Baird, Doe filed suit in the U.S. District Court in Indianapolis, naming as defendants then-Governor Mike Pence, then-Attorney General Gregory Zoeller, then-Marion County Clerk of Court Myla A. Eldridge, and Executive Director Lilia G. Judson of the Indiana Supreme Court Division of State Court Administration, all in their official capacities. Chief U.S. District Judge Jane Magnus-Stinson granted the defendants' motion to dismiss (2017 WL 956365 [S.D. Ind., March 13, 2017]), finding that Doe lacked standing to sue these officials, opining that the "injury in fact" that Doe claimed to suffer was not fairly traceable to any conduct by the named defendants and would not likely be redressed by a favorable decision against them. Of course, Doe could not sue the state directly in federal court because of the 11th Amendment, which insulates states from being sued by their residents in federal court except where the state has waived such immunity.

Doe appealed and a 7th Circuit panel affirmed on March 2, voting 2-1, but on different (and surprising grounds). While agreeing that the suit against the county clerk (Mary Willis having been substituted for her predecessor) should be dismissed on standing, the court opined that 11th Amendment immunity stood in the way of suing the named state officials (by now, new Governor Eric Holcomb and new Attorney General Curtis T. Hill, Jr. as well as Ms. Judson). The majority of the 7th Circuit panel found that none of the named state officials had the sort of enforcement responsibilities for the name-change statute that would subject them to potential liability in their official capacities to overcome the 11th Amendment immunity they otherwise enjoyed from being sued in

federal court. The 7th Circuit majority asserted that the correct way for Doe to proceed would be to file a name change application in the Marion County state court and, if it is denied by that court on the ground that Doe is not yet a U.S. citizen, either to wait until he can complete the naturalization process (for which he will be eligible to *apply* four years after his permanent residence status was approved by the government, and as of January 1, 2018, processing time for applications was averaging nine months and increasing as a backlog grew in response to a flood of new applications resulting from the Trump Administration's aggressive deportation activities), or to make his constitutional challenge to the citizenship requirement in the state court and, if necessary, appeal it up through the state court system, ultimately seeking U.S. Supreme Court review if the highest state court to consider his appeal rules against him. (Given the time it would take to go through the state court system, this route would perhaps be less practical than just waiting until he can become a citizen, although reported backlogs in the naturalization process might suggest otherwise. The website uscitizenshipsupport.com reported this January that the waiting time for process new citizenship applications averages nine months, and that the agency has been overwhelmed as the Trump Administration's crack-down on non-citizens and deportation activity has prompted a flood new citizenship applications from legal residents.) To avoid the 11th Amendment immunity problem, says the panel majority, he should pursue his remedy in state court. The majority's reliance on 11th Amendment immunity was surprising because none of the defendants sought to raise an immunity defense in the district court, according to the cert petition.

The majority's conclusion drew a strong dissenting opinion from Chief Circuit Judge Diane Wood. "This is an unusual case," she wrote, "but in the end it is not one that we should bar from adjudication . . . In my view, the majority's analysis gives insufficient weight to the significant roles played by the Attorney General, Executive Director, and Clerk in enforcing the name-change statute and preventing Doe from securing official recognition of his identity." While agreeing that the governor should be dismissed as a defendant, Wood focused on the attorney general's role as the state's chief law enforcement official and the one charged with defending the constitutionality of state statutes, and the administrative responsibility of the other two officials. "I would give Doe an opportunity to amend his complaint to name other executive-branch officials whose responsibilities include the policing of the name a person uses in order to receive services or to deal with the state."

The cert petition, which identifies as Counsel of Record Thomas A. Saenz of the Mexican American Legal Defense and Educational Fund, makes a very practical argument about why Doe should be allowed to proceed in federal court on the merits of his constitutional claim. Indiana is the only state that requires citizenship by statute as a prerequisite for a legal change of name, and does not apparently give its courts any ability to waive that requirement in particular cases. The provision was adopted relatively recently, and is clearly part of the overall hostility toward non-citizens by the current Republican-dominated state government. That same bias may well be present in the state judiciary, especially given the elected status of judges in the state. The Petition argues that Doe should not be required to undertake the likely futile, time-consuming and expensive step of litigating this question in the politically-responsive state court system. Indeed, the availability of a federal forum, made up of judges who have no political accountability to the state electorate, to determine whether the citizenship requirement is constitutional seems the much more appropriate way to go in order to afford Doe the appropriate neutral forum to decide his constitutional claim. (Ironically, this principal was at the heart of the Supreme Court's ruling in *Masterpiece Cakeshop*, which was announced on the day this Petition was filed with the Supreme Court!)

The Petition's argument echoes concerns raised by Judge Wood in her dissent. "Consider the consequences if any state function entrusted to the state court system were placed beyond the power of the federal courts to address (an outcome, I note, that would be incompatible with *Mitchum v. Foster*, 407 U.S. 225 (1972), which upheld the power of the federal courts to issue civil rights injunctions against state-court proceedings). A state hypothetically could refuse to allow an African-American person to change his or her surname on an identification card to that of a Caucasian spouse, in flagrant violation of *Loving v. Virginia*, 388 U.S. 1 (1967), or it could pass a statute refusing to allow a single surname for a same-sex couple, in disregard of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The expedient of placing final authority for name-changes in the state court system cannot operate to avoid accountability for potential violations of the federal constitution by other state officials. Nor can it have the effect of negating the right of any person to bring an action under 42 U.S.C. sec. 1983, which lies within the subject matter jurisdiction of the federal courts, see 28 U.S.C. secs. 1331, 1343(a)."

Judge Wood also noted that many functions are confided by the state to its court system, and "when there is a problem in the system, those aggrieved by that problem sue the state official best suited to the situation." In this case, for example, Wood suggests that Doe could have sued the Commissioner of the Bureau of Motor Vehicles in order to change his name on his driver's license. "It is likely that the Commissioner would have defended his action in such a lawsuit on the basis of the state statute, but Doe's response to such a defense would have rested on his constitutional rights," she wrote. But suing each individual department head for name-change relief would not be "a particularly efficient system," wrote Wood. While noting the majority's suggestion that Doe should initiate his case in the state courts, Wood observed, "What the majority has not explained to my satisfaction, however, is why the same suit cannot be brought in the form and forum Doe has chosen – that is, in a federal court, when no conflicting state-court proceeding or judgment exists."

The Petition suggests that this case would provide a suitable vehicle for the Supreme Court to clarify the right of individuals to access a federal forum in order to assert their constitutional rights in the face of a state law that, on its face, discriminates in a way that clearly implicates the 14th Amendment, which explicitly guarantees equal protection of the laws to *everybody* present in the United States, not just to citizens. And, in other contexts, the federal courts have sharply questioned state laws that require citizenship as a prerequisite for various rights and benefits. One is hard put to think of any significant state policy reason for absolutely restricting legal name changes based on citizenship. If there might be some reason in a particular case, state judges could be charged with fact-finding and discretion to deny a particular name change application, which discretion they already possess if they find that a change is requested to avoid accountability for crimes or debts or to perpetrate a fraud.

However, one cannot be optimistic that the Court will grant this Petition, for the simple reason that over the past few decades the Court has sharply reduced the number of cases it is willing to hear each term, preferring to focus on disputes among the circuit courts about the interpretation of federal statutes or constitutional questions that have national import. Since Indiana is the only state imposing such a citizenship requirement for a name change, at present a decision on this case would not seem to meet that description. But perhaps the Court will see the 7th Circuit's approach to federal court jurisdiction in this case to present an issue of broader import affecting the entire federal court system and the ability of legal residents to access the federal courts to vindicate their federal rights, the kind of issue that is normally addressed in several cases each Term by the Court.

The state of Indiana's response, if any, to this Petition is due at the Court by July 5. A decision on whether to grant the Petition would not be likely until shortly before the Court reconvenes for its next term late in September. ■

Federal Court Refuses to Dismiss Gavin Grimm's Long-Running Challenge to Public School Restroom Policy

By Arthur S. Leonard

Opening up a new chapter in the continuing battle of Gavin Grimm to vindicate his rights as a transgender man, U.S. District Judge Arenda L. Wright Allen issued an Order denying the Gloucester County (Virginia) School Board's motion to dismiss the latest version of the case Grimm filed back in July 2015, prior to his sophomore year at Gloucester High School. *Grimm v. Gloucester County School Board*, 2018 U.S. Dist. LEXIS, 2018 WL 2328233 (E.D.Va., May 22, 2018).

During the summer of 2014, Grimm's transition had progressed to the point where he and his mother met with high school officials to tell them that he was a transgender boy and "would be attending school as a boy," wrote Judge Allen. They agreed to treat him as a boy, including allowing him to use the boys' restrooms. He did so for about seven weeks without any incident, until complaints by some parents led the school board to adopt a formal policy prohibiting Grimm from using the boys' restrooms. The school established some single-user restrooms that were theoretically open to all students, but Grimm was the only one who used them because they were not conveniently located to classrooms.

"Because using the single-user restrooms underscored his exclusion and left him physically isolated," wrote Judge Allen, "Mr. Grimm refrained from using any restroom at school. He developed a painful urinary tract infection and had difficulty concentrating in class because of his physical discomfort." During the summer after his sophomore year, he filed his lawsuit, alleging violations of Title IX – a federal statute that forbids schools from discriminating because of sex – and the Equal Protection Clause of the Constitution.

Meanwhile, Grimm had begun hormone therapy in December 2014, "which altered his bone and muscle structure, deepened his voice, and caused him to grow facial hair." In June 2015, he received a new Virginia identification car from the Motor Vehicles Department designated him as male. During the summer of 2016, he had chest-reconstruction surgery, a necessary step to get the circuit court to issue an order changing his sex under Virginia law and directing the Health Department to issue him a birth certificate listing him as male. He received the new birth certificate in October 2016. Thus, as of that date, Grimm was male as a matter of Virginia law.

Yet, despite all these physical and legal changes, the School District clung to its contention that his "biological gender" was female and that he could not be allowed to use boys' restrooms at the high school. The school maintained this prohibition through the end of the school year, when Grimm graduated.

Meanwhile, his lawsuit was not standing still. Senior U.S. District Judge Robert G. Doumar dismissed his Title IX claim in September 2015, denying his motion for a preliminary injunction, and holding his Equal Protection Claim in reserve while he appealed to the U.S. Court of Appeals for the 4th Circuit, based in Richmond. In the spring of 2016, the 4th Circuit sent the case back to the district court, issuing an opinion holding that the court should have deferred to the position advanced by the U.S. Departments of Education and Justice, which opined that discrimination because of gender identity is sex discrimination and schools are required under Title IX to treat student consistent with their gender identity.

Judge Doumar then issued a preliminary injunction during the summer of 2016 ordering the School District to let Grimm use the boys'

restrooms, but the School District obtained a stay of that order from the Supreme Court, which subsequently granted the School's petition to review the 4th Circuit's "deference" ruling. The Supreme Court scheduled the case for argument, but then the incoming Trump Administration "withdrew" the position that the Obama Administration had taken, knocking the props out from under the 4th Circuit "deference" ruling, and persuaded the Supreme Court to cancel the argument and send the case back to the 4th Circuit, which in turn sent it back to the district court. And, by the time it got there, Grimm had graduated from Gloucester County High School.

The School District attempted to get rid of the case at that point, arguing that it was moot. Grimm begged to differ, arguing that his Title IX and Equal Protection rights had been continuously violated by the School District from the time it adopted its exclusionary restroom policy through the time of his graduation. In a newly amended complaint, Grimm sought a declaratory judgement as to the violation of his rights under both Title IX and the constitution and an end to the school's exclusionary policy.

The School District moved to dismiss this new complaint, leading to the May 22 ruling by Judge Allen, to whom the case had been reassigned in the interim. Judge Doumar, who was born in 1930, was appointed to the court by President Reagan and is still serving as a part-time senior district judge. Judge Allen was appointed to the court by President Obama in 2011.

Judge Allen's opinion relies heavily on important judicial developments that have occurred since Judge Doumar's initial dismissal of the Title IX claim back in 2015. The 4th Circuit has yet to issue a ruling on the merits of the question whether federal laws that forbid discrimination because of sex can be construed to apply to gender identity discrimination claims. Since the Supreme Court has also avoided addressing that issue, it was open to Judge Allen to follow as "persuasive precedents" the lengthening list of rulings from other federal courts, including five different circuit courts of appeals and many district courts, holding that sex discrimination laws should be broadly construed to cover gender identity claims.

These decisions draw their authority from two important Supreme Court decision: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). In *Price Waterhouse*, the Supreme Court accepted as evidence of intentional sex discrimination an accounting firm's denial of a partnership to a woman who was deemed inadequately feminine by several partners who voted against her. In *Oncale*, the Court ruled that Title VII, the federal law banning employment discrimination because of sex, could apply to a claim of hostile environment sexual harassment by a man who worked in an all-male workplace, commenting that even if this scenario was not contemplated by Congress when it passed Title VII in 1964, that statute could be applied to "comparable" situations.

Since the turn of the century, federal appeals courts have used those two cases to find that transgender people can seek relief from discrimination under the Gender-Motivated Violence Act, the Equal Credit Opportunity Act, Title VII of the Civil Rights Act, Title IX of the Education Amendments Act, and the Equal Protection Clause. In addition, district courts have found such protection under the Fair Housing Act. A consensus based on the gender stereotype theory has emerged, even in circuits that have generally been hostile to sexual minority discrimination claims. And, most significantly, the 7th Circuit ruled last year in the case of Ashton Whitaker, a transgender boy, that Title IX and the Equal Protection Clause required a school district to allow him to use boys' restroom and locker room facilities. There is no material distinction between the Whitaker and Grimm cases. *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

Furthermore, and closer to home, on March 12 of this year U.S. District Judge George L. Russell, III, ruled in a case from Maryland (also in the 4th Circuit) that a school district had violated Title IX and the Equal Protection Clause by refusing to allow a transgender boy to use the boys' locker room at his high school. Judge Allen found Judge Russell's analysis persuasive, as she did the recent cases from other courts. *M.A.B. v. Board of Education of Talbot City*, 286 F. Supp. 3d 704 (D. Md. 2018).

Turning to Grimm's constitutional claim, Judge Allen followed the precedents from other courts that have determined that discrimination against transgender people is subject to "heightened scrutiny" judicial review, similar to that used for sex discrimination cases. Under this standard, the challenged policy is presumed to be unconstitutional and the government bears the burden of showing that it substantially advances an important governmental interest. (Surprisingly, she did not refer to the recent ruling in *Karnoski v. Trump*, 2018 WL 1784464, 2018 U.S. Dist. LEXIS 63563 (W.D. Wash., April 13, 2018), in which a federal district court ruled for the first time that gender identity discrimination gets strict scrutiny under a suspect classification analysis.)

The Gloucester School District argued that its interest in protecting the privacy of other students was sufficient to vindicate its policy, but Judge Allen disagreed, finding that "the policy at issue was not substantially related to protecting other students' privacy rights. There were many other ways to protect privacy interests in a non-discriminatory and more effective manner than barring Mr. Grimm from using the boys' restrooms." The school had created three single-user restrooms open to all students, so any student who sought to avoid using a common restroom with Mr. Grimm had only to use one of those. She also noted that the School Board reacted to the controversy by taking steps "to give all students the option for even greater privacy by installing partitions between urinals and privacy strips for stall doors." Thus, any validity to privacy concerns raised when the controversy first arose had been substantially alleviated as a result of these renovations.

Having denied the School District's motion to dismiss the amended complaint, Judge Allen directed the attorneys to contact the Courtroom Deputy for United States Magistrate Judges within thirty days to schedule a settlement conference. If the parties can't work out a settlement with a magistrate judge, the district court will issue a final order dictating what the school district must do to be in compliance with Title IX and the Constitution. And, because Grimm is the prevailing party in this long-running and hotly litigated civil rights case, one suspects that sometime down the road there will be a substantial attorneys' fee award.

Grimm's lawyer, Joshua Block of the ACLU LGBTQ Rights Project, indicated that their goal in the case at this point is the declaratory judgment and nominal damages for Grimm, and of course an end to the School Board's discriminatory policy. Grimm now lives in Berkeley, California, and intends to begin college this fall in the Bay Area, according to The *New York Times*' report on the case.

The School District filed an appeal of this ruling to the 4th Circuit early in June. Attorney General Jeff Sessions issued a Memorandum last fall formally rejecting the Obama Administration's position that federal sex discrimination laws forbid gender identity discrimination, so the School District could count on the Justice Department to support an appeal. And Trump's rapid pace in filling federal circuit court vacancies may slow or eventually halt the continuing trend of transgender-positive rulings from the other circuit courts, but that is not likely to be the case in the 4th Circuit for some time. At present that court has an overwhelming majority of Democratic appointees (including six by Obama and four by Clinton on the 15 member court) with only one vacancy for Trump to fill. The 4th Circuit was out front of the Supreme Court in 2014 in striking down state bans on same-sex marriage, and its 2016 opinion in Gavin Grimm's case was notably transgender-friendly, so it is unlikely that an appeal by the School District will be successful in the 4th Circuit. The Supreme Court, of course, may be a different matter. Time will tell. ■

Federal Court Finds Gay Tennessean Has Standing to Challenge "Therapist Bill" That Allow Rejection of Services

By Arthur S. Leonard

In *Barber v. Bryant*, 860 F.3d 345 (2017), the 5th Circuit Court of Appeals found that LGBT citizens of Mississippi did not have standing under the Establishment Clause to challenge the constitutionality of a state law that openly embeds special status for particular religious beliefs, insulating state and private individuals from any liability for withholding their services based on their concurrence with the specified beliefs, which include religious or moral disapproval of homosexuality, transgender identity, or same-sex marriage. In a decision firmly repudiating the 5th Circuit's reasoning, U.S. District Judge Aleta A. Traugher found that a "gay Tennessean" has standing to bring an Establishment Clause challenge against Tennessee's so-called "Therapist Bill," signed into law by the defendant, Governor Bill Haslam, on May 2, 2016, under which counselors and therapists are protected from any civil or criminal liability for refusing services based on their "sincerely held principles." *Copas v. Haslam*, 2018 WL 2388549, 2018 U.S. Dist. LEXIS 88309 (M.D. Tenn., May 25, 2018). Of course, Tennessee is in the 6th Circuit, so the *Barber* decision is not binding on Judge Trauger, but neither did she find it persuasive, evidently.

Tennessee's so-called "Therapist Bill" provides counselors and therapists protection from any civil or criminal liability for refusing services based on their "sincerely held principles."

Bleu Copas, who himself has a Master's degree in counseling and works as a state-certified Peer Recovery Specialist, is a "distinguished Army veteran" who was discharged involuntarily in 2006 under the "Don't Ask Don't Tell" policy. (Indeed, his discharge from a position as a skilled military interpreter occasioned media coverage as an example of the egregious stupidity of the military's anti-gay policies.) "Copas suffers from Post-Traumatic Stress Disorder (PTSD) and Chronic Adjustment Disorder (CAD), for which he saw a therapist from the time of his discharge in 2006 until February 2016, when his therapist retired," wrote Judge Trauger. Copas alleges that as a result of passage of the Therapist Bill, he has not sought to establish a treatment relationship with a new therapist, fearing discrimination. He also "alleges that he has suffered stigmatic and psychological injury from the Bill. He suffers from feelings of marginalization and exclusion and believes that the State of Tennessee deems him unworthy of guaranteed access to services."

In this lawsuit, Copas seeks a declaratory judgment that the Bill is unconstitutional as a violation of the Establishment Clause and the Equal Protection Clause, as well as injunctive relief against its enforcement. Shortly after he filed suit on November 13, 2017, Governor Haslam filed a Rule 12(b)(6) motion to dismiss, claiming that Copas "lacks standing because he alleges only

a speculative future injury and that Copas is not entitled to equitable relief because he cannot demonstrate a real or immediate threat."

Judge Trauger agreed with the defendant as to the Equal Protection standing issue, but not as to the Establishment Clause standing issue. In a footnote to her detailed standing analysis under the Establishment Clause, she comments, "Governor Haslam relies heavily on *Barber*, for which this court stayed this case at Copas's request. In *Barber*, the Fifth Circuit rejected standing for an Establishment Clause claim based on stigmatic and psychological injuries allegedly caused by a Mississippi statute similar to the Bill . . . The court found that standing based on those injuries would be 'indistinguishable' from standing based on a generalized interest because 'an individual . . . cannot confront statutory text.' This categorical approach hinges entirely on the assumption that one can only 'confront' an instance of state expression by seeing it or hearing it. But this assumption has no basis in the Establishment Clause or its underlying concerns. Being physically exposed by proximity to a prayer or a statue is one form of confrontation. Being forced to acknowledge and consider a potential barrier placed between oneself and one's needed medical coverage is another. Neither is more particularized than the other."

Whatever the 5th Circuit might think on this issue, Judge Trauger found it to be at odds with 6th Circuit precedents, as well as numerous cases in which the Supreme Court had upheld standing to challenge various state policies under the Establishment Clause. The Supreme Court's standing requirement is that a plaintiff's alleged injury is "sufficiently concrete and particularized." Judge Trauger found that both of these tests were met by Copas's pleadings.

"Copas claims that he has been marginalized by the Bill, made to feel ostracized and unworthy as a non-adherent to the religiously-based, anti-LGBT preference he alleges the Bill endorses." Haslam argued that there was no concrete injury, citing a Supreme Court case, *Valley Forge Christian College v. American United for Separation of Church and State*," 454 U.S. 464 (1982), where the Court rejected standing of a "non-local advocacy group and its employees" seeking to prevent the transfer of federal property in a different state to a Christian non-profit institution. The Court found that the plaintiffs had no concrete personal injury, and rejected their argument that their "psychological injury" at the prospect of what they saw as a blatant Establishment Clause violation was insufficient to confer standing on them. But Trauger rejected Haslam's argument that this meant that a plaintiff could never rely solely on psychological injury for standing to challenge an alleged violation of the Establishment Clause, noting that neither the Supreme Court nor the 6th Circuit had treated *Valley Forge* as a such a sweeping precedent.

"Accordingly," she observed, "the Sixth Circuit has found standing based on psychological injury incurred from seeing a courtroom poster of the Ten Commandments, from future encounters with a proposed Ten Commandments monument on the state capitol grounds, and from passing a portrait of Christ in a public school hallway . . . . The Court sees no meaningful distinction between the marginalization alleged by Copas, who feels that the state has deemed him unworthy of equal status because of his non-adherence to Evangelical beliefs, and that suffered by Mormon and Catholic high school students when their majority-Baptist school district implemented a policy allowing a pregame prayer at football games," she continued. "Nor does the court see significant difference between Copas's marginalization and that of the lawyer practicing under the Ten Commandments poster, nor that of the student made to see a representation of Jesus. Copas's alleged harm is comparable to those psychological injuries of litigants whose cases the Supreme Court and the Sixth Circuit have heard."

She also rejected Haslam's argument that "the Bill does not actually discriminate against homosexuals," commenting, "The Bill need not discriminate on its face to inflict an Equal Protection injury," and, regardless, that this was a merits question "not properly addressed on an inquiry into standing. Copas has alleged a colorable Establishment Clause violation. No further merits analysis is proper at this stage." She also noted that Copas had made a specific allegation sufficient to overcome the defendant's argument based on the lack of an explicit religious reference in the bill: "The Bill impermissibly advances the particular (and far from universal) religious disapproval of LGBT people."

As far as the element of a particularized injury goes, she wrote, "Copas adequately alleges that the Bill has directly affected him. He cites 'his feelings of marginalization and exclusion as a result of the Therapist Bill' which 'directly and personally impact me as a gay man suffering from PTWD and Chronic Adjustment disorder who has sought psychological counseling in the past but is now discouraged from doing so.' He also claims that, as a member of the LGBT community, the Bill makes him feel 'not worthy of being guaranteed counseling services' from a counselor of this choosing. This is sufficient to satisfy the particularization requirement." She cited in support cases challenging President Trump's Muslim refugee ban, among others.

However, Judge Trauger recognized that the standing requirement for an Equal Protection challenge is significantly different from an Establishment Clause challenge. She wrote that "the gravamen of an equal protection claim is differential government treatment, not differential governmental messaging . . . To have standing for an equal protection claim based on the threat of discrimination, Copas must satisfy the injury-in-fact requirement's imminence component," quoting the Supreme Court's statement in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), that "threatened injury must be *certainly impending* to constitute injury in fact" and "allegations of *possible* future injury are not sufficient." She continued,

"Copas failed to show that rejection from a counselor based on his sexuality is certainly impending. He pleads that he 'desires to re-engage in therapy, but fears that a therapist will refuse to treat him.' But he pleads no specific plans to seek treatment in the near future. Even if the court were to grant that Copas is likely to seek treatment, there is no factual basis to find rejection certainly impending. Copas does not, for example, plead facts indicating that a counselor from whom he expects to seek treatment was a proponent of the Bill, or has expressed animus towards homosexuals, or even is an Evangelical Christian. The imminence requirement 'cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculate for Article II purposes,'" again quoting from *Clapper*. She concluded that "stigmatic injury" standing alone is not sufficient to ground an equal protection claim. "And because rejection is not certainly impending," she wrote, "Copas's unwillingness to re-engage in therapy due to the Bill is not an independent injury sufficient to confer standing."

She also rejected an alternative Equal Protection claim charging that the Bill "prefers Evangelical Christian counselors who disapprove of homosexuals over Copas and other counselors who don't share those beliefs by allowing the Evangelical Christian counselors to graduate from public universities and obtain licensure without complying with all of the ACA's Code of Ethics," under which counselors are not supposed to discriminate among patients based on the counselors' personal beliefs. Trauger pointed out that since Copas had long since graduated and been licensed, he had no standing to challenge the Bill on this basis. But the court's dismissal of the equal protection claim is of little moment in relation to the overall goal of putting the Bill to a constitutional challenge, since the judge is allowing the Establishment Clause Claim to go forward.

Copas is represented by Christopher W. Cardwell and Mary Taylor Gallagher, Gullett, Sanford, Robinson & Martin, Nashville, TN.■

After Stringing Transgender Inmate Along for Three Years, Nebraska Federal Judge Slams Door on All Claims in Two Cases

By William J. Rold

This is the fourth time *Law Notes* has reported about the odyssey of Nebraska transgender inmate Mee Mee Brown, who is in mental health incarceration. Her prior efforts to obtain diagnosis and treatment and freedom from discrimination are detailed in the third report, on *Brown v. Department of Health and Human Services*, 2017 U.S. Dist. LEXIS 94518 (D. Nebr., June 2, 2017), reported in *Law Notes* (Summer 2017 at pages 277-8). She is still *pro se* and before Senior U. S. District Judge Richard G. Kopf. Judge Kopf had, in previous decisions, raised hope that Brown could receive relief and that she was going after the correct defendants. In two current decisions, *Brown v. Dawson*, 2018 WL 2120333, 2018 U.S. Dist. LEXIS 78442 (D. Nebr., May 8, 2018), and *Brown v. Kroll*, 2018 U.S. Dist. LEXIS 87036, 2018 WL 2363955 (D. Nebr., May 24, 2018), the judge slams the door closed completely. The main difference between the cases is that Brown alleged retaliation in the second case for filing the first one, and she alleges denial of Equal Protection for issuance of a "no contact" order in the second case, keeping her from associating with other inmates (or them with her). Some defendants overlap; others do not.

Judge Kopf granted summary judgment to all defendants in the first case on injunctive relief as moot, because she is no longer at Norfolk Regional Center, where she filed suit. This fact (her transfer) is buried in a footnote; but it is dispositive of Brown's request for injunctive relief, except for possible claims against the director of the agency (see below). This leaves Brown's claims for damages, as to which all defendants plead qualified immunity. Judge Kopf addresses qualified immunity similarly in both cases.

The Supreme Court has left it to the discretion of the district courts to decide either arm of qualified immunity first: whether a constitutional right was violated; or whether that right was clearly established. *See Akins v. Epperly*, 588 F.3d 1178, 1183 (8th Cir. 2009). The absence of either supports the affirmative defense of qualified immunity. In the first case, Judge Kopf could have easily said the law about right to medical care for transgender inmates is not clearly established in the Supreme Court or the Eighth Circuit, and he could have been done with it, without adding to the transphobic law of the Eighth Circuit on prisoner transgender health care. Instead, he addresses the constitutional question first and writes a shaky opinion as to whether Brown's rights had been violated.

Although Brown's treating doctor recommended a specialist referral, and state officials promised her (and Judge Kopf) that she would receive one, this has never occurred. The treating doctor's referral was handled as a "recommendation" to a Central Office Committee, who denied referral to a specialist because Brown had not previously received hormone treatment. This is a version of the "freeze frame" policy challenged in other litigation, including the Missouri case in another district court in the Eighth Circuit. *See Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516 (E.D. Mo., February 9, 2018), reported as "Federal Judge Issues Preliminary Injunction for Hormones, Hair Pattern Treatment, and Feminizing Canteen Items to Missouri Transgender Inmate; Rejects 'Freeze Frame' Policy" (March 2008 at pages 108-9). In *Hicklin*, Magistrate Judge Collins recently issued a permanent injunction against "freeze frame," finding it

facially unconstitutional. See update on *Hicklin* under "Missouri" in *Prisoner Litigation Notes*, this issue. Iowa had already done so voluntarily – see *Law Notes* (September 2016 at page 392). So transgender inmates' rights on health care vary tremendously depending whether they are incarcerated east or west of the Missouri River!

Here, the treating doctor's continuing recommendation and his self-confessed lack of experience with transgender patients is in his affidavit in PACER, and it appears in Judge Kopf's opinion. The judge lists 173 facts that he says are material and not in dispute – most of which are lifted verbatim from the Attorney General's motion, which had 187 such "facts," taken from defendants' affidavits, which contain double and triple hearsay. One "fact" is that Brown was first diagnosed by the committee with gender dysphoria in 2017 – but this did not change the denial of specialist care, even though the treating doctor found a board-certified specialist in transgender care in Omaha (whose C.V. appears in PACER), who was willing to see the prisoner. Judge Kopf does not list any material facts in dispute, such as Brown's continuing need for a specialist. Judge Kopf refuses to accept Brown's statement of facts because it is not referenced to defendants' numbering and had no record citations. He purports to rely on her sworn pleading and its attachments, but it seems to this writer that he does not do so when the details dispute the defendants' affidavits, despite 28 U.S.C. 1746, which allows statements under penalty of perjury to suffice as affidavits.

Judge Kopf never explains why the request for injunctive relief does not survive Brown's transfer to another facility of the Department of Health and Human Services, since she sued the agency's executive concerning a Departmental policy. The executive of the agency admitted knowledge of Brown's case in her affidavit. Judge Kopf makes no finding as to the weight prior treatment or its absence should be given in the constitutional question of deliberate indifference with respect to current need. The entire medical part of the opinion deals with damages liability of the treating doctor (who confesses being over-ruled) and a physician's assistant – both of whom he says were not deliberately indifferent because they did all they could. In this writer's view, this fails to accord Brown all favorable inferences from the records in PACER, since this doctor signed first on nearly every medical report submitted in summary judgment – even those of the committees.

As to retaliation for asserting her rights, at issue in both cases, Judge Kopf accepts as undisputed defendants' repeatedly self-serving affidavit statements that they did not care if Brown contacted the state Ombudsman or filed this lawsuit, and it made no difference in her treatment or progress in the program. Here, in addition to the acceptance of defendants "facts," as he did in the first case, he lists 93 of the 98 "facts" submitted by the Nebraska Attorney General as "undisputed," despite Brown's objections. Brown quotes numerous examples of transphobic and other remarks by defendants tying her lack of progress in the program to her assertion of transgender rights. In the second case, the verified complaint provided detailed remarks, quoted, with date and speaker. Defendants even admit discussing Brown's litigation in committee, albeit in a "therapeutic" way (whatever that means). Judge Kopf finds such comments, even if made, to be "unnecessary" to the resolution of charges of retaliation or denial of equal protection.

Although it is not mentioned in either opinion, PACER shows that Judge Kopf stayed discovery (over Brown's objections) in both cases after the defendants moved for summary judgment, so Brown had no opportunity to depose them or even serve them with supplemental interrogatories based on their affidavits. Judge Kopf found the affidavits of other inmates attesting to defendants' attitudes towards transgender and black inmates that Brown submitted to be "conclusory."

On the issue of privacy for showering and bathroom, Judge Kopf found that defendants' asking other inmates "not to look at" Brown was sufficient. On Equal Protection, Judge Kopf ruled that the standard of review in the Eighth Circuit was unclear; he then proceeded to deny relief under rational basis scrutiny, citing security concerns about clothing, showering and the like – and finding class-of-one theory did not change the analysis. (This ignores the case law in several circuits finding that official discrimination against transgender people should be dealt with the same as traditional sex discrimination claims, using heightened scrutiny.)

In the second case, although suggesting in an earlier decision that Brown may have some First Amendment point about denial of association, Judge Kopf does not mention it here. Again, he accepts defendants' contested statements that they did not restrict Brown's association beyond what was needed for her safety and that of others. According to Brown's verified complaint, the stated reason for the order was her out-front transgender behavior, not her or others "safety."

Brown's case may be a poor test case for the Eighth Circuit for many reasons. She is *pro se*, and she has a mental health and disciplinary history. Can we look forward to more bad appellate law for transgender prisoners if counsel does not get involved? The opinions could have rested on mootness and lack of clear law, with leave to amend at Brown's new facility. After three years, why Judge Kopf decided to add to the abysmal substantive law in the Eighth Circuit, when these cases were regarded as daring to push the envelope, is beyond this writer's ken. Judge Kopf was appointed to the district court in 1992 by President George H.W. Bush, after having served as a U.S. Magistrate Judge in the same court. ■

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.

Eleventh Circuit Rejects Damages Case of Gay Inmate Raped After Homophobic "Branding" by Sergeant

By William J. Rold

Perhaps they will leave it as an unpublished *per curiam* opinion, but the Eleventh Circuit's decision in *Block v. Pohling*, 2018 WL 2110781, 2018 U.S. App. LEXIS 12231 (11th Cir., May 8, 2018), is nevertheless most unfortunate. Jay M. Block, a slight, effeminate, openly gay inmate – Corrections records said he "appears to be a very defenseless individual" – was placed in administrative segregation in a Florida prison after being sexually assaulted by another inmate.

On his arrival in segregation, defendant Sergeant Robert Pohling called him a "fruit, faggot and a punk" in a loud voice, clearly audible to other inmates and staff in an area where holding cells were separated only by wire mesh. Other remarks and "jokes" by Pohling followed. Pohling then double-celled Block with a known violent sex offender, Timothy Hippolyte, who was classified as "of special concern." Over a period of approximately five days, Hippolyte raped Block numerous times and threatened him if he reported the rapes. Pohling also threatened Block, saying he would "leave prison in a wheelchair" if he sued. Other rapes and defendants figure in the case, allegedly based on Pohling's homophobic remarks.

As a result of the assaults Block suffered in prison, he was diagnosed with post-traumatic stress syndrome, anxiety, depression, complex rape trauma, aggravated startle response, and bipolarity. Block tried to litigate *pro se*, since his request for counsel was denied. The district court allowed only "limited" documentary discovery – and it appears from PACER that no depositions were taken. At the time of summary judgment, Pohling was the only defendant left in the case.

In the Report and Recommendation ["R & R"] of U. S. Magistrate Judge Edward M. Wenger and the opinion of Senior U. S. District Judge William Terrill Hodges (M.D. Fla.), adopting the R & R and rejecting Block's objections, it appeared that the only legal issue was application of the two arms of the test for violation of the right to safety for prisoners enunciated in *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Judge Wenger's R & R found no jury question on either arm of the test: the objective (risk) or subjective (deliberate indifference to the risk). In other words, there was no issue of risk; and, therefore, Pohling could not be indifferent to it – so he recommended summary judgment for Pohling.

On appeal to the district court, Judge Hodges relied primarily on the second prong of *Farmer*, although adopting the R & R and granting summary judgment against Block. The court found that there was no evidence on which a jury could find that Pohling was subjectively deliberately indifferent.

In the Court of Appeals, the panel (and their appointing Presidents) consisted of Senior Circuit Frank M. Hull (Clinton), Circuit Judge Jill A. Pryor (Obama), and (by designation) U. S. District Judge R. David Proctor (N. D. Ala.) (George W. Bush). They determined to hear oral argument and appointed counsel, who briefed the appeal and appeared for Block at the argument.

The briefs, reviewed in PACER, focused almost entirely on *Farmer*. Pohling argued that Block was "targeted" because of his effeminacy and size, not Pohling's remarks; Block claimed that Pohling had "branded" him as a target. The Court of Appeals took an entirely different tack, barely mentioned in the briefs. The court assumed, *arguendo*, that the *Farmer* test had been met, but it required a third element: "a causal connection between the defendant's conduct and the violation," writing that this test was derived not from *Farmer*, but from § 1983 itself, citing the pre-*Farmer* case of *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993).

The court said that Block presented no proof that any other inmate heard Pohling's remarks and that Hippolyte arrived the day *after* Pohling's "derogatory outburst" and therefore could not have been influenced by Pohling. It required too many inferences to show that Pohling's remarks (which were not isolated) "caused the harm [Block] suffered."

Of course, causation is an element of every tort case, constitutional or otherwise; but these assaults did not take place at a different time or place from Pohling's watch; most were under his very nose as area sergeant. Incredibly, the court does not mention that Pohling's decision as sergeant to place Hippolyte in Block's cell was a possible source of causation.

It appears to this writer that Block and his counsel were ambushed by the court's decision. Causation occupied less than a page of Block's brief, which assumed the case would turn on the subjective arm of *Farmer*, and the appellee's and reply briefs do not mention this "third element" in their table of contents. This case resurrects the very defense rejected in *Farmer*: that a plaintiff had to prove direct causation from a creator of conditions to an assailant's action to succeed in a protection from harm case.

The Supreme Court wrote in *Farmer* that liability can occur when the risk is "obvious," noting: (1) a plaintiff can prevail by "showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attacks by other inmates"; (2) "it does not matter whether the risk comes from a single source or multiple sources, any more than it would matter whether a prisoner faces an extreme risk of attack

for reasons personal to him or because all prisoners in his situation face such risks"; and (3) "it would obviously be irrelevant to liability that the official could not guess beforehand precisely who would attack whom." 511 U.S. at 843-4.

Block's case, as is, presents far more concrete evidence on causation than the situations just described. But, if there was any doubt, the Eleventh Circuit should not have affirmed. In *Farmer*, the Supreme Court remanded, among other reasons, on causation, because the record was inadequately developed, with instructions to the district court to reconsider its denial of further discovery for summary judgment purposes under F.R.C.P. 56(f).

If Block had trial counsel, the points of who heard what and who knew what could have been developed through depositions – something beyond the reach of a *pro se* plaintiff. The Circuit's decision might just as well have painted a bull's-eye on the back of vulnerable LGBT inmates, who, once victimized, do not have the means for counsel or the ability to obtain a lawyer from the court.

Summary judgment can be affirmed on grounds not used by the District Court, but it should not be affirmed on legal theories that the plaintiff had no opportunity to rebut. Even *LaMarca*, the case on which the Eleventh Circuit purported to rely, remanded for further development on the issue of causation. 995 F.2d at 1549. It is a comprehensive opinion, in which the court anticipated the holding of *Farmer*: "the finding that a prison condition offends the 8th Amendment presupposes the distinct likelihood that the harm threatened will result." *Id*. at 1538.

The Eleventh Circuit here found that "a link between Pohling's words and the attacks on Block is lacking," as if *Farmer* has taught us nothing. The court ends its opinion by condemning Pohling's "repugnant statements," as if that were enough for the ruin of a man's life.

Block was represented on appeal by Joshua N. Friedman, Esq., Washington, D.C. ■

Federal Court Allows Action to Proceed Seeking Coverage of Transition by Wisconsin Public Employee Health Insurance Program

By Arthur S. Leonard

U.S. District Judge William M. Conley issued an opinion and order in *Boyden v. Conlin*, 2018 WL 2191733, 2018 U.S. Dist. LEXIS 79753 (W.D. Wis., May 11, 2018), denying in part and granting in part defendants' motion for summary judgment in a suit challenging the refusal of state employee benefits authorities to cover sex reassignment procedures for transgender state employees under the state's health insurance plan. Two transgender employees of the University of Wisconsin, Alina Boyden and Shannon Andrews, brought suit represented by Chicago-based ACLU attorneys together with cooperating attorneys Michael Godbe and Nicholas Fairweather of Hawks Quindel S.C., Madison.

Named defendants in the lawsuit include Robert J. Conlin, Secretary of the Wisconsin Department of Employee Trust Funds (ETF, which is also sued as an entity), the Board of Regents of the University of Wisconsin, University Chancellor Rebecca M. Blank, University President Raymond W. Cross, and the Medical School's Dean, Robert N. Golden. Also a defendant is the Wisconsin Group Insurance Board (GIB), the policy-making body for the state's public employee health insurance plan that voted not to cover sex reassignment procedures.

The lawsuit alleges violations of Title VII (sex discrimination), the Equal Protection Clause (under 42 U.S.C. sec. 1983), and the Affordable Care Act's provision banning sex discrimination by health plans that received federal funding, section 1557. Because of the lack of coverage under the public employee health insurance plan, plaintiff Boyden has never received the surgery despite her doctor's certification that it is medically necessary treatment. Plaintiff Andrews, unwilling to wait for the state to raise the restriction against coverage, went out of state, had the procedures performed at a medical center in Pennsylvania, and is seeking reimbursement for the $14,750 she paid out-of-pocket to the medical center, as well as reimbursement for additional fees she paid for the hospital and anesthesia. She applied to the plan administrator, Wisconsin Physicians Service Insurance Corporation, but it denied her claim based on the policy decision made by GIB, and her internal appeals within ETF were rejected.

Much of the argument on the summary judgment motion concerns who can be sued on these claims, raising questions of standing and governmental immunity, which Judge Conley patiently and methodically deals with in his opinion. The defendants argued that the only proper defendant is GIB, which made the policy decision, and that the University officials, despite their status as employers of the plaintiffs, have nothing to do with making insurance coverage policy, which is decided at the state government level. "The Employer Defendants do indeed fall outside the court's jurisdiction and must be dismissed," concluded Conley, but he found, "Based upon the information alleged, plaintiffs' injuries can be fairly traced to GIB, ETF, and ETF's Secretary Conlin." Rejecting the defendants' argument that plaintiffs fell short on a crucial element of the standing analysis, redressability, the court found it was theoretically possible that an order could be made against GIB, ETF and Conlin to redress the plaintiffs' injuries in this case. Having dismissed the Employer Defendants (university officials) as defendants on

standing grounds, Conley concluded they could not be held liable for an equal protection violation under Sec. 1983. However, GIB, ETF and Conlin could be held liable, although 11th Amendment immunity would shield Conlin, sued in his official capacity, for liability for damages. However, the court could award injunctive relief. ETF and Conlin tried to shift all exposure to GIB, claiming that they were bound to administer the policies GIB established, but the court rejected that argument, finding that their role in administering benefits subjected them to potential liability.

Since Wisconsin is in the 7th Circuit, it is not open to the defendants to argue that gender identity discrimination is not actionable under Title VII. However, ETF and GIB argued that they could not be sued under Title VII because they are not employers of the plaintiffs. Furthermore, ETF argued that it should escape Title VII liability because it did not, as a department, discriminate against the plaintiffs, and that the technicality that GIB is an instrumentality within the department should not subject the department as a whole to liability. Conley rejected these arguments. "While GIB made the decision to discriminate against transgender persons," he wrote, "plaintiffs still allege that ETF had an active role in administering that decision by (1) discriminating against plaintiffs, (2) who were transgender, (3) because they were transgender. For example, when plaintiff Andrews was unable to receive reimbursement for her surgery, she filed appeals with WPS. When WPS denied her appeals, Andrews took the next step: appealing to ETF. At this stage, it is not yet clear how much discretionary power ETF has during the appeal process, if any, or whether it could act to rectify a policy that it found illegal under federal law. Since the scope of ETF's role is uncertain, however, the question of ETF's liability is best addressed on a more fulsome record than an initial pleading can afford."

Conley also agreed with plaintiffs in rejecting defendant's argument that plaintiffs must provide evidence of a specific intent to discriminate by the defendants. "When an employment practice involves explicit facial discrimination, as alleged here, the existence of a disparate treatment does *not* depend on the employer's intent. Instead, disparate treatment is demonstrated by the terms of the policy itself." And as to the argument that GIB and ETF are not "employers" under Title VII, Conley wrote, "Here, again for the reasons explained above with regard to standing, defendants GIB and ETF are empowered to provide health insurance benefits to state employees, including plaintiffs. As such, the court finds that they are proper suable entities under Title VII, and will deny the motion to dismiss on this basis."

As to the claims under the Affordable Care Act (ACA) Sec. 1557, such claims must be accompanied by plausible allegations that the defendant received federal funds under the ACA, and the court noted that there was some question whether GIB qualified to be sued on this basis. The plaintiffs argued that since ETF received some federal funding, and GIB "is part of ETF," that base was covered. Judge Conley questioned this. "The mere allegation that ETF received federal funding does not support a reasonable inference that GIB also received federal funding." So he granted the motion to dismiss the ACA claim against GIB "without prejudice so that plaintiffs may file an amended complaint if they can allege in good faith that GIB actually received federal funding, either from ETF or otherwise."

The defendants also sought a stay of the ACA claim "until the resolution of ongoing litigation in the Northern District of Texas" in *Franciscan Alliance, Inc. v. Price*, a case that challenged the Obama Administration's interpretation of Sec. 1557 to extend to gender identity discrimination. (The section mentions sex as the only potentially relevant prohibited ground of discrimination, but consistent with their approach to other sex discrimination laws, Obama Administration agencies broadly construed such provisions to cover both sexual orientation and gender identity. The Franciscan litigation, brought by a group of entities covered by the ACA, sought a court ruling that this interpretation was wrong, and had obtained a preliminary injunction.) Judge Conley noted that the district judge in *Franciscan* had stayed the case overall due to an indication from the Trump Administration that it intends to "either revise or eliminate the challenged regulations." Opposing the stay, the plaintiffs in this case "point out that they are relying on the language of the statute itself, rather than regulations under them." Good argument, in light of the 7th Circuit's ruling in *Whitaker* that laws banning sex discrimination (such as Title IX in that case) also cover gender identity discrimination. Conley held that "in light of plaintiff's focus on the ACA language itself, the uncertainty of whether and when the stay in the *Franciscan Alliance* case will be lifted, and when and if the court will ever issue an opinion, a stay is neither likely to simplify the issues in question nor streamline the trial. Moreover," he continued, "since plaintiffs' Title VII and Equal Protection claims are proceeding, a stay will not reduce the burden of litigation on the parties or on the court in this case. Accordingly, the court will deny defendants' motion to stay."

Thus, despite some reduction in the parties on the defense side, the plaintiffs largely survived the ordeal of summary judgment and may proceed to trial on their claim that the state employee health insurance program is required to cover sex reassignment procedures for transgender employees. In light of the Trump Administration's general position, articulated last fall in a memorandum by Attorney General Jeff Sessions, that federal laws banning sex discrimination do not prohibit gender identity discrimination, one anticipates that the administration may get involved in this case on the side of defendants at some point, particularly if Judge Conley rules for plaintiffs and grants relief, sparking an appeal to the 7th Circuit by Wisconsin authorities. ■

Wisconsin Federal Judge Denies State Summary Judgment, Orders Trial, on Sex Confirmation Surgery for Transgender Inmate

By William J. Rold

U.S. District Judge James D. Peterson issued a thoughtful, balanced, and progressive opinion on third triad needs of transgender inmate Mark A. Campbell, a/k/a Nicole Rose Campbell, in *Campbell v. Kallas*, 2018 U.S. Dist. LEXIS 76144, 2018 WL 2089351 (W.D. Wisc., May 4, 2018). Although Campbell filed the case *pro se*, Judge Peterson appointed counsel, who acquired documents, took over a dozen depositions, retained experts, and worked with the DOC to narrow issues and propose stipulated facts.

Campbell is already receiving hormones and using feminizing hygiene products. Having exhausted all other remedies, Campbell sues basically for court orders directing defendants to provide her electrolysis, to allow her to wear make-up, and to perform sex confirmation surgery ["SCS," also referred to by some as "SRS," or "sex reassignment surgery"]. Wisconsin officials refuse all three. The parties have filed cross-motions for summary judgment.

Although Campbell did not move separately for summary judgment on electrolysis and make-up, Judge Peterson found these issues ripe for summary disposition and notified defendants under F.R.C.P. 56(f) that he was prepared to rule on these points – so they should present anything else they wished to be considered. The bulk of the opinion deals with SCS and third triad care.

Campbell has served ten years in prison, and she is not eligible for release consideration until 2041. She is in a male prison, but she has lived with male genitalia as a woman as much as defendants' constraints will allow. The parties agree she has had "severe gender dysphoria" since 2012. She has been before Wisconsin's central office committee on transgender care multiple times, to get this far; but surgery continues to be disapproved, after "outside" review by Cynthia Osborne, who has served as transgender consultant to committees in several states. The primary objection to SCS is a requirement (also found in WPATH) that the patient have a "real life" experience in the post-operative gender for twelve months prior to surgery. Wisconsin insists this is not possible in prison.

Campbell's experts (Drs. Kathy Oriel and Felicia Levine) say that the 12-month "real life" experience requirement outside of prison is questionable, given Campbell's long history living as a transgender woman, such that that she has satisfied the experience requirement, and that no reasonable physician knowledgeable in transgender care would deny her surgery. They also stress that the WPATH guidelines specifically oppose different rules for institutionalized patients. While Osborne recommends "only reversible interventions," for the first time in this writer's review of Osborne's reports, even she hedges in this case. She allows that Campbell may be a "rare" exception, and that the weighing of benefits and risks may tip in favor of surgery based on "severe anatomic dysphoria," and that maybe Campbell can have a "real life" experience through accommodation in the women's prison. The experts also seem to agree that Campbell's mental health issues are under control and her hormone intake is at therapeutic level and is now "optimized" – both of which presented potential contraindications to surgery from 2012-2014.

Corrections offered affidavits of two professionals: Dr. Kevin Kallas (whom Judge Peterson declined to treat as an expert because he is a party defendant) and Dr. Chester Schmidt, who said that SCS was not "medically necessary," but there was no medical contraindication to it, and that he had no opinion as to whether Campbell had a "real life" experience as a woman in the corrections system.

Campbell's counsel made a pointed effort to establish defendants' experts as out of the mainstream and the case not presenting merely a difference of opinion on treatment – what Judge Peterson called the "no minimally competent professional standard" refutation to an expert's "opinion." These professional opinions and DOC officials' persistent refusals are enough for Judge Peterson to order a trial on SCS.

Judge Peterson found that Campbell's needs are "serious" as a matter of law. The issues for trial, as framed by Judge Peterson, are as follows: Whether sex reassignment surgery is medically necessary for Campbell . . . . ; whether real-life experience is invariably a prerequisite to sex reassignment surgery; whether the real life experience can be adequately achieved in a prison setting; and, if some form of real-life experience is required, whether Campbell has completed it."

In the meantime, Campbell amended her pleadings to include an Equal Protection claim: that she was being denied treatment (vaginoplasty) provided to cisgender women. Judge Peterson applies "heightened scrutiny" to the claim under *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *cert. dismissed*, No. 17-301 (Mar. 5, 2018), but he grants defendants summary judgment. He rules on two challenges to DOC policy on its face: the denial of vaginoplasty to transgender women while providing it to cisgender women; and the impossible requirement of 12 months real life experience as a woman in a male prison as a prerequisite to SCS.

On the first point, Judge Peterson finds that transgender women and cisgender women are not similar situated for Equal Protection purposes. Cisgender women already have vaginas and seek surgery for medical correction, while transgender women seek to create

vaginas. Transgender women must work through triads of care under WPATH standards, while cisgender women do not. This binary approach to sexual identity may someday seem as quaint as the now rejected "only women can get pregnant" defense to pregnancy discrimination as sex discrimination – but this is not that day.

Judge Peterson also found for Equal Protection purposes that the 12-month "real life" standard was not a "blanket" rule at all, since transgender women can complete the twelve months prior to incarceration and thereby meet state standards. Perhaps an "as applied" challenge would have had more traction, but the point seems subsumed in the Eighth Amendment analysis.

Campbell also sought damages, and all defendants plead qualified immunity. Judge Peterson denied them summary judgment on this point. He found that case law on "deliberate indifference" was sufficiently established by the Supreme Court and the Seventh Circuit, citing gender dysphoria cases going back to 2011 – e.g., *Fields v. Smith*, 653 F.3d 660, 556 (7th Cir. 2011) – and that there did not need to be a case precisely on point to defeat qualified immunity so long as defendants were on reasonable notice of a possible constitutional claim, citing *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

Because of the qualified immunity point, the DOC took an interlocutory appeal of the case to the Seventh Circuit and sought a stay of Judge Peterson's scheduled trial in *Campbell v. Kallas*, 2018 U.S.Dist. LEXIS 83339 (W.D. Wisc., May 16, 2018). Judge Peterson found that the pendency of the appeal did not necessarily divest him of jurisdiction over the injunction portions of the case, citing *Gothtasby v. Bd. of Trs. Of Univ. of Ill.*, 123 F.3d 427, 429 (7th Cir. 1997). Campbell urged Judge Peterson to "press on" with her injunctive case, but Judge Peterson, in his discretion, said that the decision on qualified immunity may "shed light" on the merits of the injunctive case. Campbells' claims for electrolysis and make-up, however, will be resolved "now."

Campbell is ably represented by appointed counsel Husch Blockwell, LLP, of Madison, WI. ■

9th Circuit Dismantles District Court's Summary Judgment Ruling in Sexual Orientation Discrimination Case

By Arthur S. Leonard

A 9th Circuit panel took to pieces and largely reversed U.S. District Judge James V. Selna's grant of summary judgment to the City of Santa Ana, California, in a sex and sexual orientation employment discrimination case brought under Title VII and the California Fair Employment and Housing Act (FEHA) in *Franks v. City of Santa Ana*, 2018 WL 2425395, 2018 U.S. App. LEXIS 14247 (May 30, 2018). In his rush to grant summary judgment to the defendants, who included 10 "John Doe" city officials as well as the City, Judge Selna appeared to trample on basic principles of employment discrimination practice. The initial version of the opinion sent to Lexis deemed the opinion "not suitable for publication," but the first Westlaw print indicated that it will appear in Federal Appendix.

Plaintiff Tammy Franks, an out lesbian former commanding police officer, was subjected to an investigation based on an anonymous complaint. When the department received the complaint (the substance of which is not related in the Court of Appeals panel's opinion), it "immediately" placed Franks on administrative leave, prompting the first and second causes of action in her complaint. She alleged that the City "treated her differently because of her gender and sexual orientation by placing her on administrative leave pending the completion of the investigation" without undertaking any sort of preliminary investigation. Quoting 9th Circuit precedent, the court of appeals wrote: "We require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the factfinder, upon a full record." (*Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112 (9th Cir. 2011)) "The district court incorrectly found that Franks failed to meet this low evidentiary burden," wrote the court, continuing, "While there are multiple factors courts consider when determining whether there has been discrimination, the district court reached only pretext, finding that the City's articulated reason for placing Franks on administrative leave was not pretextual. A plaintiff can prove an employer's articulated reason is pretextual 'directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence," citing the Supreme Court's leading decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), and consistent 9th Circuit precedent. "Franks met this burden by demonstrating that there was a deviation from police force procedure that worked to her disadvantage," said the court.

"Deposition testimony confirms there were numerous deviations from the City's standard investigation procedure" in Franks' case, "including but not limited to, (1) no other employee accused of the type of conduct alleged against Franks had ever been placed on administrative leave without a preliminary investigation, (2) no other employee with these allegations had been placed on administrative leave based on an anonymous complaint; and (3) no other employee had ever been subjected to an absolute 'no contact' order without limiting it to the subject of the investigation. In fact," the court continued, "the city's PMA board reviewing Franks' investigation noted that Franks' case appeared to have been handled differently than any others it had seen and questioned

whether the way the police department handled this case constituted disparate treatment, especially considering Franks was the highest ranked female in the department's history." Since these experienced investigators had formally questioned whether the City's actions were discriminatory, said the court, "a reasonable jury could come the same conclusion" so summary judgment was inappropriate.

The court also found that the district court incorrectly found that she had presented insufficient evidence for a reasonable jury to find that she was subjected to a hostile environment on account of her sex and sexual orientation. Determining whether a hostile environment claim has been proved is a very fact-intensive inquiry, the court pointed out, taking into account the totality of circumstances and weighing numerous factors. "In light of the improper management of the investigation and aftermath," wrote the court, "including ostracization, rampant rumors, and inability to effectively manager her team, a reasonable jury could find the City's management of the investigation caused Franks to lose credibility to do her job." This would be enough to withstand summary judgment on the hostile environment claim.

The only part of the summary judgment that the court upheld went to Franks' constructive discharge claim, as the court found that she did not present "any facts that were sufficiently severe to constitute a constructive discharge," since apart from the administrative leave itself, she did not suffer any tangible adverse employment action.

The district court's order was reversed in large part, affirmed only as to the constructive discharge count, and remanded. The panel, which did not assigned individual authorship for its opinion, consisted of Circuit Judges Kim McLane Wardlaw and Ronald Gould and Chief U.S. District Judge Raner C. Collins of the District of Arizona, sitting by designation. The first opinion on the research databases did not identify counsel or indicate whether Franks is proceeding *pro se*. ■

California Appellate Court Rules New Jersey Domestic Partnerships are not Substantially Equivalent to California Registered Domestic Partnerships

By Matthew Goodwin

On May 9th, 2018, a California Appeals court ruled that New Jersey domestic partnerships ("NJ D.P.'s") are not "substantially equivalent" to California Registered Domestic Partnerships ("CA RDP's"), rejecting a same-sex spouse's claim that the trial court in his divorce erred by declaring the date of the couple's union to be the date they legally wed in Connecticut in 2009 rather than the 2004 date they entered into their NJ D.P. *In re G.C. & R*, 2018 Cal. App. Lexis 415, 2018 WL 2123912.

Same-sex spouses in long-term partnerships but shorter term marriages frequently argue during divorce that courts should consider some or all of the pre-marital portion of their relationships.

The California 4th District Court of Appeal said that the trial court correctly limited the time period of the men's relationship to which California's law of dissolution and property distribution could apply. Ostensibly, R.W., the appellant, might have been entitled to a larger property division award had he prevailed. The 4th District court decides appeals arising from cases in the southern portion of the state, for example Riverside and San Diego Superior Courts.

Same-sex spouses in long-term partnerships but relatively shorter term marriages frequently argue during divorce that courts should consider some or all of the pre-marital or non-marital portion of their relationships when it comes to issues such as property distribution and spousal support given that same-sex marriage was not available to them and their soon-to-b-exes at the time they became partners. The efficacy of such "tacking" claims as they are known depends largely on the jurisdiction in which the couple resides when they divorce.

The couple purchased a home together in New Jersey in 2002. In 2004 they registered as domestic partners in that state. In 2006 the parties moved together to New York. In 2009 the parties married in Connecticut and then purchased a home in and moved to California in 2011.

G.C., R.W's spouse, submitted an affidavit stating that the parties entered into the N.J. DP to preserve their rights to care for one another in medical emergencies and to have access to one another's employer-provided benefits available to same-sex partners in that state. G.C. submitted to the trial court a document entitled "Notice of Rights and Obligations of Domestic Partners" (the Notice of Rights) issued by the New Jersey Department of Health. Under the heading, 'Terminating a Domestic Partnership,' the Notice of Rights stated that the Superior Court of New Jersey would have jurisdiction over all proceedings to terminate a domestic partnership and that '[i]n all

such proceedings, the court shall in no event be required to effect an equitable distribution of property, either real or personal, which was legally and beneficially acquired by both domestic partners or either domestic partner during the domestic partnership.'"

By contrast, R.W. took the position in his amended petition and at trial that the parties would have married when they purchased the house together in 2002 had same-sex marriage been legal at the time. G.C. claimed (as a spouse in his position often does) that the parties' true intent was *not* to enter into a marriage-like relationship given that marriage was available to the couple in Massachusetts and yet they waited until 2009 to marry in Connecticut.

Resolution of the case required the trial and appellate courts to consider an issue of first impression in California; that is, whether the NJ D.P. was "substantially equivalent" to a CA RDP.

The appellate court described the California Registered Domestic Partners Act that was enacted in 2003 and which "extend[ed] the rights and duties of marriage to persons registered as domestic partners on or after January 1, 2005" (the "Act"). The Act applied retroactively to CA RDP's entered into previously unless the partners in such CA RDP's opted out of the new statutory scheme upon receipt of a notice from the California Secretary of State informing them of the otherwise forthcoming change in their legal status.

The Act further provides that "[a] legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is *substantially equivalent* to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership." [Emphasis added].

The appellate court reviewed the trial court's conclusions of law *de novo* and stated its obligation in a matter of statutory construction: " . . . ascertain the intent of the enacting legislative body so that [the court] adopt[s] the construction that best effectuates the purpose of the law."

In this respect the appellate court concluded the legislature intended the act " . . . to recognize unions formed under the laws of another jurisdiction that are *substantively comparable* to domestic partnerships as defined under the [Act] even if the union is referred to by another name under the other jurisdiction's law." In other words, the court resorted to comparing the substance of the laws of the two jurisdictions to decide whether they came within the California statutory term "substantially equivalent."

The appellate court looked to a number of practice treatises and law journal articles to support its "substantively comparable" test. Specifically, the court held that what matters in an investigation of substantial equivalence under the act is what rights, responsibilities and privileges such unions provide the couples who enter into them, particularly with respect to "property rights, debt liability, [and] [spousal] support." This proposition was further supported by the California Legislature's requirement that the Secretary of State notify pre-2003 registered domestic partners of the forthcoming "momentous" change in their legal status; had the Legislature instead intended the Act to recognize quasi-marital unions as R.W. contended, there would have been no need for such notice.

R.W. proposed that a court adjudicating "substantial equivalence" should ask merely whether the non-marital union entered into was between two persons or not. The appellate court rejected R.W.'s preferred interpretation because it would have made the words "substantially equivalent" superfluous and that would be contrary to decisional law requiring a court to presume each word of a statute was intended and imbued with purpose and meaning. R.W. went on to suggest that NJ D.P.'s and CA RDP's were "substantially equivalent" because New Jersey and California similarly define "partners" as individuals who share one another's lives in a committed and intimate fashion. This approach was found to be misguided because, again, it largely ignored those provisions of the Act which recognized that non-marital unions could go by many different names in many different jurisdictions and the Legislature appeared to be creating a scheme for parsing whether such unions should or should not be subject to dissolution in California.

Finally the appellate court wrote that "even a cursory examination of the two statutory schemes makes clear that the legal rights conferred by the domestic partnership laws differ dramatically in the two states." California, for example, extends the "same" rights and responsibilities as does marriage to CA RDP's, while New Jersey extended "certain" rights and responsibilities to couples entering into NJ D.P.'s. Most damming for R.W. in this regard appeared to be the statutory language of New Jersey G.C. pointed to in the proceedings below; namely, that "New Jersey law provides that, in proceedings to terminate a domestic partnership, 'The court shall in no event be required to effect an equitable distribution of property, either real or personal, which was legally and beneficially acquired by both domestic partners or either domestic partner during the domestic partnership.'"

R.W. did succeed at the appellate level in reversing the trial court's decision to award him only a proportionate share of the increase in the equity of the marital residence between date of marriage and date of dissolution. Here the appellate court indicated that G.C. failed to rebut the presumption in California law that property acquired in joint names during the marriage is community property.

The decision was written by Judge Aaron for a unanimous three-judge panel.

R.W. was represented on appeal by Timothy L. Ewanyshyn and La Quinta Law Group. G.C. was represented by Lann G. McIntyre and Lewis Brisbois Bisgaard & Smith. ■

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Federal Civil Rights Claims by HIV-Positive Prisoner Survive Dismissal

By Robert Watson and Carl Rogers

On May 2, 2018, a federal judge allowed some civil rights claims by an HIV-positive inmate to proceed against Louisiana Department of Public Safety and Corrections officials. *Henderson v. LeBlanc*, 2018 WL 2050149, 2018 U.S. Dist. LEXIS 74280 (M.D. La. May 2, 2018). Plaintiff William Henderson, an inmate at the Louisiana State Penitentiary (LSP), brought claims under 42 U.S.C. § 1983 alleging that prison officials violated his constitutional rights by failing to ensure that he received his HIV medication timely and consistently. U.S. District Judge John W. deGravelles denied dismissal of Henderson's claim for injunctive relief against the defendants and his claim for damages against a prison nurse, but did dismiss claims for damages against the other defendants for failure to state a claim.

According to the operative complaint, Henderson was raped several times in jail before conviction, then tested positive for HIV at LSP in 2013 and began receiving four different HIV medications. Three months later, Henderson and the senior nurse in charge of HIV-positive offenders at LSP met with a specialist via a telemedicine service to discuss Henderson's treatment. The doctor, Henderson claimed, informed him that two of the medications were to be taken once a day and the other two, twice a day. Henderson alleged that the doctor specifically instructed the nurse that she should not dispense Henderson's medications all at once and explained that inconsistent dispensation of antiretroviral HIV medication leads to viral resistance and a compromised immune system and could cause a patient to suffer a premature death from AIDS.

Despite these warnings, Henderson allegedly did not receive his medications as directed over the next several years. He claimed, for example, that from three to six times per month he was not given any of his medications and once did not receive them for over two weeks. In response, Henderson filed several administrative grievances, which prison officials denied. He also claimed that during a second telemedicine meeting with the specialist, the nurse attempted to disrupt Henderson from reporting issues related to receiving his medications.

In 2016, Henderson filed a lawsuit against corrections officials. He sought declaratory and injunctive relief against them in their official capacity "to ensure he will receive his life-sustaining medication without interruption for the duration of his incarceration." In addition, he sought damages in a personal capacity against the LSP medical director and the LSP nurse for their allegedly improper provision of care, as well as against the head of the state prison system, the prison warden, the assistant warden of health services, and a deputy warden (the "Warden Defendants") for their handling of his administrative grievances. The defendants moved to dismiss the claims.

The court first held that sovereign immunity under the Eleventh Amendment did not bar the claim for declaratory and injunctive relief against the defendants in their official capacity. It explained that *Ex Parte Young*, 209 U.S. 123 (1908), established an exception to sovereign immunity for violations of the Constitution or federal law. Addressing the damages claims, the court explained that an official's "deliberate indifference" to a prisoner's serious medical needs could constitute a violation of his constitutional rights, while noting that the standard is "extremely high." To prevail, a plaintiff must show (1) "objective exposure to a substantial risk of serious harm," (2) that prison officials "acted or failed to act with deliberate indifference to that risk," and (3) resulting injury. Applying this standard, the court found sufficient factual allegations against the nurse for the claim to survive. The complaint alleged a substantial risk of serious harm from not properly providing Henderson's medications because it claimed that the nurse was aware of this risk, but nevertheless dispensed the medications in an inconsistent manner. Finally, the court found that the complaint alleged substantial harm from denial of medication (for example, Henderson alleged that his medications failed because of inconsistent dosing).

As to the medical director, the court found "no specific allegations of any wrongdoing by [him] that would rise to the level of deliberate indifference" and explained that attempting to hold him liable simply due to his supervisory position was not permitted. The court did, however, grant the inmate an opportunity to amend his complaint as to this defendant.

Henderson alleged constitutional violations by the Warden Defendants for denial of his administrative grievances. The court agreed with defendants that an inmate has no "federally protected liberty interest in having . . . grievances resolved to his satisfaction." *Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005). And it concluded that none of the Warden Defendants personally participated in the denial of Henderson's medical care and could not be held vicariously liable for the conduct of others. It also explained that allegations of mere receipt, review, and denial of a prisoner's grievances were insufficient to show deliberate indifference to the alleged violations of his constitutional rights by prison medical staff. As Henderson had a prior opportunity to amend the allegations against the Warden Defendants, the court dismissed the claims with prejudice.

As a result of this ruling, Henderson's claims for injunctive relief survive against all defendants in their official capacity, as do the damages claims against the prison nurse in her personal capacity. Defendants did not seek dismissal of Henderson's allegations that they violated the Louisiana State Constitution and committed intentional infliction of emotional distress against him, so those claims also survive.

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N.Y. Family Court Appoints Guardian and Renders Special Immigrant Juvenile Status Findings for Transgender Honduran Girl

By Arthur S. Leonard

New York Family Court Judge Javier E. Vargas issued an opinion on May 17, 2018, explaining the rulings he had made on April 20 in response to petitions filed on behalf of a transgender girl from Honduras who is currently being held by U.S. Immigration & Customs Enforcement (ICE) in the transgender section of a detention center in New Mexico. *Appointment of a Guardian Pursuant to Family Court Act of the Person of Christian J.C.U. a/k/a Monica C.U., v. Jorge R.C., Maria N.U.*, 2018 WL 2424279, 2018 N.Y. Slip Op 28159 (N.Y. Fam. Ct., May 17, 2018). Judge Vargas provides a compelling and horrifying account of the life story of Monica C.U., who is being represented by Hector R. Rojas of Catholic Migration Services, Brooklyn, N.Y.

This is the story of a person identified male at birth who asserted a female gender identity from "an early age," earning the enmity and scorn of her parents in Honduras. She was "abandoned" in a Honduran orphanage at age 3, but was "rescued by her Paternal Grandmother, who took her in, nurtured and provided for her schooling throughout her childhood." However, her parents continued to "abuse and mistreat Monica with brutal beatings, which once resulted in broken ribs requiring medical attention, as well as by inflicting cigarette burns and scars." She was also repeatedly raped and sexually abused by an older brother, who continued the assaults even after Monica complained to her Grandmother. "On one occasion, Monica's Father saw her dressed in a manner consistent with her gender identity, and he beat her up to the point that she was taken to the hospital and the Honduran child protective authorities were called and investigated, yet nothing was done civilly or criminally against the Father to subvert the abuse." Actually, the Father continued to abuse Monica. "Everything came to a head upon the passing of her Grandmother in 2013, when Monica was 16 years of age and left all her little property to her." Monica fled Honduras in 2014 and crossed the U.S. border illegally, was seized by law enforcement and returned to Honduras. She fled again in 2017, but "was captured" by ICE after entering the U.S. illegally and was sent to the detention center in New Mexico. At that point, Catholic Migration Services took over her defense. CMS has her personal property, "consisting of her backpack with clothing, a purse, a wallet, medication and other items."

Judge Vargas provides a compelling and horrifying account of the life story of Monica C.U.

CMS filed petitions on her behalf on April 17, 2018, "just days before her 21st birthday." This is significant because once she turned 21 she would no longer be eligible for consideration for Special Immigrant Juvenile Status (SIJS), under which she might find refuge in the U.S. based on a series of factors that, given her story, she would clearly meet. The petitions seek appointment as her guardian of Alisha W., described as "her friend and mentor" by Judge Vargas, and that the court to make the factual findings necessary to support SIJS status.

In order to do this, of course, the court must have jurisdiction over her, even though she is currently "residing" in the detention center in New Mexico. The court found that jurisdiction could be premised on the presence in Brooklyn of Monica's property, such as it is, through a liberal reading of the Family Court Act and the Surrogate's Court Procedure Act. "Courts have long recognized a Surrogate's jurisdiction to appoint a guardian of a minor who resides outside the state, but has property in the county in question," wrote Judge Vargas. "Applying these principles to the matter at bar, the Court finds that the Family Court has the same jurisdiction over Monica's Guardianship proceeding as the Surrogate's Court would. It is undisputed that Monica is currently detained by USCIS in New Mexico and, as such, is a 'non-domiciliary of the state.' But, as the statute provides, Monica 'has property situated in [the] county,' consisting of her personal property located in Kings County. It does not consist of real estate property, substantial assets or any significant monetary property, but merely Monica's own personal property items, including her backpack, clothing, purse, wallet and medicines. Nevertheless, those items are Monica's only 'property' in the world! Unlike the Civil and Supreme Court which have monetary minimums for their jurisdiction, the Family Court is the real 'People's Court' which welcomes all parties with open arms regardless of their gender, sexual orientation, gender identity, race, national origin, financial or citizenship status. That Monica's property is *de minimus* should not stymie her jurisdictional right to pursue her Guardianship proceeding here." After all, in such cases "the infant's best interests are paramount." Thus, Judge

Vargas found that the court has subject matter jurisdiction and appointed Alisha W. as guardian.

Next, the court made the SIJS findings. Judge Vargas explained that under federal law, "Congress provided a pathway for abused, neglected or abandoned non-citizen children to obtain Lawful Permanent Residence in the U.S. through SIJS, if they are, *inter alia*, under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. It must also be establish that reunification with one or both parents is not viable due to their prior misconduct, and that it would not be in the child's best interests to be returned to his or her previous country of nationality or country of last habitual residence." Although the ultimate status determination is to be made by USCIS and the Department of Homeland Security, the court's factual findings may carry weight with those agencies.

In this case, the findings were easy to make. Based on Monica's story, it was clear that reunification with her parents would be a terrible idea and not viable in any event, as the parents could not even be located and had previously abandoned her and provided nothing towards her support when she was living with her Grandmother, that Honduras is no place to send this young transgender girl, and that she should be allowed to stay in the United States. "Monica's harrowing life cries for her to be permitted to remain, restart and enjoy her new life on these shores of New York City," wrote Judge Vargas, quoting from the famous verses by Emma Lazarus "emblazoned on our Statue of Liberty." The court thus granted Monica's motion for SIJS findings in her favor.

As she is still detained in New Mexico, it is now up to her representatives from Catholic Migration Services to initiate proceedings with the Department of Homeland to secure her release to her Brooklyn Guardian, Alisha W., who was not separately represented by counsel in this proceeding.

Judge Vargas is an esteemed judicial member of LeGaL. ■

Defying *Obergefell* Mandate, Michigan Appeals Court Rejects Lesbian Co-Parent Standing

By Brett Figlewski and Shayla Ramos

A recently-decided Michigan case, *Sheardown v. Guastella*, 2018 WL 2229058, 2018 Mich. App. LEXIS 2509 (Mich. App., May 15, 2018), concerns a child custody action between former lesbian partners who had a child together prior to marriage equality. Michigan's Child Custody Act (CCA) governs custody, parenting time, and support issues and defines parent to mean: "the natural or adoptive parent of a child." Anita Sheardown is not biologically – or adoptively – related to the child, whereas Janine Guastella is the biological mother. Sheardown argued that the CCA's definition of parent is an unconstitutional violation of her fundamental right to parent, but, in a 2-1 decision, Michigan's Court of Appeals affirmed the trial court's dismissal of Sheardown's complaint for lack of standing in an opinion by Chief Judge Christopher M. Murray, and held that the CCA's provision in question is not unconstitutional.

Sheardown and Guastella entered into a contract with a sperm donor during the course of their relationship. The parties intended for Guastella to become pregnant, and the donor stipulated that he would not seek to become a legal parent of any child born from the insemination, nor would he seek custody or visitation rights at any time. The agreement also stated that Sheardown and Guastella "intend[ed] to be legal parents of any child born as a result of [the] inseminations," and that "they will file a petition for [Sheardown] to adopt the child as soon as possible after its birth."

Guastella gave birth to the child, M.E.G., in 2011, and Sheardown and Guastella later executed another agreement with the same donor in order this time for Sheardown to become pregnant with a child who would be M.E.G.'s biological half-sibling. Sheardown and Guastella continued their relationship until 2014, but they never married and indeed could not marry in Michigan prior to the U.S. Supreme Court's recognition of marriage equality in *Obergefell v. Hodges*, 576 US __, 135 S. Ct. 2584, 192 L. Ed. 2d 609, in 2015. In addition, it was also impermissible prior to *Obergefell* for Sheardown to adopt M.E.G. in Michigan.

In 2016, Sheardown filed suit for custody of M.E.G. as well as parenting time based on the best interests of the child, since she had parented the child since birth. Guastella claimed that Sheardown lacked standing because Sheardown was not the "natural" or adoptive mother. The trial court initially agreed with Guastella and dismissed Sheardown's petition for lack of standing. However, after a remand from the Court of Appeals regarding the constitutionality of the statute, the trial court held the statute's definition of parent to be unconstitutional but not subject to retroactive application and maintained its original ruling with respect to Sheardown. The Michigan Supreme Court refused to review the previous Court of Appeals decision, see 905 N.W.2d 421 (Mich. Jan. 19, 2018). When the case came before the Court of Appeals for a second time, it reversed the trial court's determination with respect to the constitutionality of the statutory definition of parent: to the majority, a limitation to "natural" or adoptive parents was no violation of Sheardown's or other LGBT individuals' rights to due process and equal protection because, in the majority's view, it applied equally to heterosexuals.

Sheardown had argued that the fundamental right to parent, recognized and reaffirmed in *Troxel v. Granville*, 530 US 57 (2000), was violated by the appeals court's refusal to allow her to seek custody of M.E.G. In *Troxel*,

the Supreme Court had ruled that a Washington statute which permitted "any person" to petition for visitation rights "at any time" and whenever visitation may serve a child's best interest violated the fundamental right of parents to make decisions concerning the care, custody, and control of their children. The Michigan court's analysis, however, focused on the right to marry as determinative of the parentage statute's validity. Specifically, the court noted that Sheardown filed the action the year *after* Michigan's prohibitions on same-sex marriage were invalidated in *Obergefell*, and that the relationship had ended over a year before *Obergefell* was decided. The court even considered the fact that the couple had never tried to marry in states that did recognize same-sex marriage, which they could have done before having the child. The court reasoned that the CCA's definition of parent did not run afoul of *Obergefell* because the "definition applies equally to same-sex and opposite-sex unmarried couples" and offered the hypothetical in which a female in an unmarried, opposite-sex relationship becomes pregnant with another man's child but the male in the relationship treats the child as his own. According to Michigan law, after the relationship ends, the male would be in the same position as Sheardown relative to the statutory definition of parent: he would have no biological, adoptive, or legal link to the child.

Unlike the majority, dissenting Judge Karen Fort Hood considered that at the heart of the case was the well-being of a minor child denied the opportunity to continue a relationship with one of his parents, as well as his biological half-sibling. The dissent gave weight to the fact that Sheardown had been legally foreclosed prior to *Obergefell* from taking the necessary steps to protect her relationship with M.E.G. at all times from the child's birth to the breakdown of the relationship, and the majority's analogy to the unmarried heterosexual male who raised another man's child was found to be inapposite because it overlooked this key fact. According to the dissent, *Obergefell* and the U.S. Supreme Court's subsequent decision in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), made eminently clear that one reason why same-sex married couples should not be denied the right to marry was specifically because of the importance of marriage's safeguards for children and families and its inextricable connection to related rights of procreation and childrearing. The dissent also recognized the undue hardship and unfairness that the majority's factoring of failure to travel to another state to marry imposed, especially on individuals of limited financial means.

Overall, the majority's ruling betrayed a paucity of legal imagination in its application of legal principles to adjudicate a not-unfamiliar course of events in a family's dissolution. To the great detriment of non-biological/non-adoptive parents and their children, the court failed to bring to bear long-standing principles of family law, including, first and foremost, the best interests of the child, as well as equitable principles such as estoppel to ascertain if an asserted legal position might be contrary to a party's prior words or conduct. The court's singular focus on the right to marry was no doubt the result, at least in part, of a statutory scheme unable to contemplate the formation of parent-child bonds beyond biology, marriage-based adoption, or application of the marital presumption. Even so, the rigidity with which it interpreted *Obergefell* repudiated – in effect if not intent – that decision's unmistakable emphasis on the equal dignity of LGBT families, especially out of regard for the children of those families. In so doing, it served to reify injustice for LGBT families in Michigan and severed unconscionably the relationship between a six-year-old boy and his mother.

None of the opinions in the case mention counsel. An appeal of this ruling to the Michigan Supreme Court would be desirable. ■

Shayla Ramos is a law student at Hofstra University (class of 2019); Brett M. Figlewski is the Legal Director of The LGBT Bar Association of Greater New York (LeGaL).

Pro Se Complaint Alleging Eighth Amendment Violation for Denial of Sex-Reassignment Surgery to Transgender Inmate Survives Motion to Dismiss

By Joseph B. Rome and Deborah Sparks

In November 2017, a federal court in California broke new ground when it became the first in the nation to order a state government to provide sexual reassignment surgery to a prison inmate, Shiloh Quine. In the wake of the Quine case, another California federal court may soon deny a motion to dismiss similar claims attempting to compel California to provide such surgery to an inmate. In *Stevens v. Beard*, 2018 WL 2081850, 2018 U.S. Dist. LEXIS 74519 (E.D. Cal., May 2, 2018), Plaintiff Lyralisa Lavena Stevens's *pro se* complaint alleges that Defendants, all California prison officials, violated her Eighth Amendment rights by denying her medical need for sex-reassignment surgery. Stevens, transgender woman, argued that her doctors had recommended surgery as medically necessary, yet Defendants denied the surgery regardless of the excessive risk to her health.

In deciding the motion to dismiss against the Defendants, U.S. Magistrate Judge Stanley A. Boone assumed that all the facts Stevens alleged in her complaint were true. Stevens alleged that on October 3, 2016, Defendant Dr. Carrick, the Deputy Medical Executive of Utilization Management at California Correctional Health Care Services, sent the other Defendants a determination letter denying Stevens's request for surgery because, or so he asserted, her current treatment regimen provided sufficient relief to treat her gender dysphoria. Despite the fact that Stevens received multiple recommendations for surgery from California Department of Corrections and Rehabilitations (CDCR) doctors, psychologists, and state-appointed specialists, the Defendants only provided Stevens with hormonal therapy programs, and not the medically necessary surgery.

In their joint motion to dismiss, Defendants raised several arguments: (1) res judicata, (2) lack of linkage of several defendants to any alleged wrongdoing, (3) failure to state a claim under the Eighth Amendment, (4) that the claims are barred by Stevens's participation in the *Plata* class action, and (5) that the Defendants each benefit from qualified immunity for government officials. The magistrate denied each of these arguments in turn, recommending that the District Court deny the motion to dismiss.

(1) Res Judicata. The Defendants argued that Stevens's complaint should be dismissed because Stevens already brought the same claims against these same Defendants in a prior state action. Although the magistrate took judicial notice of these cases, he ruled that Defendants' *res judicata* defense failed because the current action did not involve a claim identical to that in any of the previous actions. Although Stevens's past suits claimed that Defendants violated her constitutional right to medical care by deciding not to provide surgery in 2008 and 2010, she had never before argued that the decision to send the 2016 determination letter was the source of her harm. As this was a separate and distinct act, the magistrate found that it did not involve the same claim.

(2) Lack of Linkage. Defendants argued that Stevens failed to allege that each individual Defendant's actions were linked to the decision to deny her surgery. In other words, the defendants alleged that Stevens failed to take into account the fact that the Defendants were differently situated. The magistrate rejected this argument, noting that Stevens submitted to the magistrate a description of each Defendant's involvement in the decision.

(3) Failure to State a Claim. Defendants argued that Stevens's claim failed to meet the standard necessary for a violation of the Eighth Amendment. They argued that Stevens had to allege that the prison officials acted with "deliberate indifference" to Stevens's serious medical needs, but that Stevens alleged only a simple disagreement about appropriate treatment. The magistrate agreed that "deliberate indifference" was the correct standard, but, citing *Rosati v. Igbinso*, 791 F.3d 1037, 1039-40 (9th Cir. 2015), and *Norsworthy v. Beard*, 87 F.Supp.3d 1164, 1187 (N.D. Cal. 2015), held that an inmate's gender dysphoria can constitute a serious medical need to which prison officials may not be deliberately indifferent without violating the Eighth Amendment. Stevens had alleged that several medical experts recommended the surgery, yet Defendants denied it in disregard of an excessive risk to her health, despite the severity of her symptoms and psychological well-being. Therefore, the Magistrate found that Stevens's allegations demonstrated more than a mere disagreement regarding the surgery.

(4) Class Action Preclusion. Defendants argued that Stevens's claims of deliberate indifference and request for injunctive relief were barred because she was a class member in actions attempting to compel medical treatment for inmates. *Plata v. Schwarzenegger*, No. C-01-1351 TECH (N.D. Cal., filed May 14, 1990) and *Brown v. Plata*, 563 U.S. 493, 507 (2011). The magistrate easily rejected this argument, citing a Ninth Circuit ruling that individual claims for injunctive relief related to medical treatment are distinct from the claims for systemic reform in *Plata*. *Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013).

(5) Qualified Immunity. Qualified immunity is meant to protect public officials from liability when they perform their duties reasonably. Defendants argued that they are entitled to qualified immunity because the 2016 determination letter and related documentation clearly showed that the relevant Defendants considered Stevens's request for surgery, but reasonably determined that her current treatments for gender dysphoria provided sufficient relief.

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Italian Supreme Court Downgraded a Foreign Same-Sex Marriage to a Registered Partnership

by Matteo M. Winkler

On May 14, 2018, the Italian Supreme Court (*Corte suprema di cassazione*) released its first judgment interpreting the law of 2016 on same-sex registered partnerships (Law No. 76 of 20 May 2016, *Gazzetta Ufficiale* No. 118 of May 21, 2016; see (2016) *LGBT Law Notes* 226). The case is reported as *X, Y & Avvocatura per i Diritti LGBTI–Rete Lenford v. Sindaco del Comune di Milano* (No. 11696/2018).

The case concerned an Italian-Brazilian same-sex couple who had married in Brazil and subsequently in Portugal, two countries that extended civil marriage to same-sex couples, respectively, in 2013 and 2010 [see Res. 157 of the Nat'l Judicial Council, May 16, 2013 (Br.) and Law No. 9/1010 of May 31, 2010 allowing civil marriage between persons of the same sex (Port.)]. The two men urged the civil status registry of Milan to register their union as a marriage, but both the first instance and appeal courts denied this request, finding that same-sex marriage did not exist in Italy as such and therefore can neither be recognized nor registered (Tribunal of Milan, July 17, 2015, unreported; Court of Appeals of Milan, Nov. 6, 2015, No. 2286).

Before the Supreme Court, the petitioners argued that their marriage should be recognized on two grounds: (i) nowhere in Italian law is it explicitly provided that spouses have to be of the opposite sex; (ii) refusing to recognize foreign same-sex marriage entails a discrimination based on sexual orientation. However, both arguments had been raised before the entry into force of Law No. 76/2016, which dictated some rules for the recognition (and non-recognition) of same-sex marriages contracted abroad.

Law No. 76/2016 introduced in the Italian legal system the new institution of registered partnership between persons of the same sex [see Matteo M. Winkler, *Italy's Gentle Revolution: The New Law on Same-Sex Partnerships*, [2017] *Digest—Nat'l It. Am. Bar Ass. J.* 1, 22–31]. The registered partnership regime is similar, but not identical, to that of a civil marriage. Regarding specific aspects, same-sex registered partners are treated in a discriminatory way compared to married couples; in other occasions, however, they benefit from advantages that remain still unavailable to legal spouses. For example, registered partners have no fidelity duty towards each other (a duty that, on the contrary, spouses bear), but can choose their common family name (while the name of the husband is imposed on a married couple). More importantly, adoptions are precluded to registered partners, although Law No. 76/2016 does not prevent same-sex partner from relying on the stepchild adoption scheme provided by adoptions law (Art. 44(d) of Law No. 184 of May 4, 1983).

As regards foreign marriages, Law No. 76/2016 commanded the government to issue a regulatory framework concerning the update of private international law rules.

As regards foreign marriages, Law No. 76/2016 commanded the government to issue a regulatory framework concerning the update of private international law rules "by providing the application of the registered partnership regime governed by Italian laws to couples of the same sex who have entered into marriage, registered partnerships or a similar institution abroad" [Art. 1(28)(b)].

In the comparative context, the same mechanism of downgrading has been envisaged by the legislature in the United Kingdom before the *Marriage (Same-Sex Couples) Act* of 2013 (Sec. 215 of the *Civil Partnership Act 2004*; for an application see *Wilkinson v. Kitzinger*, [2006] EWHC 2022 (Fam), 21), Switzerland (Art. 45(3) of the *Federal Law on Private International Law* of Dec. 18, 1987, introduced by the *Federal Law on Domestic Registered Unions* of June 18, 2004) and Germany (Adm. Trib. Berlin, June 15, 2010, 23 A 242.08; in the latter the registered partnership has been repealed in 2017 and replaced with same-sex marriage: *see, Law Introducing the Right to Marry for Persons of the Same Sex*, July 20, 2017, *BGBl* S. 2787, July 28, 2017).

The government initially interpreted the Parliament's directive as to "avoid elusive behaviors of Italian citizens who go abroad to marry with the objective of circumventing Italian law in a logic of system shopping" (Report to the Parliament, No. 345 of Oct. 5, 2016). As a result, the government drafted a provision that downgraded the foreign marriage to a registered partnership regardless of the spouses' citizenships. The Parliament, however, solicited the government to distinguish truly elusive marriages from genuine foreign ones. As a result, the new provision sanctions the downgrading only for those marriages "entered into by Italian citizens with a person of the same sex" (new Art. 32-bis of Law No. 218 of 31 May 1995).

Literally taken, this provision seems to lead to including *foreign mixed*

marriages (where one spouse is Italian) in the anti-elusion scheme, hence it necessarily downgrades those marriages to registered partnerships according to Italian law. To the contrary, only *truly foreign marriages* (where both spouses are foreigners) can be recognized and registered as marriages in the Italian civil status registry. The question before the Supreme Court was whether this construction was correct.

The Supreme Court construed Article 32-bis using textual, legislative intent-based and systematic canons to confirm that foreign same-sex marriages between two Italian citizens convert to a registered partnership in Italy, and as such they are registered, while a marriage between two foreigners is recognized and registered as a marriage. For the court, the choice made by the legislature "has the clear-cut meaning" to absorb in the registered partnership regime all same-sex relationships that are "intrinsically Italian," whereas at the same time preserving the foreign element of "truly transnational unions." As to mixed marriages, the provision's grammar (". . . by Italian citizens *with a person of the same sex* . . .") indicates that they remain subject to the former rule, so that the petitioners can obtain the registration in the civil status registry as simple registered partners, but not as spouses.

The solution envisaged by the Supreme Court is highly questionable. In fact, globalization has made citizenship less and less a useful connecting factor for transnational family relationships compared, for example, to habitual residence or domicile. The choice of the Italian legislature to link the downgrading rule with the Italian citizenship of one of the spouses may give rise to potentially unjust situations, especially for mixed couples who lived abroad for a long time and who may see no reason why an anti-elusive scheme should apply to them in a way that downgrades their marriage to another institution they never intended to enter. ■

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CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Arthur S. Leonard

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U.S. COURT OF APPEALS, 3RD CIRCUIT – In *Martinez-Almendares v. Attorney General*, 2018 U.S. App. LEXIS 11285, 2018 WL 2057471 (3rd Cir., May 2, 2018), a 3rd Circuit panel went to some lengths (in a *per curiam* opinion that will not be published in F.3d, so one wonders why – guilty consciences?) to explain why it was rejecting a *pro se* challenge by a gay man from Honduras to the Board of Immigration Appeals' adoption of an Immigration Judge ruling denying his petition for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). The Petitioner tried to enter the U.S. on October 8, 2015, when he was taken into custody by "Customs and Border Patrol agents" and sought to claim refugee status. Immigration Judge Silvia A. Arellano rejected his claims and the Board of Immigration Appeals affirmed the decision. Petitioner grew up in a small town where he was not "out" to anybody and feared a violent response from his father if he came out, but his mother had a close friend who was a gay man who apparently lived openly in the town without any problem. Petitioner claimed that he knew only two gay men in Honduras, one person other than his mother's friend. He had moved to a city where he worked as a clerk at a transportation company, where he was the victim of a robbery by a gang member, but there was no evidence that his sexual orientation had anything to do with it. He was not personally acquainted with gay people who encountered difficulties in Honduras, but based on television reports about gay men targeted for violent crimes and his belief that the government would not be able to protect gay people from gang violence, he decided to leave for the United States. The court observed that he had not suffered any persecution in Honduras on account of his sexual orientation, and found that the evidence he presented would not require a conclusion that he would suffer such persecution, much less torture, on the basis of his sexual orientation if he was returned there. The BIA had pointed out, based on the testimony about his mother's gay friend, that it seemed that he could live as a gay men in his hometown with fear of persecution, and rejected his argument that the BIA was improperly requiring him to remain closeted in his home country in order to avoid trouble. The court also noted that Honduras had amended its laws to ban sexual orientation discrimination. Because the Petitioner could not document having suffered any persecution himself or any objective basis for believing he would be persecuted in the future, he fell far short of making a case for asylum or withholding of removal. His case was really based on more general evidence that Honduras was afflicted with out-of-control gang violence and there were some media reports of gay men being victims. He proffered such evidence to try to establish that he would be in danger of torture or serious physical injury because of his sexual orientation if he were forced to return. The court doubted that he would necessarily be more at risk because he is gay, since the reports about gang violence were more generalized. Among other things, the court agreed with the BIA that the Petitioner had failed to show that the violent gangs in Honduras would necessarily know that Petitioner was gay. And it is clear from this case that the U.S. immigration system is not set up to automatically grant refugee status to gay people from Honduras based solely on generalized reports about the dangerous situation for non-gang members in that country and the flailing

attempts by the government to deal with it. Evidence of individualized risk is the keystone of the system, and it is difficult for a *pro se* petitioner to succeed. (One possible exception to this generalized statement is that in the 9th Circuit there is a disposition by the Court of Appeals to grant refugee claims for transgender petitioners from Mexico.)

U.S. COURT OF APPEALS, 5TH CIRCUIT – *Ogbemudia v. Sessions*, 2018 WL 2422437, 2018 U.S. App. LEXIS 14417 (5th Cir., May 29, 2018), is one of those perplexing *per curiam* decisions denying a petition to review a decision by the Board of Immigration Appeals, in a case brought by a Nigerian native and citizen seeking protection against deportation under the Convention against Torture (CAT). The petitioner, *pro se*, sought CAT relief for four reasons: (1) he had been tortured in the past by state actors or with the acquiescence of state actors due to his homosexuality, (2) Nigeria's new Same-Sex Marriage Prohibition Act criminalized homosexuality; (3) he provided testimony that a friend had been killed in Nigeria because he was gay, and (4) his criminal history (the details of which are not specified in this opinion, but which were likely what provoked the move to deport him) was not relevant to a CAT claim. He also argued that the documents that would have corroborated his story were confiscated during his transfer to the immigration detention center, the asylum officer failed to write down his statement during his "reasonable fear" interview and that other legal materials than those relevant to the case had also been confiscated. He also claimed he had not been given proper notice that corroboration was necessary. He said the Immigration Judge wrongly relied on the government's claim that he was not gay, and he raised other criticisms of the proceedings. Without going into any kind of detailed explanation for its ruling, the court said that he "has failed to show that, under the totality of the circumstances, the evidence is so compelling that no reasonable factfinder could make an adverse credibility determination, conclude that his claim was not adequately corroborated, or decide that he was ineligible for relief under the CAT." The court also refused to fault the Board for denying various motions to reopen his case. Reading this kind of summary opinion, it is difficult to judge whether this guy is being railroaded. If his allegations are true, sending him back to Nigeria is grossly inhumane. But, of course, the opinion is totally unenlightening as to his U.S. criminal record. The case is not being published in F.3rd, and one wonders about the utility of including it in electronic databases, other than to add further illustration of the difficulties faced by persons seeking to invoke protection under the CAT based on their sexual orientation, especially when they are not represented by counsel during what may end up being a life or death process for them.

ALABAMA – Call this the case of the randy schoolteacher. *Pruitt v. State*, 2018 WL 1980781 (Alabama Ct. Crim. App., April 28, 2018). Ashley Pruitt was hired as a teacher and athletic coach as Locust Fork High school, teaching there two years (2012-2014). In August 2014, the school board assigned her to teach at Appalachian High School, in the same school district but about 20 miles away from Locust Fork High School. Evidently Pruitt was hot for some of the teen male athletes in her classes at Locust Fork. After starting at Appalachian, she was back in touch with students from Locust Fork, eventually having sex with three of them (ages 16-18). She assumed she was in the clear because she believe that the age of consent in Alabama was 16. But there is a statute specifically making it a crime for a teacher to have sex with a student who is under 19, and she was prosecuted. She lost a motion to dismiss on constitutional grounds, then pled guilty while reserving the right to appeal the denial of her motion. Relied heavily on *Lawrence v. Texas* for the proposition that consensual sex between people old enough to consent may not be made a crime consistent with the 14th Amendment. She noted that 16-year-olds can marry in Alabama, thus the state considers that at 16 a person is mature enough to choose sexual partners. She also argued that the teacher-student restriction should only apply within the same school. She struck out with the Court of Criminal Appeals, however. After quoting from cases in various jurisdictions upholding the constitutionality of statutes criminalizing sex between teachers and teenage students, the court said, "We agree with the reasoning of these courts and reiterate the importance of maintaining the integrity of the teacher-student relationship." The court insisted that "the fact that Pruitt engaged in sexual conduct with the student victims after she transferred to teach at a different school does not render [the statute] unconstitutional under the particular facts and circumstances of this case . . . The language in the statute is unambiguous and, therefore, requires no judicial interpretation on our part . . . [It] prohibits a teacher from engaging in a sex act or deviant sexual intercourse with a minor student. As noted above, it is undisputed that Pruitt was a school employee and that the victims in this case were students under the age of 19 years. The particular facts of this case exemplify the importance of reading [the statute] to prohibit sexual contact between teachers and students, regardless of whether the teacher and student are at the same school or different schools. In this case, the stipulated facts indicate that Pruitt taught the victims at Locust Fork High School for at least one year and possibly two years. In August 2014, Pruitt was hired to teach at Appalachian High School, another high school in

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Blount County. Approximately one month after her transfer to a new high school in the same school system, Pruitt engaged in sexual intercourse with one of the student victims. The very next month, Pruitt engaged in deviant sexual intercourse with another student victim and sent yet another student victim nude photographs of her breasts and vagina. Pruitt waited only a couple of months after she was transferred to a different school before she engaged in sexual conduct with another student victim. At the very least, the timing of her conduct evidences an attempt to circumvent a legitimate state interest that Pruitt concedes on appeal, namely, that the State has 'a legitimate interest in criminalizing sexual contact between teachers and students of the same school' (quoting from her brief on appeal). The State's interest in protecting students, however, does not end when the student or teacher transfers to another school, particularly one in the same school system, as in this case." The court also upheld her conviction for sending the nude pictures to one of the students, under a provision making it a crime for "any person to knowingly or recklessly distribute to a minor . . . any material which is harmful to minors." Although the student testified that he was not harmed by receiving the pictures, the court deemed that irrelevant.

ALABAMA – Another *pro se* plaintiff bites the dust, at least in part, as U.S. District Judge Callie V. S. Granade has adopted as the court's opinion a recommendation by U.S. Magistrate Judge P. Bradley Murray to grant the state's motion to dismiss a complaint filed by a gay man living with HIV seeking compensation for the bullying he suffered during 1993-2001 as a public school student in the Mobile County school system, and the alleged denial of prescribed medication for his HIV infection for 27 days during a 30-day incarceration in the Mobile County Metro Jail. *Fick v. State of Alabama and Mobile County Public School System*, 2018 WL 2210440, 2018 U.S. Dist. LEXIS 70657 (S.D. Ala., April 25, 2018) (Magistrate's Report and Recommendation), 2018 U.S. Dist. LEXIS 80688 (S.D. Ala., May 14, 2018) (District Court Order adopting Magistrate's Recommendation and granting State's motion to dismiss). The complaint also named the school system as co-defendant, and it is unclear whether the school system also filed a motion to dismiss, or whether the case continues against it for now. Neither opinion mentions whether the dismissal order also extends to the claims against the school system. Daniel Fick's original complaint, which lacked various essential elements, was supplanted by an amended complaint filed on January 18, 2018, which identifies three federal statutes on which he bases his claim, and sets out in brief summary detail two accounts of being bullied, the claim that his doctor diagnosing him "with AIDS" at age 23 told him he "contracted the virus approximately during ages of 15-17" while a student in the Mobile County schools, and the claim of a long delay while in the county jail in getting his HIV medications. The state's motion to dismiss raises 11th Amendment immunity and failure to state a claim, and pointedly notes that the complaint falls far short of the specificity required by federal pleading standards, asserting that it "is nothing more than a recitation of events that allegedly occurred while Plaintiff was enrolled in the Mobile County School System, attributed to no one." (Fick did not name either his assailants or the teachers and administrations whose response to the situation he decries.) Magistrate Murray rejected the state's immunity claim, but found the complaint defective. The complaint cited statutes that do not apply to the situations described by the plaintiff, and no mention is made of Title IX of the Education Amendments Act of 1972, which would be the relevant statute to seek liability from the school system for anti-gay bullying. In his response to the state's motion to dismiss, Fick invoked the 14th Amendment, arguing the state should not enjoy immunity against equal protection claims, including his argument that the state's "Model Anti-Harassment Policy did not, and still does not, protect students from harassment due to sexual-orientation." One wonders what competent counsel might have come up with as a complaint against the state here? Suing a state for failing to include sexual-orientation as a prohibited grounds of harassment strikes us as a non-starter. It will be interesting to see whether there is a motion to dismiss by the Mobile School system, which is represented in this case by a local law firm. One suspects that the bullying events at school occurring during 1993-2001 cannot be made the subject of a current lawsuit, as stale claims. In any event, plaintiff demanded $3,000,000.00 in damages . . .

ARIZONA – The Arizona Court of Appeals rejected what might be called a reverse discrimination claim brought by a heterosexual state employee in *Loncar v. Ducey*, 2018 WL 2316000, 2018 Ariz. App. LEXIS 82 (Ariz. Ct. App., May 22, 2018). Renee Loncar and her male domestic partner, Christopher Kutcher, lived together for several decades but did not marry. They had two children together and shared income and expenses. Loncar was hired into a state job in 2006. In 2008, the state enacted rules giving certain benefits to dependent domestic partners of state employees, regardless of sex or sexual orientation. Loncar identified her partner as a dependent to get state benefits, including life insurance. In 2010, the legislature enacted a statutory provision defining 'dependent' to mean "a spouse under the laws of this state," thus disqualifying Loncar's domestic partner as well as same-sex partners of state employees. The move resulted

in cancellation of insurance coverage for many same-sex partners of state employees, leading Lambda Legal to file suit on their behalf. In that case, the federal district court enjoined the state from enforcing the statutory provision to eliminate family insurance eligibility for "lesbian and gay state employees and their domestic partners," ordering the state to "make available family health insurance coverage for lesbian and gay State employees . . . to the same extent such benefits are made available to married State employees." *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010). The 9th Circuit affirmed, 656 F.3d 1008 (9th Cir. 2011), and the Supreme Court denied certiorari, 133 S. Ct. 2774 (2013). "Thus," writes Arizona Appeals Court Judge James Beene, "as of July 2010, same-sex domestic partners were eligible to be dependents for the purposes of state employee benefits, but unmarried opposite-sex domestic partners were not." On June 7, 2014, Loncar's partner died in an auto accident. Because she was not his "dependent" under state law, he did not have state life insurance coverage, so she received no death benefit. When a federal district court ruled later in 2014 that same-sex couples were entitled to marry and the state decided not to appeal to the 9th Circuit, the district court in *Collins* dissolved its injunction, and spousal benefits became available to same-sex couples only if they married. Loncar filed her complaint on April 21, 2016, alleging sex discrimination, seeking a declaration that for the time it was in effect (which covers the date of her partner's death while she was a state employee), the provision of insurance to unmarried same-sex partners but not unmarried different-sex partners under the *Collins* injunction was unconstitutionally discriminatory, and she was entitled to a death benefit from the loss of her partner. The State moved to dismiss, arguing that the statutory definition of dependent "did not confer any privilege on unmarried same-sex couples that it withheld from unmarried heterosexual couples." The Superior Court dismissed her complaint, finding that "sex refers only to membership in a class delineated by gender, and not to sexual orientation," that as Loncar's counsel conceded at oral argument, "sexual orientation is not expressly included in the constitutionally protected class," and that because she did not fall within a protected class, she could not bring a claim for "preferential treatment or discrimination based on sexual orientation." Finding that the state had a reasonable basis for providing benefits for unmarried same-sex couples who were prohibited from marrying at the time, the court insisted Loncar was not "similarly situated" because there was no legal impediment to her marrying her longtime male partner. The court of appeals provided a *de novo* review. It found, as had the trial court, that this case was governed by the rational basis test, and that "the State's extension of benefits to same-sex couples was reasonable and rationally related to a legitimate government purpose," responding to the district court's order in *Collins* which the state had attempted without success to reversed on appeal. Loncar argued on appeal for heightened scrutiny, claiming to be the victim of sex discrimination, but the court demurred, Judge Beene writing that "the State's action was not based on Loncar's biological designation as a female, but on her marriage eligibility as a heterosexual couple. It is undisputed that sexual orientation is not a suspect class and employee benefits do not involve a fundamental right. Therefore we evaluate the State's action applying rational basis review." Loncar also cited *Obergefell* to support her argument that if there is a fundamental right to marry, then there is also a fundamental right not to marry, but the court was not persuaded. The court also rejected a similar claim under the state constitution. Co-counsel for Loncar are Joel B. Robbins of Robbins & Curtin, PLLC, Phoenix, and David L. Abney of Ahwatukee Legal Office, PC, Phoenix.

CALIFORNIA – *San Francisco Chronicle* (May 9) reported that San Francisco Superior Court Judge Harold Kahn issued a ruling that the city is covered by state anti-discrimination laws in public accommodations, refusing to dismiss a suit by Tanesh Nutall, a transgender woman who claims to have suffered discrimination when she attempted to use a public restroom on city property. She said that a woman who worked for the city's Department of Police Accountability told her she was not allowed to use the women's restroom and called her a "fucking man" and a "fucking freak." The city, while not conceding the accuracy of Nutall's factual allegations, asserted that the state's public accommodation law did not apply to a city office building, which was not a business selling goods and services to the public. Refusing to dismiss the lawsuit, Judge Kahn said that allegations in the complaint, if true, would show that "the city was conducting itself as a business establishment" as defined in the Unruh Act. Nutall also has a suit pending against the city in federal court.

CALIFORNIA – This one is a discovery dispute arising from an HIV-related disability discrimination claim. *Lira v. Chipotle Mexican Grill*, 2018 WL 2128707 (N.D. Cal., May 9, 2018). The opinion does not specify whether this is a federal question case under the Americans with Disabilities Act or the Family and Medical Leave Act, or a diversity case under the California Fair Employment and Housing Act or other state laws. U.S. Magistrate Judge Kandis A. Westmore was ruling on defendants' broad-ranging subpoena of two of plaintiff's medical providers for all documents from January 1, 2008 to the present relating to plaintiff's

"medical records, psychiatric records, psychological records, billings, prescription and insurance records." Plaintiff Juan Lira began working for the defendant restaurant in January 2008. In February 2012 he was diagnosed HIV-positive and began suffering various complications, including fatigue, severe headaches, nausea, vomiting, muscle aches, joint pain, diarrhea and insomnia. His doctor gave him a hand-written note for a medical leave of absence, which he presented to his store manage on February 18. The store manager gave the note to the corporate defendant's general manager, Evange DeKaristo, who told Lira it was "insufficient" because it was hand-written rather than typed, and that Lira had to present a "more professional doctor's note." Lira asked for return of the handwritten note, but DeKaristo said he had already torn it up. On February 21, Lira provided the typed note. "Mr. DeKaristo questioned Plaintiff about his disability, demanding to know his diagnosis and the nature of his disability. Plaintiff, however, refused to disclose his HIV status." Plaintiff's doctor originally authorized a leave to March 30, but extended this several times "due to the persistence of Plaintiff's symptoms." For each extension Lira presented written confirmation to the employer. On January 14, 2013, Lira spoke to DeKaristo about coming back to work when his most recent leave expired January 18. DeKaristo told him that he had already been terminated, and he filed his discrimination claim. Plaintiff sought to have the court narrow the defendants' discovery demand. He admitted that defendants are "entitled to the medical records pertaining to Plaintiff's disability, HIV, and his related symptoms," but not anything beyond that. "The Court agrees," wrote Judge Westmore. Defendants argued that by putting his medical condition at issue, Lira had waived any privilege regarding his medical records. Westmore agreed with that in general, but pointed out that there is also a test of relevance for discoverable medical records. "In the instant case," she wrote, "this is not a situation where the details of Plaintiff's medical condition are truly at issue; rather, Plaintiff's case is premised on his having a disability, informing Defendants of his need for medical leave based on that disability, and then being terminated nevertheless. Thus, anything outside of this set of facts has no apparent relation to this case, such as Plaintiff's medical records *prior* to his diagnosis of HIV." She asserted that defendants had not explained the need for "any records other than those related to Plaintiff's HIV diagnosis and related symptoms," including failing to justify any need for billings, prescriptions, and insurance records that are unrelated to the HIV diagnosis and symptoms. As to mental health records, Westmore noted that discoverability of such records is not automatic when the plaintiff seeks damages for emotional distress incident to a disability-related discharge, as in this case. Because the complaint does not "allege a specific mental or psychiatric injury or disorder," but rather is just a "garden variety" emotional distress claim, there is no basis to compel production of the plaintiff's mental health records. Thus, wrote Westmore, "The Court will permit discovery of medical records pertaining to Plaintiff's HIV diagnosis and related symptoms only."

CALIFORNIA – The *San Francisco Chronicle* (April 24) reported on a ruling by San Francisco Superior Court Judge Richard Ulmer, denying a motion by the San Francisco Deputy Sheriff's Association to block a new policy that allows transgender inmates in the city's jail to choose the sex of a deputy who conduct a jailhouse strip search. It is called the Transgender, Gender Variant and Non-Binary (TGN) Policy. The Association claims that the policy would violate the privacy of transgender deputies who don't match the gender identity of the inmate who selected them. The newspaper report described this new policy as "the first law enforcement policy in the nation to take account of gender identity during visual body cavity searches, known colloquially as strip searches." The judge did not dismiss the lawsuit, however. Ken Lomba, president of the Association, says that the organization represents many LGBT members, some of whom have not publicly disclosed their gender identity. "One of our members' immediate concerns was the policy requires deputies to be of the same gender identity as the inmates they are searching," he said. "The way the policy is written, they could be forced to out their gender identity." Sheriff Vicki Hennessey stated that the deputy sheriff's association was one of many groups consulted as the policy was being devised. "Our TGN policy is about respecting TGN individuals, making them feel safe and facilitating their participating in county jail rehabilitation programs," said Hennessey, who said fewer than 1% of the jail population is TGN. The new policies also make housing assignments based on an inmate's preferences, mental health, history of behavioral problems, criminal sophistication and gang affiliation, and provides gender awareness training for sheriff's deputies and civilian employees.

HAWAII – Bloomberg Law's *Daily Labor Report* reported May 30 on a settlement in *EEOC v. Discover Hidden Hawaii Tours, Inc.*, Case No. 1:17-cv-00067 (D. Hawaii), consent decree signed May 30, in which the EEOC alleged that three commonly owned tourism companies violated Title VII on charges of systemic sexual harassment brought by 18 male former employees, who claimed that the owner of the businesses, Leo Malagon, had beginning in 2006 subjected them to quid pro quo sexual harassment, unwanted touching, display

of pornographic materials, coercive sexual behavior, and lewd conversation topics. Under the settlement, Malagon agrees to relinquish ownership of the three companies sued by EEOC, and to have no input in their day to day operations. The companies will pay a total of $570,000 to settle claims of the 18 complainants. EEOC Regional Attorney Anna Park, announcing the settlement, stated: "This settlement sends an unequivocal message that accountability is required regardless of who the alleged harasser is, and no one is above the law under Title VII." The article reports that "redressing systemic harassment is one of the EEOC's six national strategic priorities."

IDAHO – The *Idaho Press-Tribune* (May 20) reported that the state's "top elected officials have approved a $75,000 payout to attorneys who successfully represented two transgender women born in Idaho who sued to overturn the state's law forbidding any changes to the gender listed on a person's birth certificate." The federal district court ruled against the state in the case in March, finding an equal protection violation, and new state rules allowing changes on birth certificates went into effect April 6. Lambda Legal and local counsel from Cockerille Law Office of Boise represented the plaintiffs in the case, in which U.S. Magistrate Judge Candy Dale found that the state's rule exposed transgender people to "harassment and embarrassment."

ILLINOIS – U.S. Bankruptcy Judge Deborah L. Thorne ruled in *In re Porsha Simmons and Linda Nova*, 2018 WL 2271000 (U.S. Bankruptcy Ct., N.D. Ill, Eastern Div., May 17, 2018), that a lesbian couple who entered into a civil union in Illinois but who had not subsequently "upgraded" their status to legal marriage after Illinois began allowing same-sex couples to marry by passage of a marriage equality statute in response to the Supreme Court's *Windsor* decision, should be deemed "spouses" who can file a joint bankruptcy petition. 11 U.S.C. Sec. 302(a) provides: "A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse." The Bankruptcy Code does not contain its own definition of "spouse," and the general definition for purposes of federal law adopted by Congress in Section 3 of the Defense of Marriage Act was, of course, declared unconstitutional by the Supreme Court in *United States v. Windsor*, 570 U.S. 744 (2013). Thus, when Simmons and Nova filed their joint bankruptcy petition under chapter 13 on February 5, 2018, there was no express federal definition of "spouse" in effect. A chapter 13 trustee for the Northern District of Illinois, Marilyn Marshall, moved to dismiss the joint petition on the ground that the couple did not have a marriage certificate, just a civil union certificate. "The status of two individuals joined in a civil union under the Illinois Religious Freedom Protection and Civil Union Act" was found by Judge Thorne to be "substantively identical under Illinois law to the status of two individuals joined in a marriage under the Illinois Marriage and Dissolution of Marriage Act. For that reason," she continued, "the court concludes that the substantive nature of the Debtors' status under Illinois law vis-à-vis one another means that they are substantively, if not formally, in a state of marriage with one another under Illinois law, and therefore both are each other's spouses under the Bankruptcy Code." She rejected precedents from other states, most notably California, where there were court decisions delineating the difference between marriages and civil unions, finding them not relevant due to the peculiar nature of the Illinois law establishing civil unions. "Whether or not two persons are in a state of marriage with one another such that they are spouses of one another under federal bankruptcy law depends on the substance of those individuals' status vis-à-vis one another under relevant state law," wrote Judge Thorne. "State law labels and classifications are not controlling in and of themselves; thus, the fact that Illinois law might term two individuals joined in a marriage under the Illinois Marriage and Dissolution of Marriage Act 'spouses' while calling two individuals joined in a civil union 'parties to a civil union' does not conclusively determine the federal question as to who exactly may be a 'spouse' under the Bankruptcy Code." In a footnote, she added: "Even if it did conclusively determine the federal question, it is unclear whether the labels under Illinois law are even different at all in light of statutory language *expressly* equating 'party to a civil union' with 'spouse' as that term is 'used throughout the law.' See 750 Ill. Comp. Stat. 75/10." Thus, she concluded, the debtors in this case having presented a Certificate of Civil Union from Illinois, they were entitled to file a joint bankruptcy petition under chapter 13.

INDIANA – Granting summary judgment to the employer in *Pierce v. Fort Wayne Healthcare Group, LLC*, 2018 WL 2270287, 2018 U.S. Dist. LEXIS 81433 (N.D. Ind., May 15, 2018), Chief U.S. District Judge Theresa L. Springman found that there was no evidence in the summary judgment record that the company official who determined to terminate the plaintiff, a nurse assistant, during her probationary period knew at the time she signed the termination paper that the plaintiff had tested positive for HIV and was awaiting a confirmatory test. The employer, a health and rehabilitation center, had an attendance policy that provided that three absences during an employee's 90

day probationary period would result in termination unless they were for bereavement, jury duty, or Family and Medical Leave Act leave. It also had a policy that an employee scheduled for a shift who failed to show up without calling the facility in advanced would be treated as terminating herself. The employer stressed that the importance of unbroken coverage to provide service to the patients of the facility, so the attendance policy made sense; if an employee failed to show up without notice for a scheduled shift, the employer would be scrambling to arrange for coverage of the patients the employee was supposed to serve. Plaintiff was scheduled to work on March 29, 2016, but before her shift she received a call from a laboratory that some plasma she had donated had tested positive for HIV and that she should come to the lab for more information. The lab referred her to her own physician for follow-up. "Shaken by the news, the Plaintiff called the Defendant and spoke with the scheduler to say she would not be working her shift." This was counted as her first absence. Two or three weeks later, she told her supervisor and the Administrator, Fred Taylor, that she might be infected with HIV and was awaiting a confirmatory test. The Administrator assured her that this would not cause her to lose her job and that good treatments for HIV infection were available. She was scheduled to work the weekend of May 13 (Friday) through 15 (Sunday). She had previously requested to be off May 14 because she had to move, but the request had been denied. She reported for the Friday shift but felt unwell, and her supervisor sent her home at 2 a.m. She called the following morning and spoke with a first shift nurse to communicate that she was sick and planned to visit a walk-in-clinic and would not work her night shift on May 14. She was told to submit a doctor's note. The clinic diagnosed her with strep throat and she received a doctor's note stating she should be excused from work that day – May 14. She called the nurse back to relay her diagnosis and claims she brought in the note as requested. The employer has no record of receiving the note until it received a fax on May 18, after plaintiff was terminated. Plaintiff did not come to work on May 15, and did not call to report her absence. The Director of Nursing, Rachel Shaffer, and her assistant director, decided to terminate the plaintiff under the attendance policy, and the termination papers were signed on May 16, when the assistant director called plaintiff and told her she had been terminated. The plaintiff disputed the termination, stating her absences for May 14 and 15 should be excused since she was under a doctor's care. She came to the facility to speak with Taylor, the Administrator, who arranged for her to meet with Director Shaffer on May 18. During that conversation, Shaffer first learned that the plaintiff might be HIV positive. According to plaintiff, Shaffer refused to reconsider the termination and stated that the plaintiff "should not be working in health care with her medical issue." The plaintiff sued for disability discrimination (Americans with Disabilities Act) and race discrimination (Title VII). The court granted summary judgment to the employer on both counts. Regardless of Shaffer's statements on May 18, the court found that the decision to terminate plaintiff was made on May 16, by a management official who was not aware that plaintiff might be HIV-positive, and plaintiff's failure to comply with the attendance policy during probation was well documented. The court rejected as insufficient plaintiff's speculation that Taylor (who had promised to keep the HIV information confidential) had told Shaffer about plaintiff's possible HIV infection, finding that Taylor's co-signing the termination paper with Shaffer was not evidence of such a breach of confidentiality. The court also found no factual allegations to ground a race discrimination claim in this case. The plaintiff is represented by Christopher C Myers, Ilene M Smith, Jennifer L Hitchcock, and Lori W Jansen, of Christopher C Myers & Associates, Fort Wayne, IN.

MICHIGAN – Another decision in the Andrew Shirvell case. Shirvell is a former lawyer for the state whose 2017 disbarment was affirmed on May 8 by the Michigan Attorney Disciplinary Board. He was dismissed by the state's attorney general in 2010 after it was revealed that he had carried on a vendetta against out gay University of Michigan student body president Chris Armstrong, including stalking and derogatory and defamatory statements on a website Shirvell maintained using an office computer. Shirvell argued that he was engaged in protected 1st Amendment activity, but the Disciplinary Board disagreed, according to a brief *Associated Press* report published on May 9. Shirvell has also been on the losing end of litigation, in which a jury ordered him to pay $4.5 million in compensatory and punitive damages to Armstrong.

MISSISSIPPI – The City of Starkville settled a lawsuit that arose over the city council's vote against allowing a pride march, which was later rescinded as a result of the lawsuit being filed. The *Associated Press* (May 25) reports that the city has agreed to pay attorneys' fees and issue a proclamation of support for LGBT rights in order to settle the case. The city will pay $12,750, which includes fees for the lawyers that represented Starkville Pride in its suit to get a permit for the march.

MISSISSIPPI – Should people convicted of sodomy in Louisiana prior to *Lawrence v. Texas* be required to continue to comply with sex offender registration requirements in their current state of residency, Mississippi?

CIVIL LITIGATION *notes*

On May 10, U.S. District Judge Carlton Reeves signed a partial settlement order in *Doe v. Hood*, Civil Case No. 3:16-cv-789 CWR-FKB (S.D. Miss.), applying to people convicted in Louisiana who were to be removed from that state's sex offender registry by federal court order after the state amended its law to stop adding such people in 2011. Mississippi, however, continued to apply its registration requirement to those people, even though the U.S. Supreme Court ruled in 2003 that the state cannot criminalize private consensual anal and oral sex between adults. These people will be removed from the Mississippi registry.

NEW JERSEY – In a long-running employment discrimination case, a gay man who was terminated almost ten years ago as a Rite Aid store manager will get another shot at a jury trial after having his prior victory set aside by the trial judge. *Hansen v. Rite Aid Corporation*, 2018 WL 2027137, 2018 N.J. Super. Unpub. LEXIS 1032 (N.J. App. Div., May 2, 2018) (*per curiam*). Harold Hansen appealed from a judgment in the Monmouth County Superior Court dismissing his complaint after the first trial in this ten-year-old case resulted in a no-cause verdict against him. The Appellate Division vacated the verdict and remanded for a new trial, as it disagreed with the trial judge's decision to bar plaintiff's disparate treatment evidence concerning a non-gay manager who was not terminated under arguably similar circumstances. There was a new trial in 2017 which resulted in a verdict in favor of Hansen on his sexual orientation discrimination claim under the NJ Law Against Discrimination, but the trial judge granted a post-trial motion by the defendants and declared a mistrial *sua sponte*, having determined that he had failed to give an appropriate charge for the jury to evaluate the disparate treatment evidence – specifically on how to determine whether two people who received different treatment by the employer were sufficiently similar to be comparators for purposes of determining disparate treatment. The trial judge also issued an order that on a further trial, the plaintiff was barred from presenting his disparate treatment evidence. Hansen appealed again. In this latest decision, the Appellate Division decides that it was appropriate for the trial court to declare a mistrial, but not appropriate to bar evidence of disparate treatment on retrial. Hansen was a store manager, discharged for failing to properly implement the company's loss protection policies. He sought to show that the non-gay pharmacy manager in his store had been similarly lax with regard to loss protection but was not terminated. The question was whether the two positions were sufficiently similar to serve as comparators and to support a contention of disparate treatment because of the plaintiff's sexual orientation. The Appellate Division agreed that the trial judge's instructions had been deficient in this regard at the last trial, but disagreed that with the notion that the two managers were so obviously dissimilar that plaintiff should be barred on the new trial from pursuing his disparate treatment proof. The solution is to give better instructions. The court found that there is no bright-line test governing this kind of analysis, as it is very fact sensitive, but that does not make it impossible to fashion appropriate instructions for the jury and plaintiff should be able to attempt to prove that there was sufficient job similarity for the different disciplinary treatment to be relevant as evidence going to the motivation for his termination. Plaintiff is represented by Denise Campbell.

NEW YORK – Pity the *pro se* plaintiff. Reading decisions responding to motions to dismiss *pro se* civil rights complaints is quite frustrating, because a plaintiff without knowledge of the law may be grasping at straws, relying on the common ignorance of the community, failing to surmount procedural barriers or misunderstanding the nature of various causes of action. But sometimes, perhaps just by getting lucky, the *pro se* plaintiff manages to include in a scatter-shot complaint a few viable causes of action. Such is the case in *Artemov v. Ramos*, 2018 U.S. Dist. LEXIS 77556, 2018 WL 2121595 (E.D.N.Y., May 8, 2018). U.S. District Judge Pamela K. Chen was dealing with a motion to dismiss a *pro se* action brought by Dmitry Artemov, a transgender woman, proceeding *in forma pauperis* by permission of the court. According to the opinion, plaintiff alleged that "on January 18, 2018, she brought her bicycle to the CVS pharmacy at 1346 Pennsylvania Avenue in Starrett City at approximately 2:55 p.m. and parked it near the shopping carts. Defendant [Luise] Ramos" – a public safety officer employed by the Starrett City Department of Public Safety – "observed Plaintiff, and blocked the entrance to the pharmacy with his patrol car, seized plaintiff's bicycle 'by placing a heavy steel shopping cart above the bicycle, stopped plaintiff, and detained plaintiff for a period of time.' Plaintiff alleges that Ramos had no probable cause or basis for stopping her, and that he discriminated against her because she is a transgender woman. In response to her inquiry as to why he was stopping her, Ramos, who had known Plaintiff as a transgender woman since 2012, said to her: 'You are not a human.'" How cruel!!! "Plaintiff alleges that Defendants 'obstructed access to public accommodation, detained, harassed and abused' her. She seeks damages for violations of her constitutional rights, state law, and the NY City Human Rights Law." She sued Ramos, Starrett city, and the Starrett City Department of Public Safety, seeking to establish liability under 42 USC Section 1985, Section 1988, Section 1983, Title VII of the

Civil Rights Act of 1964, and the NYC Human Rights Law, which expressly forbids discrimination in places of public accommodations because of gender identity. In the end, Judge Chen found that 1988 (civil rights attorney fee) provision non-actionable, pointing out as a practical matter that Artemov has no attorneys' fees to deal with as a *pro se* litigation, dismissed the 1985 claim because there were no factual allegations of any conspiracy to violate Artemov's civil rights, and dismissed the 1983 claims against Starrett City and its Public Safety Department for failure to allege a formal policy of discrimination, there being no *respondeat superior* liability by municipal actors for the torts of their employees. Of course Title VII has nothing to do with this case, since Artymov is not an employee of Starrett City and that statue deals with employment discrimination. Although Starrett City and its Public Safety Department are not government agencies, the court found that a private corporation operating a private police force is subject to potential municipal liability under 1983, and its employees thus may be subject to constitutional liability under 1981 on the same basis as state actors. In this case, that left Mr. Ramos as a 1983 defendant for deprivation of constitutional rights, and of course under the court's supplemental jurisdiction under the city human rights law. Thus, the action continues against him under 1983 and against all defendants under the city law. The court referred the matter to a magistrate judge to supervise pretrial discovery and motions. And the *pro se* transgender plaintiff survived dismissal on several of her claims. The court necessarily assumed the truth of plaintiff's allegations for purposes of deciding the motion to dismiss.

NORTH CAROLINA – U.S. District Judge Thomas D. Schroeder, ruling on a motion to dismiss, sharply whittled down the claims in an Americans with Disabilities Act (ADA) lawsuit by an HIV-positive man, who had filed a charge with the EEOC that did not go into all of the specific claims asserted in his subsequent lawsuit. *Thiessen v. Stewart-Haas Racing, LLC*, 2018 WL 2440686, 2018 U.S. Dist. LEXIS 90317 (M.D. N.C., May 30, 2018). Andrew Thiessen was employed as a "tear down technician" by Stewart-Hass, which "operates a number of professional racing teams (primarily in NASCAR)." He was employed from January 13, 2013, until he was discharged January 31, 2017. He learned that he was HIV-positive in November of 2015, and told the company's Human Resources director, who kept the information confidential but told Thiessen "to be careful in his work" to avoid exposing his blood to co-workers. The next month he requested a transfer to a different department. The HR director told him he would need a new version of his resume to be transferred; he never sent the updated resume, and was not transferred. Plaintiff alleges that the company provided safety training to workers, including information on blood borne pathogens, but did not specifically cover HIV and AIDS or how they could be communicated, as a result of which, he alleges, some of his co-workers "were uninformed on the ways HIV can be transferred to others." He confided about his HIV diagnosis to a co-worker in July 2016; obviously, a big mistake, since by late in the year "it had become 'common knowledge' among employees that Thiessen was HIV positive. Co-workers became afraid to work with him, for fear of being infected with HIV. At some point in 2016, some of Thiessen's co-workers went to the physician on staff and requested HIV tests to confirm that they had not contracted HIV." Thiessen sought a transfer to a different race team in December 2016, but was turned down on grounds that did not seem plausible to him. He was terminated on January 31 for "creating an unsafe working environment for others" due to his HIV infection and claims that he had "exposed other employees to blood borne pathogens in their workplace." Management had photographic evidence that he had "dropped blood in his work area and failed to clean it up." Thiessen disputes this allegation, and points out that prior to his termination, his job performance "always met or exceeded Stewart-Haas's employment standards" and that he received no formal warnings or any discipline, so he claimed his termination violated the company's progressive discipline policy. He filed a charge with the EEOC reciting the facts of his termination. He checked the box on the EEOC intake form for discrimination because of a disability, but did not check the box for retaliation claims. After the EEOC issued a right to sue letter, he filed suit. Presumably his counsel, Todd J. Combs of Mooresville, NC, was retained to file the lawsuit. One suspects attorney Combs was not involved in the framing of the charge filed with the EEOC. The lawsuit alleges failure to accommodate his disability, failure to promote, retaliation, and wrongful discharge. The company moved to dismiss all the claims. Judge Schroeder agreed with the company that several of the claims should be discharged for failure to exhaust remedies, based on a strict reading of the EEOC charge form. He found that failure to check the retaliation box on the form or to mention retaliation in the narrative of the charge meant failure to exhaust on that claim. Further, he noted the company's response to the EEOC charge that Thiessen had never requested an accommodation, and decided that the failure to accommodate claim also had not been exhausted administratively, since this it was not mentioned in the EEOC charge form narrative. Furthermore, the failure to promote and the denial of transfers were not mentioned in the EEOC charge form, either. Although some courts

have taken a lenient view and found exhaustion with respect to any facet of a discrimination case that would logically arise out of the investigation of the charge, Judge Schroeder took a strict approach, finding that because the charge form narrative focused solely on the wrongful discharge claim, that was the only claim that could be litigated. However, he dismissed the other claims without prejudice, on the ground that failure to exhaust was jurisdictional and "a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits."

OREGON – As a hearing was to be convened to deal with allegations of sexual orientation discrimination in the North Bend public schools, a settlement was reached between the North Bend School District and student complainants, who were represented by the ACLU of Oregon. Under terms of the settlement, the homophobic high school principal will be dismissed and the district commits to improving the climate for LGBTQ students. The students were not seeking damages, but agreed to dismiss their complaints on condition the District also make a $1,000 gift to a local gay support group, Q&A of Coos County. *Canadian Press*, May 22.

PENNSYLVANIA – The Trump Administration may take the position that federal laws banning sex discrimination do not apply to gender identity claims, but there is a growing body of federal case law to the contrary. Add to that list *Brown v. Matrix Property Management Co.*, 2018 U.S. Dist. LEXIS 80051, 2018 WL 888996 (W.D. Pa., May 10, 2018), in which Chief U.S. Magistrate Judge Maureen P. Kelly recommended denial of a motion to dismiss for failure to state a claim in such a case. Dealing with the *pro se* plaintiff's third amended complaint, Judge Kelly found that the plaintiff had presented "sufficient allegations to establish a plausible claim of unlawful housing discrimination," despite dismissal of the original and first amended complaints he had filed. "Plaintiff began renting the subject property in May 2012, and he was evicted therefrom on July 13, 2015," wrote Kelly. "Plaintiff had a valid lease for the subject property. Plaintiff was evicted by Shane McNeese, the manager for Matrix, who informed Plaintiff that information obtained from Plaintiff's ex-roommate that Plaintiff was transgender was the basis for the eviction because Defendant's owner, Mark Haak, did not want Plaintiff's 'kind' in his building. These allegations satisfy the majority of the shortcomings identified by Defendant. The remaining alleged deficit, i.e., the details of the precise manner of the eviction, is not necessary to establish a plausible claim for housing discrimination." Judge Kelly also rejected a *res judicata* argument by defendant, premised on the Pennsylvania Human Relations Commission having determined "no probable cause" on a similar complaint filed under the state's anti-discrimination law. Kelly dismissed this as not being the product of adjudication. It is also noteworthy, of course, that the Pennsylvania statute does not expressly cover gender identity discrimination. On the other hand, a growing body of case law (none cited by Judge Kelly, unfortunately) accepts the argument that gender identity discrimination is covered by federal sex discrimination laws, a position embraced by the Department of Housing and Urban Development during the Obama Administration.

TEXAS – Stacy Bailey, an out lesbian elementary school art teacher, has filed a federal lawsuit against the Mansfield Independent School District and two school officials, alleging that she is the victim of unlawful discrimination because of her sexual orientation. According to an article about the lawsuit published on May 10 in the *New York Times*, Ms. Bailey was suspended when parents complained that she had mentioned to her fourth grade art students the existence of her same-sex partner and their plans to marry (which is, of course, legal in Texas under the *Obergefell* and *DeLeon* decisions) and thus was "promoting a homosexual agenda" in the classroom. Bailey also mentioned to her class that the artist Jasper Johns, whose paintings they were discussing, was the partner of Robert Rauschenberg, an artist whom they had previously studied. Bailey was contacted by assistant superintendent Kimberly Cantu, a named defendant in the case, who told her that a parent had claimed that Bailey had shown the children "sexually inappropriate" images. Other parents subsequently complained as well, "recruited" by the first one, according to Bailey's complaint. She was placed on paid administrative leave and instructed by the district not to speak about the case or attend events at the school, so the Times' sourcing for the story included speaking with Bailey's partner but not with her. Bailey's complaint alleges that she was asked to resign in October, but had refused. The school district released a statement denying sexual orientation discrimination, stating that "there has never been an issue with her sexual orientation until this year. That's when her actions in the classroom changed, which prompted her students to voice concerns to their parents." The district says the issue is whether Bailey failed to follow district guidelines that require "controversial subjects be taught in 'an impartial and objective manner.' Teachers shall not use the classroom to transmit personal belief regarding political or sectarian issues." Her lawyer, Jason Smith, and her wife held a press conference about the lawsuit on May 8 at which Bailey was present but did not speak. Smith said that Bailey is seeking a jury trial, reinstatement, and possible

damages. Smith insisted that Bailey had "used age-appropriate terms" in class. "She never used the term 'gay' or 'lesbian.' She used the term, 'this is my future wife.' She never talked about sex or anything inappropriate." Her wife said that they had been together since 2011 and were married in March, adding, "The whole situation is just a little mind-boggling. The bottom line is that our family has a right to talk about our family just the same as any other family."

VIRGINIA – Lambda Legal and Outserve-SLDN are collaborating on lawsuits filed on behalf of two HIV-positive men challenging the Defense Department's continuing discrimination denying service opportunities to people living with HIV. Despite current treatment modalities which make it possible for HIV-positive individuals to maintain their health and physical and mental ability to serve in the military, the Defense Department refuses to enlist HIV-positive people, to sideline those diagnosed while in the service from promotions and desirable assignments, and to discharge them on "deployability" grounds. One of the plaintiffs is a sergeant in the D.C. Army National Guard, Nicholas Harrison, who has been denied promotion and faces possible discharge simply because he is HIV-positive. The other plaintiff, suing anonymously as John Voe, claims he was discharged by the Air Force solely because he is living with HIV, despite being found medically fit for duty since his diagnosis. The lawsuits are prompted by a new policy announced by the Defense Department on February 14, 2018, "Deploy or Get Out," which directs the Pentagon to identify service members who cannot be deployed to military posts outside the U.S. for more than 12 consecutive months and to discharge them from the service. Current U.S. military policy identifies service members living with HIV as non-deployable outside the U.S., so they would face discharge under this policy. The policy is based on outdated medical information and mythology about the capabilities of people living with HIV. The cases are *Harrison and Outservv-SLDN, Inc. v. Mattis* and *Voe v. Mattis*. The policy appears to be conceptually related to the Defense Department's purported justification for denying service opportunities to transgender individuals, based on similarly unjustified arguments that deployability problems associated with gender transition make transgender people unfit for service.

WASHINGTON – Here's the latest on *Karnoski v. Trump*, a legal challenge to the president's attempt to ban military service by transgender people through policy memoranda. On May 30, District Judge Marsha J. Pechman issued a new opinion responding to a renewed motion by the government to stay her nationwide preliminary injunction. The injunction was issued on December 11, 2017, and reaffirmed by the court on April 13, 2018, when it granted partial summary judgment for the plaintiffs and concluded that an evidentiary hearing would be needed to resolve disputed material facts prior to reaching a final ruling on the merits. On April 30, the government filed a Notice of Appeal to the Ninth Circuit, and a motion to stay the preliminary injunction pending the appeal. The government also filed a motion seeking a stay in the 9th Circuit, which had not ruled on the motion by May 30. Judge Pechman pointed out that it is "well-settled that the filing of a notice of appeal general 'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Finding that the government's motion "addresses issues which are not only involved in the appeal but are 'inextricably bound up' with this Court's preliminary injunction," wrote the judge, the court ordered the parties to "show cause why Defendants' Motion to Stay the Preliminary Injunction should not be renoted until after the Ninth Circuit enters a ruling or otherwise disposes of the appeal. The judge gave the parties 7 days to respond. The Justice Department is like the energizer bunny on this. So long as there is a glimmer of hope, it will keep filing motions to stay the preliminary injunction until it is finally turned into a plain old regular injunction, at which point it will seek to stay that pending appeal. *Karnoski v. Trump*, 2018 U.S. Dist. LEXIS 90248 (W.D.Wash., May 30, 2018).

WISCONSIN – If a person of unspecified sexual orientation is subjected by a supervisor to verbal harassment of a homophobic nature and complains about it to management, he is not protected from retaliation because he isn't gay? Run that by me again, U.S. District Judge Lynn Adelman . . . In *Gabler v. City of Milwaukee*, 2018 U.S. Dist. LEXIS 76582 (E.D. Wis., May 7, 2018), two Milwaukee Police Department employees sued the city under Title VII, alleging unlawful retaliation against them for opposing unlawful and discriminatory employment practices. One of the employees, Peter Pfau, had complained about harassment by an instructor in the Firearms Section of the MPD named Ted Puente. Wrote Judge Adelman, "Pfau describes Puente as a 'bully' who 'always called me gay' and 'would go on his computer, . . . photo-crop my face on guys running in drag or guys doing sexual acts,' and post 'that around the office where everyone could see.'" There were various other incidents set out in detail in the opinion. When it came to ruling on the city's motion to dismiss Pfau's claim, the judge decided that the only issue requiring resolution was whether Pfau had engaged in protected conduct under the anti-retaliation provision when complaining

to management about Puente's conduct towards Pfau. "The record suggests that Puente regularly harassed Pfau for being 'gay,'" wrote Adelman. "If Pfau were a gay man, a reasonable person could construe such harassment as sex-based discrimination. But nothing in the record suggests that Pfau is, in fact, gay or even that Puente thought that he was. At most, a reasonable person could construe Puente's conduct toward Pfau as laden with 'offensive sexual connotations,' but not as discrimination '*because of* his sex.' Thus, Pfau could not have reasonably believed that Puente's conduct toward him was unlawful under Title VII, and his opposition to that conduct, if any, was not protected activity." Thus, the anti-retaliation provision of Title VII did not protect Pfau when he opposed Puente's conduct by complaining to management. OK, is that clear? Any evidence that Puente harassed women by calling them "gay"? Just wondering.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

CALIFORNIA – Some California trial judges continue to arbitrarily order HIV testing of those convicted of listed sexual offenses without regard to whether the acts for which the defendant was convicted could possibly transmit HIV. This is a long-running problem, exemplified yet again in *People v. Rodriguez*, 2018 Cal. App. Unpub. LEXIS 3511, 2018 WL 2316104 (Cal. App. 5th Dist., May 22, 2018). Eric Rodriguez was charged with entering an apartment where the 14 year old female victim was sleeping. Rodriguez, then naked, "positioned himself between her legs and held her down by the shoulders; the victim was wearing sweatpants and a T-shirt. Feeling the weight on top of her, the victim awoke. Rodriguez covered her mouth with his hand and said, '[s]hhh,' then went to 'grab [her] boob.' The victim screamed to alert her family members in the apartment. Rodriguez jumped up and fled the apartment." Police later found Rodriguez in the storage room of the apartment complex, still naked except for socks. The victim identified him in a photographic line-up, and the Kern County Superior Court jury convicted him of "assault of a person under 18 years of age with intent to commit rape and committing a lewd or lascivious act on a child of 14 or 15 years of age." The "lewd or lascivious act" charge is on the list of offenses for which a convicted defendant can be required to submit to HIV testing, but only "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." Superior Court Judge Charles R. Brehmer ordered HIV testing, without making a specific finding on the record as required by the statute. From the above account of the factual evidence, it is clear that no such finding could be made. Thus, although at trial Rodriguez did not object to the HIV testing order, the state conceded on appeal that it was not appropriate under the testing statute. So, what is the remedy? One would think the remedy is for the Court of Appeal to simply vacate the testing order. But no, legal formalism rules here. Relying on the California Supreme Court's decision in *People v. Butler*, 31 Cal. 4th 1119 (2003), the court says that the appropriate remedy is to remand the case to the trial court so the prosecution can present any evidence that might satisfy the finding requirement, if it wants to do so. The court quotes *Butler*: "Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause" to order testing. The rationale for this is that because the defendant didn't object at trial, the prosecutor "had no notice that such evidence would be needed to overcome a defense objection. Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive if evidence exists to support a testing order. Accordingly, we concur in the Court of Appeal's determination that it is appropriate to remand the matter for further proceedings at the election of the prosecution," wrote the Supreme Court. While a remand might make sense in some cases, this case does not sound like one. After all, there is no allegation that any activity took place that could transmit HIV. Unless the prosecution is going to find "alternative facts" to present, to use a phrase introduced by Kellyanne Conway to the public discourse, a new hearing would be a waste of time. Furthermore, if it is the victim's health that is the concern, testing the defendant now makes no sense; it is the victim who should have an HIV test. This incident occurred on February 5, 2016, more than two years ago. If the victim tests negative now, then she was not infected by the defendant and there is no cause for concern for her health on that score. HIV testing of defendants upon conviction has *never* made sense as a practical matter, if the purpose is to protect the health of the victim. If a victim of a sexual assault is concerned about HIV, the victim should submit to testing immediately, with periodic follow-up. Rodriguez was represented on this appeal of the testing order by appointed counsel, Robert L.S. Angres. It is time for the California Supreme Court to revisit this issue and replace *Butler* with a more sensible ruling. And one hopes that California continuing education officials for the judiciary are taking steps to inform trial judges about their fact-finding obligations under the testing statute, Penal Code Section 1202.1.

CRIMINAL LITIGATION *notes*

ILLINOIS – In the first gender identity discrimination case litigated by the Equal Employment Opportunity Commission through to a jury verdict, the agency lost. According to the complaint filed in *EEOC v. Rent-a-Center East, Inc.*, Civil Action No. 16-ev-2222 (C.D. Ill., Urbana Division, filed July 18, 2016), Megan Kerr, who presented as a man when hired in May 2005, was employed as an assistant manager at the company's Rantoul, Illinois, store beginning in May 2011. Kerr told her supervisor about her female gender identity and plans to transition in March 2013. EEOC alleges in its complaint that the District Manager told the Store Manager to find a way to discharge Kerr or induce her to quit. The manager failed to do so and was discharged. A new manager was charged with the same mission, and allegedly set up Kerr for a misconduct discharge by authorizing her to use a company vehicle for a Sunday delivery when the store was closed and then discharging her for using the company vehicle to deliver personal property. In other words, the EEOC's case relied on a theory that the company explanation for the discharge was pretextual. According to a story published May 18 on *Law360.com*, however, in an order denying cross-motions for summary judgment issued in September 2017, District Judge Colin S. Bruce said that Kerr's "story about her use of the vehicle that Sunday has changed dramatically over time." At the conclusion of the trial on May 18, the jury answered "no" on the verdict form to the question whether Kerr's gender identity or transition was a factor in her discharge. This happened within the 7th Circuit where the Court of Appeals has ruled (in *Whitaker*, a Title IX case) that discrimination because of gender identity is a form of sex discrimination, so that legal issue was ultimately not a factor in this case. This one went off on the jury's view of the facts. The EEOC's trial team consisted of Justin Mulaire, Miles Shultz, James Lee, Gwendolyn Young Reams and Gregory Gochanour. Rent-A-Center was represented by Stephanie Quincy of Quarles & Brady LLP, J. Bradley Spalding and Helene Wasserman of Littler Mendelson PC, and in-house counsel Andy Trusevich. Ms. Quincy told *Law360*, "Rent-A-Center is a very diverse employer and has policies and practices that are exactly what the EEOC would want. It's a very strange target for the EEOC to have chosen." The EEOC had no comment in response.

MICHIGAN – The Michigan Court of Appeals affirmed the conviction of Elazar Alexander Withers in a Wayne Circuit Court bench trial on charges involving two gay men he contacted through a gay male cruising website, met, drove around, robbed at gun point, and subsequently sexually assaulting one of them but not the other, who successfully ran away when threatened with robbery, leaving Withers in possession of the victim's personal items and car (which was later found without the personal items). These events happened in the early morning hours of March 18, 2016, in Detroit. *People v. Withers*, 2018 Mich. App. LEXIS 2327 (May 15, 2018). The *per curiam* opinion for the court of appeals mentions that there was a third victim mentioned in some of the documentary evidence, but as to whom the state did not present charges. The trial court sentenced Withers to 15-30 years imprisonment on criminal sexual conduct and armed robbery convictions as to one victim, 7 to 15 years on another criminal sexual assault conviction, and 2 to 4 years on a felonious assault conviction, to be served concurrently, but consecutive to two two-year terms of imprisonment for the felony-firearm convictions. The appeal addressed various claims concerning improper admission of evidence, with the court's repeated refrain that because this was a bench trial and the judge was presumed to know the law and to understand rules of hearsay, etc., possible errors that might be critical in a jury trial were harmless in this context. Indeed, it appears that Withers' convictions were well-supported by evidence that was credible and properly admitted. One example: Withers protested that during the police investigation the victims identified him from a photo array, when he was in physical custody and could have been identified by a live line-up. This was deemed harmless by the court, since the victims identified him in person at trial, and each of them had spent significant time with him in a car prior to being robbed and thus had plenty of time to become familiar enough to make a personal identification in court. By the same token, claims of ineffective assistance of counsel for failing to object to the admission of certain evidence was denigrated by the court in light of the bench trial situation and the ability of the trial judge to exclude from consideration evidence that should not have been introduced.

OHIO – *Lima News* (May 15) reported that Allen County Common Pleas Court Judge Jeffrey Reed honored a plea agreement under which Craig Lewis, a 51-year-old HIV-positive Lima resident, was sentenced to five years in prison for having unprotected sex with a 17-year-old girl. Lewis pled guilty to an amended charge of attempted rape, a second-degree felony, and a single count of felonious assault, also a second degree felony. In exchange for the plea, prosecutors dismissed two counts of rape (first degree felony). Lewis was classified as a Tier 3 sex offender and will be required to register with the sheriff in his county of residence every 90 days for the remainder of his life.

PENNSYLVANIA – A gay Asian-American man suffered dismissal of most of his Title VII and Pennsylvania Human Relations Act discrimination claims against his employer due to

pleading deficiencies, but one of his retaliation claims survived. *Warsavage v. 1 & 1 Internet, Inc*., 2018 U.S. Dist. LEXIS 87542, 2018 WL 2363605 (E.D. Pa., May 24, 2018). Damien Warsavage began working for 1 & 1 Internet in April 2006. As of February 2014, he held the position of Third Level Agent and Support Specialist, having been promoted from his original entry-level job. "In this role," writes District Judge Harvey Bartle III, "he was responsible for handling checks, mail, PayPal charges, and related tasks. Melissa Brown, one of Warsavage's direct managers, was an individual who assigned work to him." He filed his first charge with the EEOC on November 23, 2016, claiming, according to the EEOC intake questionnaire, that he believed the company "engages in underhanded hiring practices that center heavily around non-transparency, favoritism, and retaliation." He also stated that he had attempted to speak with "company leadership" three times, but "only got to speak with an HR agent and HR director. Neither one was up front and honest about our hiring practices. And the company director has openly ignored me." The boxes he checked on the questionnaire as the basis for his discrimination claim were race, sex, national origin, retaliation, and color. But he did not specify any concrete adverse actions that had been taken against him prior to his filing the EEOC charge, a copy of which was not attached to his complaint. Shortly after he filed the charge, "his workload increased. In addition, Warsavage was present on an occasion in early January 2017 when Brown, one of his managers, mocked Asian Americans. Specifically, a coworker offered Brown Japanese candy and explain that 'it was like a creamsicle,' to which Brown responded '[a]hhh [s]oooo,' in a very stereotypical faux-Asian voice." Then Warsavage learned on January 19 that he was being demoted without any stated reason. "Thereafter he was locked out of accessing the computer system and assigned tasks that were normally assigned to a First Level Agent, two levels below his previous position." The next day he took off from work, emailing two of his coworkers to explain what had happened. They responded that others believed his demotion was in retaliation "for something" and that Brown had asked them whether Warsavage had quit yet, and if she should deactivate his key card. He then filed a second EEOC charge, checking the boxes for race, color, sex, national origin, and retaliation, noting "hiring" as an issue. His lawyer asked the EEOC to provide a copy of Warsavage's first charge, but the response was that "after a diligent effort, the Commission is unable to locate the records." Warsavage wrote to the company on January 31, stating his intention to resign as of February 24, but the company asked him to leave "almost immediately." He filed suit on November 9, having received right to sue letters on his first charge on June 12 and on his second charge on August 15. The complaint alleged wrongful termination and retaliation. The wrongful termination charge was conceptualized as a constructive discharge based on a hostile environment. The company moved to dismiss all claims, and Judge Bartle agreed that all claims must be dismissed except the retaliation claim premised on Warsavage's second EEOC charge. Part of the problem here is that Warsavage did not file a new EEOC charge after his resignation, and the content of his charges and their timing appeared to fail to make specific timely allegations that could satisfy the requirement for administrative exhaustion of claims. The requirement to exhaust administrative remedies is jurisdictional, and the court found that the two charges Warsavage had filed were not sufficient to ground his subsequent hostile environment and constructive discharge claims. However, the court noted, the second EEOC charge was sufficient to ground a retaliation claim relating to the adverse actions taken against Warsavage after he had filed his first EEOC charge. He is represented by counsel, but the opinion does not indicate when counsel were retained, and whether they were involved with the filing of the EEOC charges, which seems unlikely, given counsel's communication with the EEOC regional office seeking a copy of Warsavage's first charge. Warsavage is represented by Christa Levko (lead attorney), Jonathan W. Chase, and Michelle R. Dempsky of Kraemer, Manes & Associates LLC, Philadelphia.

NEVADA – In *Morgan v. State*, 2018 WL 2090811, 2018 Nev. LEXIS 31 (May 3, 2018), the Nevada Supreme Court "aligned" itself with the U.S. Court of Appeals for the 9th Circuit, holding that a prosecutor's use of peremptory challenges for the purpose of keeping gay people off a criminal trial jury could be the basis of a *Batson*-type challenge to the fairness of the trial process. In this case, John Demon Morgan was on trial for one count of robbery and one count of battery with intent to commit a crime. A retail store employee had fingered him as a shoplifter and he allegedly assaulted her when she confronted him. He was ultimately convicted after a three-day jury trial. Much of the Nevada Supreme Court opinion by Chief Justice Michael Douglas is focused on disputes about Morgan's competency to stand trial, but a portion of the opinion considers his *Batson* challenge, focused on the prosecutor's use of a peremptory challenge to excuse a potential juror who incidentally revealed his sexual orientation during *voir dire* by using a masculine pronoun in responding to a question about the occupation of his partner or spouse. The trial judge rejected the *Batson* challenge. Another gay man in the venire was not challenged by the prosecution and served on the jury that convicted Morgan. Wrote Justice Douglas, "Before addressing Morgan's contention that the district court erred in overruling his *Batson* challenge

based on sexual orientation, we take this opportunity to first address whether sexual orientation should be recognized under *Batson* – a novel issue before this court. In answering in the affirmative, we align this court with the Ninth Circuit." Douglas then discussed the 9th Circuit's ruling in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F. 3d 471 (9th Cir. 2014), in which that court concluded that the Supreme Court's then-recent *Windsor* decision reflected, in effect, the use of heightened scrutiny in evaluating an equal protection challenge to the Defense of Marriage Act, and thus the use of peremptory challenges deliberately to exclude gay people from juries could be challenged under the *Batson* doctrine. "We take this opportunity to adopt *SmithKline*'s holding and expand *Batson* to sexual orientation," wrote Douglas. However, the court found that the trial judge did not err in rejecting the challenge here, pointing out that the prosecution's failure to use a peremptory to strike the other openly-gay potential juror, who eventually served on the jury, substantially undercut any suggestion that the struck juror was intentionally eliminated due to his sexual orientation. "Further," wrote Douglas, "the State, as the proponent of the peremptory challenge, provided a neutral explanation for the challenge that proved it did not engage in purposeful discrimination . . . . The State contended that juror no. 24's response during *voir dire* indicated an approval of the media's criticism of the police, because after the prosecutor asked who had strong feelings about the criticism of police officers portrayed in the media, juror no. 24 responded that he felt 'that it's about time that the police officers . . . are being charged' and that he thought 'it's gone on way too long that they have been able to abuse the public.'" Morgan sought to make something of the fact that a heterosexual juror with similar views expressed about police officers was seated on the jury, but the court countered with the lack of a peremptory challenge to the other openly gay juror. The court noted that Morgan was not himself gay and homosexuality or issues of particular concern to the gay community were not involved in the case, also relevant factors in evaluating a *Batson* challenge. Morgan was represented on appeal by two Clark County deputy public defenders, Howard Brooks and Sharon G. Dickinson.

SOUTH DAKOTA – In *Rhines v. Young*, 2018 WL 2390130 (D. South Dakota, May 25, 2018), Charles Russel Rhines, who was convicted of premeditated first-degree murder and third-degree burglary by a jury that recommended imposition of the death penalty in January 1993, tried to get the district court in a *habeas corpus* proceeding to consider evidence that the jury was biased against him because he is gay, and that this heavily factored into the jury's decision to recommend the death penalty. He has juror affidavits to that effect. For a variety of complex reasons relating to federal procedure, U.S. District Judge Karen E. Schreier found in her May 25 ruling that she was without jurisdiction to consider the merits of his claim. Rhines also has an appeal from prior *habeas* rejections pending before the 8th Circuit. And, always a long shot, but he also has a petition for certiorari pending before the U.S. Supreme Court, *Rhines v. State of South Dakota*, Case No. 17-8791 (docketed May 7, 2018), arguing that the Supreme Court's 2017 decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), provides a basis for reopening his case to consider this evidence. The South Dakota Supreme Court rejected his motion to this effect, providing the procedural basis for this attempted appeal. In *Pena-Rodriguez*, the Supreme Court held that the normal refusal of courts to inquire into the substance of jury deliberations must give way to evidence that the jurors relied on racial stereotypes or animus in their deliberations. Rhines' evidence goes directly to the death penalty verdict, including sworn statements by some of the jurors that they were aware Rhines was gay and they did not want to send him to live in all-male general population prison setting where he would get lots of gay sex and sexually corrupt straight prisoners, so they recommended the death penalty. The South Dakota Supreme Court, relying on pre-*Pena-Rodriguez* precedents, held that statements by jurors during *voir dire* that they could be fair to the defendant despite his sexual orientation were sufficient to reject any argument the jury was biased. With the state having filed its response to the Petition and Rhines' public defender lawyers having filed replies to the state filing and updated the record before the Court to include reference to Judge Schreier's opinion, the record has been distributed to the Justices and listed for consideration at their June 14 conference.

TENNESSEE – File this one under "stupid litigation" brought to make a political point. In *Grant v. Anderson*, 2018 WL 2324359, 2018 Tenn. App. LEXIS 285 (Tenn. Ct. App., May 22, 2018), some ministers and lay people brought an action against Williamson County Clerk Elaine Anderson as well as Tennessee Attorney General Herbert H. Slatery III, seeking a declaratory judgement from the Chancery Court that provisions of Tennessee law "relative to the licensing of marriage are no longer valid and enforceable" because of *Obergefell v. Hodges* and thus that "the continued issuance of marriage licenses" after *Obergefell* "violates their rights under the Tennessee Constitution." Anderson moved to dismiss, and Chancellor Joseph Woodruff granted the motion, finding that the plaintiffs lack standing and the issue was not ripe for adjudication. Plaintiffs suffered no injury in fact as a result of the *Obergefell* decision, apart possibly from outrage

at a ruling with which they strongly disagree, mainly on religious grounds. Writing for the Court of Appeals panel, Judge W. Neal McBrayer politely treated the case seriously, at least on the surface, expending considerable verbiage to explain why it was totally without merit, but without saying anything nasty or disparaging about the plaintiffs or their misguided counsel, David E. Fowler of Franklin, Tennessee. The essence of the claim was that because the Tennessee statutes governing issuance of marriage licenses mention the "contracting parties" as male and female, and these provisions were declared unconstitutional in *Obergefell*, there was left no statutory authorization to issue marriage licenses to anybody. This argument could only be made by somebody who did not carefully read the Supreme Court's opinion, as McBrayer pointed out, because Justice Kennedy was careful to specify that state constitutional and statutory provisions standing in the way of same-sex couples marrying were unconstitutional only to the extent that they prevented such marriages. Furthermore, the specific provision cited by the plaintiffs were not those specifically challenged in the Tennessee marriage equality case, *Tanco v. Haslam*, which was one of the four cases consolidated on appeal to be argued as *Obergefell v. Hodges*. Strictly speaking, the Supreme Court did not declare unconstitutional the precise provisions cited by the plaintiffs in this case as having been declared unconstitutional! Thus, clearly, the marriage license provisions remained in effect but were henceforth to be construed as gender neutral. Of course, states can "clean up" their statutes by removing gender references (which a current on-line check show that Tennessee has evidently not done), but this was not necessary to comply with the *Obergefell* decision. Indeed, Clerk Anderson stated that she was issuing licenses to both same-sex and different-sex couples; no big deal. Maybe these plaintiffs should get in touch with the guy who wants to marry his laptop so they can commiserate about the failure of the courts to see the significant injuries they are claiming to suffer. The attorney general did not deign to acknowledge the lawsuit by filing a motion to dismiss, so the court, in effect, made the motion for him and granted it.

WASHINGTON – The Court of Appeals of Washington rejected a challenge by Alexander Johnson to his conviction on charges of harassment, second degree assault, malicious harassment, and third degree malicious mischief, arising from an incident where a gay neighbor of Johnson's girlfriend was threatened and shot with a pellet gun, circumstantial evidence pointing to Johnson as the shooter. *State of Washington v. Johnson*, 2018 WL 2357773, 2018 Wash. App. LEXIS 1212 (Wash. Ct. App., Div. 3, May 24, 2018). Johnson's girlfriend lived in public housing in a building in Seattle adjacent to that in which Eric Leggett, the gay victim, lived. Johnson visited his girlfriend frequently, practically living there at times, but was not an authorized tenant. The public housing complex forbade indoor smoking. "Presumably because of Leggett's and Alexander Johnson's smoking habits," wrote Judge George Fearing, "the two became acquainted when smoking cigarettes on the sidewalk adjoining the two apartment buildings. During these respites, the two discussed many topics, including politics and religion. The cordial relationship . . . deteriorated when Leggett told Johnson he was gay and HIV positive. Thereafter and on March 20, 2016, Leggett found four threatening notes taped to his apartment window . . . Leggett reported the menacing messages" to the manager of the buildings, who advised him to contact the police. The manager also viewed surveillance video which appeared to show Johnson pacing outside the building "before placing objects on an exterior window of the adjoining building and walking away." Two weeks later, Leggett heard "a sporadic tapping noise, like the sound of pebbles, at his window. Leggett exited his apartment, checked the alleyway abutting his apartment's ground floor window, and, after seeing no one, returned inside his apartment. The tapping sound resumed, which lured Leggett outside again. A fearful Leggett also called 911. He noticed a crack in his glass window, and, while still on the phone with law enforcement, felt the pop of a bullet hit his skin, which sensation caused him to drop his phone. He deemed his life to be in danger." Evidence corroborating this include a projectile entry hole in Leggett's shirt and a bright red welt on his ribcage near his armpit. Evidence was developed from surveillance tapes and other occupants of the area, including images of Johnson behind an open window holding what appeared to be a rifle, tending to show that Johnson was the likely shooter. A police detective questioned Johnson, who denied shooting Leggett but admitted owning a pellet gun and knowing that Leggett was gay. Johnson was convicted at trial of the charges noted above. He claimed on appeal that various errors were made at trial and that he received ineffective assistance of counsel. The court of appeals rejected all but one of Johnson's arguments concerning trial errors; it did find that admission of the manager's testimony that Johnson was an "unauthorized tenant" was a "harmless error" even though the evidence was inadmissible, stating, "Inadmissible evidence requires reversal only if the error within reasonable probability materially affected the outcome . . . The State did not emphasize testimony of Alexander Johnson being an unauthorized tenant. Overwhelming evidence, such as Johnson's motive, Johnson's ownership of the pellet gun, the angle of the shots establishing that the shots came from Johnson's apartment [the court means to say Johnson's girlfriend's apartment

where he was living], and Johnson's open window, established guilt." The court rejected Johnson's objection that the building manager and Leggett were improperly allowed to give evidence as to their opinions that Johnson was the shooter, finding that they had testified based on physical evidence about the direction of shots, etc.

WISCONSIN – *The Freeman* (Waukesha, WI) reported May 19 that Eugene S. Gross has been sentenced by Circuit Court Judge Ralph Ramirez to serve 15 years in prison followed by 15 years on supervision after his prison term, having pled guilty in February to sexual assault of a child under 16 and using a computer to facilitate a child sex crime. The criminal complaint against Gross alleged that he knew he was HIV-positive and was taking medication to control his infection when he alleged had unprotected sex with the victim twice. Gross has already paid almost $5,000 in restitution to the victim, but also must pay $5,000 in surcharges for possessing ten images of child porn in a separate case, which was dismissed but considered along with the sex assault case, reported the newspaper. The news report did not mention whether Gross's medication had rendered him non-contagious at the time he engaged in unprotected sex.

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.

CALIFORNIA – James Leroye Jefferson, a black, HIV+, transgender prisoner, proceeding *pro se*, filed a civil rights case over prison officials' denial of employment to him in food services. *Jefferson v. Hollingsworth*, 2018 U.S. Dist. LEXIS 74623, 2018 WL 2045937 (S.D. Calif., May 2, 2018). This is Jefferson's second foray on his claims, which were dismissed by U.S. District Judge Dana M. Sabraw in *Jefferson v. Grey*, 2017 U.S. LEXIS 169151 (S.D. Calif., October 12, 2017), reported in *Law Notes* (November 2017 at 460-1). In the former case, Judge Sabraw indicated that the court believed it was bound by the Ninth Circuit precedent of *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994), holding that inmate fear of HIV+ workers in the mess area justified the denial of such work. Now, Jefferson alleges he has been cleared to work (and has worked in the clothing industry) and that he is medically cleared as a food handler. He alleges that he passed his interview, but the bakery supervisor refused to hire him explicitly because he is transgender, black and HIV+. Now, the case is before U.S. District Judge Michael M. Anello for screening. (He says that Jefferson has not expressed a pronoun preference, so he uses male ones, as does this writer, for ease of quotation from the opinion.) Judge Anello dismisses Jefferson's Eighth Amendment claims with prejudice because there is no right to a job in prison. Idleness does not violate the Eighth Amendment. Judge Anello dismisses claims under the Americans with Disabilities Act because Jefferson did not sue the employees in their official capacities, and the ADA does not allow him to proceed against them in their individual capacities. *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002). In the next sentence, Judge Anello notes that Jefferson failed to show any personal involvement by the other two named defendants in his denial of work in food services, citing a § 1983 case. This is gobbledygook. It conflates personal involvement – a § 1983 element – with an ADA standard that turns on official actions attributable to the employer. In any event, Judge Anello allows Jefferson leave to amend on the ADA claims to name the bakery supervisor officially. Finally, Judge Anello allows Jefferson to proceed against the bakery supervisor on Equal Protection discrimination claims of race, disability, and sexual identity. (He does not elaborate on the standard of review for screening purposes). If Jefferson wants to proceed against the other two defendants, he will have to show that they were personally involved in the denial of his work in the bakery in a way that denied him Equal Protection. Judge Anello does not mention the Ninth Circuit's *Gates* decision in his opinion.

CALIFORNIA – *Pro se* inmate Rodney K. Morgan sued the warden, deputy wardens and various DOC people responsible for jobs, because the facility where she is imprisoned (California Institute for Men), although designated a "transgender facility" with a large transgender population under California's transgender "cluster" system, has never hired a transgender inmate for a job. She alleges that entry level programming has not been provided to the transgender population. In *Morgan v. Borders*, 2018 WL 2213455, 2018 U.S. Dist. LEXIS 81070 (C.D. Calif., May 14, 2018), U.S. District Judge John F. Walter dismisses all of Morgan's claims, with leave to amend. Although the opinion enumerated ten reasons for rejecting the pleading, there is really only one that matters: Morgan neglected explicitly to say that she is transgender and that she was denied a job. (This is Reason Nine by Judge Walter, the Tenth being dismissal of state pendent claims). While Morgan describes the lack of transgender employees (which should be obvious), her discussion of same with the warden and deputies, her grievances (which were ignored), and her demand for compensatory damages, Judge Walter declines to infer that she is transgender and without a job, although

she filed an Affidavit of Indigence. He describes her complaint as "confusing, and at times unintelligible, stream-of-consciousness rambling." Reading it in PACER, it is none of those things – they more aptly describe the judge's opinion screening and dismissing the case without service, which took 14 months to write. (One can only wonder which intern was assigned this *pro se* case as a project, because that is what it reads like, with its boilerplate recitation of law – beginning with Reason One: failure to name all parties in the caption under F.R.C.P. 10 – something easily curable by order for judges so inclined). "Blatant" sexual orientation and gender identity discrimination is the gravamen of the case, and it is clear from the complaint. Morgan outlines how a white supremacist inmate has been put in charge of screening job applications after one of the defendants gives him medical and classification information to "screen out" the transgender applicants – and how the entire executive staff knows this inmate receives kickbacks from the first pay of the heterosexual white inmates who are hired. [Note: the "kickback" scheme appears in the complaint but is not mentioned in the opinion. Although the case screams conspiracy between state officials and a private actor, this is not discussed by the court.] The opinion continues for pages setting forth reasons Two through Eight, addressing Eleventh Amendment Immunity for official capacity claims, prisoner lack of due process rights in processing of grievances, personal responsibility of defendants, and *respondeat superior* – before addressing the reason for screening of inmate complaints, the nature of 42 U.S.C. § 1983, and the types of scrutiny under the Equal Protection Clause – without telling Morgan which one might apply to her situation; small help for a *pro se* inmate given leave to file an amended complaint. In this writer's view, this is not the kind of case screening that the Prison Litigation Reform Act's amendments to 28 U.S.C. § 1915A contemplated. While not well-polished, Morgan's legible *pro se* pleading is intelligible; it is neither confusing nor rambling. It states a claim upon which relief can be granted. It reveals a scandal of significant proportions, and the failure of Morgan to indicate that she had been personally affected, while an omission, should have been inferred. It should not have prevented service of the complaint on those responsible for the scandal. Forcing Morgan to start over again after a year of waiting to receive an obviously deficient opinion lends a deaf ear, indeed.

FLORIDA – Gay inmate Kris K. Brown was sitting on a bench talking to another gay inmate when a group of inmates began yelling slurs. The incident escalated into an attack on Brown in which he was stabbed in the face multiple times, sustaining a fracture to the orbit of his eye, a detached retina (still healing), and a four-day hospitalization. At the time, GEO, the contractual provider of the prison, had assigned only one officer to oversee several hundred inmates milling about the yard. The officer, who was occupied with other inmates at the time, did not intervene in the attack – nor did he provide first aid or attention to Brown following the attack. Brown, who had lost consciousness, was eventually taken by wheelchair to the infirmary, which sent him to the emergency room. Proceeding *pro se*, Brown sued two of the attacking inmates (whom he identified from a videotape of the yard), the lone officer, and GEO, for deliberate indifference to protection of inmates by understaffing supervision of the yard. In *Brown v. GEO Group*, 2018 U.S. Dist. LEXIS 68819 (S.D. Fla., April 23, 2018), recommendation accepted 2018 U.S. Dist. LEXIS 82531 (S.D. Fla., May 15, 2018), U. S. Magistrate Judge Patrick A. White's Report and Recommendation ["R & R"] recommended that the case proceed past screening only against the lone officer, for failing to prevent and intervene in the assault or provide for aftercare. Constitutional claims against the assaulting inmates were dismissed for lack of state action. Judge White also dismissed claims against GEO because Brown failed to identify and name the GEO officials who set the allegedly unconstitutional policy. In this regard, Judge White's opinion, although replete with citations, is based on several erroneous premises and misapplications of long-established law. The R & R says that a suit against GEO is a suit against the sovereign, to which it is entitled to immunity under the Eleventh Amendment. Wrong. GEO, as a contractual provider, is a state actor, but it and its employees enjoy no sovereign immunity. *Ancata v. Prison Health Services, Inc*., 769 F.2d 700, 702-4 (11th Cir. 1985). Its liability, if shown, is generally regarded as akin to that of municipalities who have unconstitutional customs, policies, or practices, like those in *Monell v. Dept. of Soc. Serv*., 436 U.S. 658, 694 (1978); *see Craig v. Floyd County*, 634 F.3d 1306, 1310-12 (11th Cir. 2011) (county jail's private contractor had policies denying sick call and ignoring medical orders). If the R & R were correct about sovereign immunity, we would see a massive rush to privatize prisons to avoid those pesky inmate damages suits. This risk was specifically mentioned by the Supreme Court in *West v. Atkins*, 457 U.S. at 56, fn. 14. The specific reason Judge White recommends GEO's dismissal is Brown's failure to identify who within GEO made the policy or custom or set the practice. This is not required; only the existence of the practice or policy, etc., need be pleaded. The case cited for this proposition in the R & R – *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) --is inapposite. In *Grech*, Clayton County was sued for the policies of the Sheriff and the acts of his deputies. Yet, a reading of the case shows that, under Georgia law,

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Sheriffs and their deputies are state, not county, employees, and that they do not make policy for the county, which was the only defendant the plaintiff named. Here, there is no such local jurisdictional turf issue (or failure to plead proper party), so *Monell* in general applies to GEO. Regardless of who set it, if the policy, custom or practice is alleged to be GEO's, it is sufficient for screening. This rule, applicable to GEO, is long-established. "The municipality must be at fault in some sense for establishing or maintaining the policy which causes the injurious result." *Owen v. City of Atlanta*, 780 F.2d 1564, 1567 (11th Cir. 1986), citing *Fundiller v. City of Cooper*, 777 F.2d 1436, 1442 (11th Cir. 1985). Judge White left the lone officer holding the bag. However culpable he may have been, his placement alone to watch hundreds of inmates who were unconfined in the yard put him in a situation, not of his making, where deliberate indifference to safety and human injury were virtually certain to occur. GEO should not have been screened out. U.S. District Judge Robin L. Rosenberg's "de novo" review of Judge White's recommendation, after Brown's objections, consists of two sentences, in which she adopts the recommendation in full as "well reasoned and correct." *Brown v. GEO Group*, 2018 U.S. Dist. LEXIS 82531 (S.D. Fla., May 15, 2018). She allowed one more chance to file an amended pleading. Counsel can still try to straighten this out.

FLORIDA – Transgender inmate Johnny Reyes was raped in a protection unit in a Florida prison and sued in *Reyes v. Posten*, 2018 U.S. Dist. LEXIS 78371 (S.D. Fla., May 8, 2018). U.S. Magistrate Judge Patrick A. White recommended denial of a motion to dismiss by the unit sergeant (Posten) for failure to state a claim of deliberate indifference to Reyes' safety. Reyes is of "feminine body type, appearance, nature and small size," and she was also receiving regular hormone treatment, as a result of a state court order. After an initial period in a single cell in the protection unit, Reyes was moved to a double cell in the unit. She expressed fear about her safety, and she renewed her fears to unit officers when she learned her cellmate would be inmate Charles Ashe, who had been under investigation for sexually assaulting other inmates. The officers joked about Ashe's large size compared to Reyes. Reyes filed a grievance and met with defendant Posten, who told her: "take your concerns elsewhere." Two days later, Ashe raped Reyes. Because of Ashe's threats, she did not report the rape until the next day, whereupon she was taken for a medical and body fluid examination. She was then returned to the protection unit and placed in a single cell near Ashe, who could see her. He continued to harass her verbally and threaten and taunt her for the next few weeks. Reyes complained to Posten, who allegedly "ignored" her concerns. Reyes suffered a nervous breakdown, after which she was moved off the unit and transferred to another prison. A week later, lab tests of semen collected after the assault matched Ashe, who was criminally charged. Posten argued that these facts do not establish a claim for deliberate indifference under either prong (objective risk and subjective deliberate indifference to it) of *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Judge White did not agree, finding that there was enough to infer that Posten was aware of the risk and that Posten deliberately ignored it. He found that it was obvious from Reyes' presentation that she was "especially susceptible to sexual assault" and that the risk was "presumably" recognized by Posten, who ran the unit. It was also a reasonable "inference" that Posten was aware of Ashe's history, certainly after Posten complained to her directly. Judge White's Report is clear and concise. *Compare* his sloppy R & R in *Brown v. GEO Group*, 2018 U.S. Dist. LEXIS 68819 (S.D. Fla., April 23, 2018), above in this issue of *Law Notes*. The most significant difference in this writer's view, is that Reyes has counsel and Brown did not. It should not matter so much, particularly at screening. Reyes is represented by Carlton Fields, P.A., Gary Michael Pappas, Lead Attorney, Miami.

ILLINOIS – U. S. District Judge Marven E. Apsen granted summary judgment to physician Wesley Harmston in claims by inmate Derrick Stefan Williams that doctor Harmston conducted sexually inappropriate examinations of Williams' claimed injuries while Williams was an inmate at the Wills County Illinois Jail in 2014. In *Williams v. Harmston*, 2018 U.S. LEXIS 89722, 2018 WL 2435540 (N.D. Ill. May 30, 2018), granting summary judgment to Dr. Harmston on all counts and dismissing the case with prejudice. Harmston, examining the inmate who had complained of an injury to his ribs after being kicked by police during his arrest, asked Williams to remove his shirt, observed his ribs, palpated them, and ordered x-rays to rule out fractures. He also offered a rectal exam based on Williams' age and race and absence of any record of a prior examination. Williams refused and Harmston did not push the point. Originally, Williams filed *pro se*, but Judge Aspen appointed counsel from the *pro bono* panel, who filed an amended complaint. On summary judgment Williams offered nothing to create a substantial jury question as to whether Harmston was deliberately indifferent to his serious needs or that he had acted inappropriately. It was perfectly reasonable to ask the patient to remove his shirt, to inspect his ribs, and to palpate them for injuries. Harmston's inquiry about a rectal exam, although not addressing Williams' primary complaint, was medically reasonable. There is no competent evidence that Harmston was acting for his own sexual gratification. Williams tried

to offer some evidence that Harmston had been counselled in the past about prior physical contact with inmates. Judge Aspen found this too vague to be accepted at summary judgment, because it could not be clarified at deposition, despite attempts to do so. Williams also offered a letter of some years ago, that referred to a Wills County Jail doctor who had been "familiar" with patients. Both proffers were rejected as inadmissible proof of "prior bad acts to show propensity not with any exceptions under F. R. Evid. 404(b)." The documents were not submitted timely and contained hearsay, and the letter did not refer to the doctor by name. The crux of Williams' complaint seems to be set forth in Judge Aspen's quotation at length from Williams' deposition: "A. Dr. Harmston is a fag . . . . Q. Okay. I noticed in one of your records that you mentioned to the mental health professionals that you thought Dr. Harmston was gay? A. He is. He a fag. A. Okay, why did you think that was worth mentioning? A. Because he looked like a fag . . . . He talked like a fag . . . . A. Okay. Why did you think that was important for the mental health professionals – A. Because I wanted to let them know they need to get rid of this dude. Q. Because he's gay? A. Yeah, gay." Without a doubt, there are correctional employees who take advantage of their position to hit on inmates. There is no evidence of that here. What is present is evidence of a paranoid homophobic prisoner who was humiliated that a physician performed his job while exhibiting traits that made him seem gay – a protected classification under Illinois law. It is unclear why Judge Aspen chose this case to appoint scarce *pro bono* counsel. Williams was presented by Ronaldson & Kuchner, LLC, Chicago.

ILLINOIS – A *pro se* gay inmate finds protection in federal civil rights statutes and legislation enacted by Congress to guarantee religious freedom in *Dent v. Dennison*, 2018 U.S. Dist. LEXIS 90043, 2018 WL 1439 (S.D. Ill., May 30, 2018). U. S. District Judge David R. Herndon allows Charles Dent to proceed past screening after he was barred from attending religious services following grievances he filed about the homophobic and transphobic content of the services. Dent had been attending the maximum religious services permitted under prison regulations (4/week, regardless of denomination). At one point he changed his affiliation on prison records from Protestant to Catholic, but he continued to attend the four services (3 of which were Protestant) as he had for 35 years, along with other LBGT inmates (probably no "L" inmates in this joint; at least none are mentioned). The prison began using volunteer services of a non-employee lay Protestant Chaplain, Lance Mahan; this is when the problems started. Mahan began to pepper his homilies with anti-LGBT remarks – that were "degrading, humiliating, and offensive" – and which escalated to calls for violence against LBGT prisoners. Mahan even allowed another inmate to "witness" – preaching that called for anti-LGBT violence. After Dent complained that this advocacy violated standards of the Prison Rape Elimination Act ["PREA"] and filed a complaint, he was removed from two of the Protestant services. When Dent would not relent, Mahan personally removed him from the third. Dent's complaints to administration went without effective response, except to state that Dent was being permitted his Catholic services in accordance with his declaration. Mahan allegedly bragged colloquially that the Warden was "rocking with him," because "he is only speaking God's word." According to the complaint, other LGBT inmates who "helped" with the investigation were also removed from religious services. Judge Herndon allowed Dent to proceed on four theories: (1) First Amendment retaliation against Dent for complaining and filing a PREA complaint; (2) conspiracy to violate Dent's First Amendment rights (which could include Mahan as a defendant even if not a state actor, under 42 U.S.C. § 1985(3)); violation of Dent's rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act ["RLUIPA"] for removing him from religious services; and (4) violation of Dent's rights under the Equal Protection Clause (class of one theory) for limiting him to Catholic services when others were not limited by denomination, and the excuse was pretextual, at least for screening purposes. Each of these theories are well-supported with Seventh Circuit and Supreme Court case citations. This is another example of when PREA is used not as itself providing a cause of action, but as a springboard for another constitutional claim – here First Amendment retaliation. The RLUIPA provides a cause of action, but no damages. Injunctive relief can be granted if a constitutional violation is found, and the standard is tougher for prison officials than if the claim is brought solely under the First Amendment. 42 U.S.C. § 2000cc-1 ("least restrictive means" test applies rather than balancing – "reasonably related to legitimate penological interests" – under *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Judge Herndon sent the case to a Magistrate Judge with instructions to give "prompt consideration" to an R & R on injunctive relief.

ILLINOIS – Applying a liberal standard to screening of a *pro se* complaint, U. S. District Judge Staci M. Yandle allows Carlos J. Garcia to proceed in claims that he was raped following a failure to protect him and subjected to discrimination because of his sexual orientation in *Garcia v. Baldwin*, 2018 U.S. Dist. LEXIS 89161 (S.D. Ill., May 29, 2018). Accepting Garcia's allegations as true for purposes of the screening, Judge Yandle finds that

Garcia was raped by a member of the Illinois DOC "Latino Security Threat Group." Despite Garcia's "very high risk of being brutally assaulted or/and violently raped," defendants did not place Garcia in protective custody or take other preventive measures. Garcia alleges that defendants have a policy and practice of intentionally placing vocal LGBTQ inmates at risk of personal harm. Judge Yandle summarizes the allegation as a "practice of punishing 'out, loud, and proud' gay men by knowingly placing them in living situations where they're at an increased likelihood of physical assault and/or violent rape" – and "keeping those inmates at high risk" by housing, cell, work, education, and program assignments, even if previously raped. Judge Yandle allows Garcia to proceed on three theories: (1) First Amendment claim, alleging he was raped because he is gay; (2) Eighth Amendment Claim, alleging he was raped by failure to protect him; and (3) Equal Protection Claim, alleging discrimination because of sexual orientation. This is the first case this writer has seen where the First Amendment was invoked to support a cause of action based solely on punishment for sexual orientation status – we'll show you if you try to be proud and out front. Judge Yandle writes: "Several legal authorities have suggested that one's identity as a homosexual—even though it is in essence a private matter—is inherently a matter of public concern because it 'necessarily and ineluctably' involves that person in the ongoing public debate regarding the rights of homosexuals." *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279, 1284 (D. Utah 1998) (citing *Rowland v. Mad River Local School District, Montgomery County, Ohio*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of *certiorari*)). By placing Garcia in a situation where he is more likely to be raped, defendants "have, in essence, punished him for being gay and discouraged him from remaining openly gay." "Further factual development is necessary." On the Eighth Amendment, Judge Yandle finds a claim under typical deliberate indifference from harm theory under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). *Farmer* deals with inmate-on-inmate violence; here, the allegation seems to be that Garcia was raped by staff. Since there is no penological interest in staff using force to rape an inmate, Eighth Amendment claims might also have been stated under *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). Equal Protection claims were allowed to proceed based on sexual orientation discrimination under *Hughes v. Farris*, 809 F.3d 330, 334 (7th Cir. 2015); *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014). Judge Yandle allowed the defendant Warden to remain in the case solely in his official capacity, in order to identify the John/Jane Doe defendant who was responsible as the prison's Chief Administrative Officer at times relevant to the complaint. Service was directed accordingly, as well as referral to a magistrate for further proceedings. Defendants are forbidden to waive answer under 42 U.S.C. § 1997e(g). This case illustrates how much can be accomplished in 3 months when a federal judge takes a case by the horns.

KENTUCKY – Eastern Kentucky Correctional Complex is located at "200 Road to Justice," in West Liberty, Kentucky; but it seems there are some bumps along that road. *Pro se* plaintiff Tori T. Curtis, whose sexual orientation or identity is never made clear, sued for violation of his First Amendment rights in *Curtis v. Bradford*, 2018 U.S. Dist. LEXIS 86246 (W.D. Ky., May 23, 2018). Senior U. S. District Judge Thomas B. Russell denied most of Curtis' claims, but he allowed him to proceed past summary judgment to trial against one seemingly homophobic Officer, Michael Bradford. The events began when Bradford saw Curtis shaving his body hair and allegedly made a remark that Curtis was a "sissie" or a "punk," to which Curtis took offense and filed a report against Bradford under the Prison Rape Elimination Act ["PREA"]. Bradford denied the remarks, but there was an investigation, including viewing of a videotape that showed Bradford speaking to Curtis at his cell, but there was no audio. After interviews, the facility PREA investigator found "no evidence" to support Curtis' allegations. About four months later, Bradford charged Curtis with sexual misconduct in the prison shower. The charges were based on Bradford's supposedly observing another inmate (Wilson) "kiss [Curtis] on his right shoulder while they were in the back of the showers with no clothes on . . . . Curtis did not make an effort to stop Inmate Wilson nor did he give any indication that Inmate Wilson's behavior was non-consensual." Bradford therefore believed the conduct was consensual and a violation of sexual rules of the prison. Curtis was given 90 days in segregation. (The opinion does not say what happened to Wilson.) Judge Russell found that Curtis established a jury question on First Amendment retaliation under *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). The PREA complaint, even if ultimately found to be unsubstantiated, was an exercise of First Amendment activity because it was not frivolous, under *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000). Ninety days in segregation was sufficient punishment to count as retaliation. The only question left was whether the punishment was motivated in part by the First Amendment exercise, a sub-question of which is whether the same action would have been taken even if there had been no First Amendment exercise. Here, Judge Russell found that four months was insufficient of itself to establish temporal proximity, but Judge Russell found that Curtis was not relying "solely" on temporal proximity. There was the additional allegation that Bradford had

fabricated the whole incident. Curtis said it never happened, so did Wilson, and so did another inmate who was near them in the shower. Even if it happened, inferring "consent" from a kiss on the shoulder from behind – because the recipient does not react the way the homophobic guard thinks appropriate – seems too much of a leap for Judge Russell to take this issue from the jury. It is notable that, in the Sixth Circuit, due to a number of "unpublished" decisions, an informal rule of law, called "checkmate doctrine," had evolved, under which an inmate could not claim First Amendment retaliation if found guilty of the underlying offense. Judge Russell noted that this is "not good law." *See Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018) ("This Court has never adopted the 'checkmate doctrine' in a published opinion. We now reject that doctrine. A finding of guilt at a prison misconduct hearing does not act as an absolute bar to a prisoner's First Amendment retaliation claim.") One can only speculate how many prisoners lost their federal cases based on the Sixth Circuit's casual use of unpublished decisions, their availability on Westlaw and LEXIS, their use by parties, and their influence on the district courts (to the point of creating a "doctrine"). As to whether Bradford would have written up Curtis anyway (even without the prior PREA complaint), Judge Russell finds Bradford's credibility sufficiently at issue (did he make the whole thing up?) to allow the jury to decide. Judge Russell dismissed retaliation claims against the officials who affirmed Curtis' discipline, finding the proof insufficient to create a jury question of retaliatory motive as to them.

MAINE – Walter William Moore, with a wonderful a/k/a, Nicki Nataska Petrovickov, which calls to mind a Russian danseuse, proceeded *pro se* to seek a preliminary injunction for what appears to be first-triad transgender medical care in *Moore v. Maine DOC*, 2018 U.S. Dist. LEXIS 75563, 2018 WL 2079499 (D. Me., May 4, 2018). The opinion by U. S. Magistrate Judge John C. Nivison, recommending denial of preliminary relief, is unclear about what exactly Moore is seeking; but she grieved the failure to provide hormone treatment. Generally, Moore is asking the court to order Maine officials to create and carry out a treatment plan for her. The state counters that no preliminary relief is needed because they have already convened a "multidisciplinary team" to meet quarterly on her case which has begun to implement a treatment plan, the terms of which are vague. Judge Nivison's opinion recites the basic law developed in the progeny of *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976) – from serious medical need, to recognition of risk of non-treatment, to deliberate indifference to the risk, citing a litany of First Circuit cases, but omitting any reference to the leading prisoner transgender *en banc* case of *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (*passim*). The omission is so remarkable as to seem deliberate. *Kosilek*, which treated the need for sex confirmation surgery as merely a difference in opinion about treatment options and not as a medical necessity, deals with the third triad. It is not such a bad decision for transgender inmates in the first and second triads; and it establishes the law of the Circuit that gender identity presents serious medical issues. 774 F.3d at 86. Nevertheless, the dissenters called it a "one-off," *id*. at 115; and this case is some evidence that the First Circuit district courts are doing the same. Moore's case will continue, despite a recommendation of denial of preliminary relief. Judge Nivison has held two conferences with state officials and has a third one scheduled, which should occur before this is published. He has tried, so far without success, to find counsel for Moore – and he has explored with the parties the possibility of transferring Moore out of state for treatment – something apparently legally available to Maine inmates. Perhaps the dark shadow of *Kosilek* is not being given the full sweep that many feared.

MISSOURI – In March, *Law Notes* reported at length about the issuance of an affirmative preliminary injunction in "U. S. Magistrate Order Hormones, Hair Pattern Treatment, and Feminizing Canteen Items for Missouri Transgender Inmate, Rejecting MoDOC's 'Freeze Frame' Policy" (March 2018, pages 108-9), covering *Hicklin v. Precynthe*, 2018 U.S. Dist. LEXIS 21516, 2018 WL 806764 (E.D. Mo., Feb. 9, 2018). Now, in *Hicklin v. Precynthe* [citations not yet available], 4:16-cv-01357-NCC, Docket No. 176 (5/22/18), U.S. Magistrate Judge Noelle C. Collins (who has the case for all purposes) issues a permanent injunction against the "freeze frame" policy as applied, as well as on its face – effectively ending "freeze frame" in Missouri state-wide. Transgender plaintiff, Jessica Hicklin, had amended her complaint after the preliminary injunction to include a facial challenge to the "freeze frame" policy against both the state and its corporate health care provider, Corizon, LLC. The state said it had no objection so long as the care was delivered by Corizon, and Corizon said it had no objection so long as the plaintiff dismissed claims against its individual employees. The defendants then declined to dispute Hicklin's factual recitation and consented to a permanent injunction against "freeze frame" on its face. In her analysis, Judge Collins found that "the freeze-frame policy at issue fails by its very nature to account for the individual medical needs of transgender prisoners." She ordered that the recommendations of treating physicians would control. The case did not present and does not address a right to sex-reassignment surgery. It is clear to this writer that defendants were agreeable to this

result and that Hicklin's counsel were savvy enough to close the bear trap on the offered relief before the Eighth Circuit had a chance to tinker with it. The U.S. Department of Justice during the Obama Administration previously filed a "Statement of Interest" opposing "freeze frame" policy in Georgia – *see Law Notes* (May 2015 at page 208) – but this writer is not aware of any such activity under the Trump Administration or Attorney General Sessions. Missouri now joins Iowa as Eighth Circuit states modernizing their transgender prison policy. Iowa was voluntary. See report on Iowa in *Law Notes* (September 2016 at page 395). Missouri was, too, after being hit by a legal 2X4. Nebraska has slammed the door. *See* Article, this issue of *Law Notes*. Kudos for the Missouri case to Lambda Legal (chief counsel Demoya Gordon and Richard Saenz); Robin Kaplan, LLC, New York; and Law & Schreiner, St. Louis.

OREGON – *Pro se* transgender inmate Colby Lee Aplin alleges she was raped by two officers in a cleaning closet in an Oregon prison, sometime "between 2014 and 2015." Her complaint, filed in August of 2017, alleges that her civil rights were violated by the rape and by the manner in which the DOC failed to take appropriate action after the rape, in *Aplin v. Oregon DOC*, 2018 U.S. Dist. LEXIS 77951, 2018 WL 2144348 (D. Ore., May 8, 2018). Chief U.S. District Judge Michael W. Mosman grants summary judgment to officials on statute of limitations grounds on the rape, but he denies summary judgment on the aftermath count and orders it to proceed to discovery. Aplin reported the rape to the Governor and to the Prison Rape Elimination Act ["PREA"] reporting department. Instead of investigating, however, Aplin alleges that prison official reassigned her and threatened "never to speak of the sexual assault again." She was later moved to another prison, where she filed a grievance. She continued to complain, but she alleges that her complaints were not taken seriously and that her life was threatened at the new facility after the assaulting officers were informed and passed word that they would find another officer to kill her. She was told repeatedly that she would be contacted "by the police," but it did not happen. She never received a decision on her grievance. Judge Mosman found that Oregon's two-year general tort statute applied to the underlying facts and that Aplin's complaint was time-barred on the rape. The "accrual" of the federal claim is a question of federal (not state) law, and inmates are given the benefit of tolling of the statute while they are exhausting administrative remedies under the Prisoner Litigation Reform Act ["PLRA"], under *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005). Here, however, Judge Mosman found that Aplin's statute had run before she filed a grievance, so tolling does not apply. He fixes the time of her grievance as March of 2017 – more than 2 years after the rape, which he fixed as before February of 2015, based on other summary judgment submissions – even though Aplin alleges her complaint under PREA (before her transfer) should have sufficed. Judge Mosman does not address exhaustion under either PREA or the PLRA (which are separate), but he nevertheless found that her rape count was time barred. The state made no argument that Aplin had failed to exhaust under the PLRA – probably because they would be faced with the allegations that they interfered with her grievance and never ruled on it. In this writer's view, Judge Mosman made a similar mistake in trying to fit this case within a "tolling" framework, instead of estoppel. The conduct at issue here allegedly prevented Aplin from filing an earlier grievance (and it also prevented her from filing in court, because she had to exhaust administratively). The issue is not "equitable tolling"; it is "equitable estoppel," which Judge Mosman does not mention. *See Lukovsky v. City and County of San Francisco*, 535 F.3d 1044, 1051-2 (9th Cir. 2008) (explaining difference between "equitable tolling," which focusses on the conduct of the plaintiff; and "equitable estoppel," which focusses on the conduct of the defendant). It appears there is a question as to whether defendants should be estopped from asserting the statute of limitations by their *in terrorum* behavior. Aplin pleaded: "Defendants have intentionally denied a response and legal action against the officers involved in the sexual assault." This writer believes that the law of estoppel was overlooked. Since this sounds in equity, it would not go to the jury; and Judge Mosman should have either ruled on it or held a hearing on its applicability. Judge Mosman did allow Aplin to proceed on claims that defendants' ongoing behavior after the assault was retaliatory, discriminatory and transphobic, and deliberately indifferent to her continued safety. Maybe counsel can still get involved and move to replead.

PENNSYLVANIA – With all due respect, this month's decision in *Moore v. Mann*, 2018 U.S. Dist. LEXIS 86370 (M.D. Pa., May 23, 2018), should be an embarrassment to U.S. District Judge Matthew W. Brann. Last month, we reported on the Report and Recommendation ["R & R"] of U. S. Magistrate Judge Martin C. Carlson regarding the protection from harm case of Brian C. Moore in *Moore v. Mann*, 2018 U.S. LEXIS 60690 (M.D. Pa., April 9, 2018) (*Law Notes*, May 2018 at page 264). Judge Carlson allowed Moore to proceed to trial against Angela Mann, a prison counselor, for placing him in danger by calling him a "snitch," a homosexual, and a pedophile, after he exposed her sexual misconduct with several inmates. Judge Carlson's 15-page R & R traces the history of this 2013 litigation through various judges,

the law of the case, and the application of "verbal abuse+" as presenting deliberate indifference to safety. Judge Carlson also reviews again the law of deliberate indifference in the Third Circuit's progeny to *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), including the inference of subjective knowledge if the risk was obvious. He then applies these rules to the jury question regarding the conduct of defendant Mann, who allegedly engaged in a campaign to undermine and threaten Moore with allegations and "labels that present a particularly serious risk in prison." No one objected to Judge Carlson's R & R. Judge Brann nevertheless granted summary judgment to Mann, without reference to the R & R, in an opinion that is less than 400 words, excluding caption and sign-offs. In addition to a lack of comity to Judge Carlson, the opinion completely ignores the teaching of *Farmer* about an inference of subjective knowledge from obvious risk. It is on the same page of *Farmer* (id. at 837) that Judge Brann cites for the proposition that only direct evidence will suffice. Here, the evidence shows more than the simple inference that *Farmer* allows: the allegation and proffer are that Mann had to have known the risk because she intended the harm arising from it. In addition to misusing *Farmer*, Judge Brann cites two other cases. Both actually support the R & R. In *Renchenski v. Williams*, 622 F.3d 315, 338 (3d Cir. 2010), the Third Circuit allowed an inmate to claim Due Process violations for being mis-classified as a sex offender when he had no sex offense convictions, but it denied Eighth Amendment claims because the error was negligent and the harm was "unintended." In Judge Brann's "*cf.*" cite to the Tenth Circuit case of *Northington v. Marin*, 102 F.3d 1564, 1567 (10th Cir. 1996), the defendant officer denied making the subject statements but conceded that, if he had made them, "the inmate would probably be beaten by other inmates." This writer sees no excuse for what happened here.

VIRGINIA – In April, *Law Notes* reported two Reports and Recommendations ["R & R"'s] from U. S. Magistrate Judge Pamela Meade Sergeant regarding two cases from the same transgender prisoner plaintiff, Terah C. Morris, *pro se* ("Federal Judges Issue Mixed Decisions on Transgender Inmate's Physical and Mental Health Care Claims; Ignore Issue of Unreasonable Restraints," April 2018 at pages 182-3). In the earlier case, *Morris v. Fletcher* (2015), the R & R recommended dismissal of Morris's case, and U. S. District Judge Ronald K. Moon adopted the report in full. Morris appealed to the Fourth Circuit; but she withdrew that appeal when Judge Moon indicated he would reconsider his adoption of that R & R based on Morris' objections, even though they were submitted late. This report on *Morris v. Fletcher*, 2018 WL 2051524 (W.D. Va., May 2, 2018), concerns that reconsideration. Judge Moon again upholds Judge Sergeant's recommendation. He makes clear, however, that the decision only concerns Morris's medical care and claims through early 2017, not the claims about later care or incidents filed in the second suit, *Morris v. Carey*, which is also on appeal to him, as described in the April article. In this reconsidered decision, Judge Moon usefully elaborates on the nuances of the Fourth Circuit's two decisions on transgender care in *De'lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003); and ten years later for the same patient in *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013). The later decision found that *some* care is not necessarily enough care to satisfy 8th Amendment standards. Here, however, Morris's early evidence did not show the medical clarity or outright refusals of *De'lonta II*. Judge Moon has yet to issue a decision on Judge Sergeant's second R & R, where some defendants interestingly overlap. A psychiatrist, Dr. McDuffie, stayed in the case in the second Recommendation (even though his dismissal was upheld in the first R & R); and he has also appealed to Judge Moon. Stay tuned.

WISCONSIN – This is the seventh *Law Notes* report on *pro se* self-declared transgender inmate Dominique Dewayne Gulley-Fernandez, a/k/a Dominique Dewayne Hakeem Enrique Gulley-Fernandez, a/k/a Teriyaki Arianna Giselle Ward, a/k/a Jessica Teriyaki Ariana Wilds-Walker, a/k/a Jessica Ariana Giselle Walker – who has filed multiple federal lawsuits in the Eastern and Western Districts of Wisconsin. *See* summary in *Law Notes* (April 2017 at page 173). The cases have been for the most part consolidated before U. S. District Judge Lynn Adelman in the Eastern District. In *Gulley-Fernandez v. Johnson*, 2018 U.S. Dist. LEXIS 88118, 2018 WL 2389732 (E.D. Wisc., May 25, 2018), Judge Adelman grants summary judgment and dismisses Gulley-Fernandez's claims. Despite numerous evaluations, Gulley-Fernandez has not been diagnosed as suffering from gender dysphoria, due to her unstable mental health condition and her behavioral issues. She has had multiple evaluations, including "outside" ones by Cynthia Osborne and Dr. Chester Schmidt, who appear in a full-length article in another Wisconsin case in this issue. The crux of the opinions is that Gulley-Fernandez does not have gender identity disorder, despite her self-diagnosis, that her other behavior justifies her security level of classification (even if it places her with fewer transgender inmates), and that the defendants have not been deliberately indifference to her serious health care needs. Gulley-Fernandez has had multiple transfers between prisons and over a hundred movements between units or cell changes due to behavior problems. She has been in segregation for serious infractions, and she admits that she has trouble controlling

her behavior. She admits to being disruptive on every unit on which she is housed. Basically, Judge Adelman accepts the professional affidavits that Gulley-Fernandez is too out of control to layer hormone therapy on top of her other behavior challenges. Gulley-Fernandez admits that she fights with other inmates, that she steals things, and that she sometimes just "goes off." Judge Adelman presents analysis of the involvement of each of the named defendants (which is not repeated here). She sees the case as turning mostly not on Gulley-Fernandez's medical care but on where she should be housed, as to which she defers to the classification decisions of the DOC, based on Gulley-Fernandez' behavioral record and the attempts to provide her with frequent psychotherapy. This case has little to do with the law of deliberate indifference, or even transgender care. Gulley-Fernandez' repeated demands for a court order for a television also do not help. Gulley-Fernandez has a mandatory release date of 2021.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur Leonard

U.S. CONGRESS – A group of Senate Democrats plus Bernie Sanders, an independent, introduced a bill seeking to amend the federal Religious Freedom Restoration Act to provide that the Act may not be used to justify discrimination. The bill would provide that RFRA cannot be used as a defense to charges under civil rights laws, employment law, protections against child abuse or access to health care. Although RFRA has not so far been successfully invoked as a defense against claims of discrimination under federal law, it was raised as a defense by a funeral parlor owner in Michigan in a case involving a transgender funeral director, but the 6th Circuit rejected the defense, finding that Title VII's sex discrimination ban covers gender identity discrimination claims, that the government had a compelling interest to prevent discrimination on that basis, and that, in any event, the employer's religious views were not unduly burdened by requiring him to continue to employ a transgender woman as a funeral director, when the employer's stated objection was to having a pre-operative transgender woman wearing a skirt while working in the funeral parlor. (After all, the Bible condemns cross-dressing, and some Christians reject the reality of transgender identity as a matter of faith.) See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 884 F. 3d 560 (6th Cir., March 7, 2018). The bill is called the Do No Harm Act. Its introduction is symbolic at this time, since it was not even get a committee hearing with Republicans controlling the Senate, and if by some miracle it were to pass both houses of Congress, the chances that Trump would sign it seem slight to none.

FEDERAL BUREAU OF PRISONS – On May 11 the Federal Bureau of Prisons released revisions to its Transgender Offender Manual, removing most of the progress that had been made during the Obama Administration in adopting better policies for the treatment of transgender federal inmates. The version of the manual published in the waning days of the Obama Administration stated: "The Transgender Executive Council will recommend housing by gender identity when appropriate." The newly-revised manual replaces this with a statement that facility assignments for transgender inmates will be assessed on a "case-by-case basis," and that the Council "will use biological sex as the initial determination for facility assignment," with transgender inmates being assignment to a facility based on their identified gender only "in rare cases," according to a May 12 report published by the *Associated Press*. The new manual modifies the prior version in the statement of purpose by placing "maintaining security and good order in federal prisons" as part of the purpose of manual, language that was not included in the original version. The National Center for Transgender Equality criticized the revised manual for, among other things, removing provisions intended to comply with the Prison Rape Elimination Act, a federal law of particular importance for transgender inmates who are liable to be targeted for sexual assault by other inmates. Part of the problem, of course, is that 8th and 14th Amendment case law does not yet provide many strong appellate precedents protecting transgender inmates in issues of housing assignment, protective custody, and treatment rights. Many courts insist that "differences of opinion" about appropriate treatment do not rise to the level of constitutional violations, although a few courts have embraced more progressive views. However, with one narrow exception, the Supreme Court has refused to address transgender inmate rights.

FLORIDA – Mulberry City Commissions unanimously approved a proclamation on May 15 recognizing the gay pride week celebration planned for June in Polk County. The measure said, in part: "Whereas the city, in honor of freedom from prejudice and bias in any form, and in recognition and praise of those members of our community who constantly fight the battle for equal treatment for ALL citizens, who are working together to obtain peace and understanding, regardless of sexual orientation, gender identity, gender expression race, color, creed, ethnic origin, or religion . . . " *Ledger* (Lakeland, FL), May 16.

HAWAII – Hawaii has become the 12th state to ban "conversion therapy" for

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minors. Governor David Ige signed the measure into law on May 25, and it becomes effective July 1. Act 13 of 2018 applies to psychiatrists, social workers, counselor, and marriage and family therapists. It also establishes a temporary sexual orientation task force in the State Health Department to address concerns from minors who seek counseling about sexual orientation, gender identity, or gender expression, according to a news report published May 25 on *hawaiinewsnow.com*. * * * Also, earlier in May the legislature gave final approval to House Bill 1489, which prohibits gender-based discrimination (including discrimination because of sexual orientation or gender identity) in any school or education program in Hawaii that receives state funding, echoing the coverage of federal Title IX. The bill would, if signed by the governor, go into effect January 1, 2020.

ILLINOIS – The Oak Part and river Forest High School Board approved a new equity policy to protect all students at its meeting on May 24, with a particular focus on gender identity. The measure revises the district's existing equal educational opportunity policy to include the following: "Students shall be treated and supported in a manner consistent with their gender identity. This shall include, but not be limited to: students having access to gendered facilities, including restrooms and locker rooms, that correspond to their gender identity." New administrative procedures are established to deal with students in transition and gender-nonconforming students, and provide that students may request accommodations and support at school. *Forest Leaves* (River Forest, IL), May 31.

KANSAS – On May 18 Governor Jeff Kolyer signed legislation granting protection against legal liability for faith-based adoption agencies that refuse to place children in homes with LGBT parents. The governor signed the measure at a ceremony at a "Christian boys' home" outside Wichita, reported the *Associated Press*, "surrounded by supporters who view it as a religious-freedom measure." The law takes effect July 1. Supporters claimed that the law will encourage faith-based agencies to place more foster children in adoptive homes, by eliminating an entire class of prospective foster parents with whom such agencies would not want to deal. Without this law, argued Kolyer, faith-based agencies might leave the state, reducing needed adoption placement services. Critics argue that tax-payer funds should not be used to subsidize discrimination against LGBT couples seeking to foster or adopt children, and criticized the measure as a "license to discriminate." Litigation is likely.

MARYLAND – Governor Larry Hogan signed a bill on May 15 making Maryland the 11th state to ban the practice of "conversion therapy" on minors. After signing the bill, Governor Hogan handed one of the ceremonial signing pens to Anne Arundel County Delegate Meagan Simonaire, a Republican who "came out" as bisexual during a speech in favor of the bill on the floor of the State House of Delegates. Simonaire's father, Senator Bryan Simonaire, had spoken against the bill in the State Senate. The law takes effect October 1. After his daughter spoke up on the House floor, Senator Simonaire said that he and his wife suggested she seek Christian counseling, not conversion therapy, according to a report in the *Baltimore Sun* (May 16). The bill does not apply to religious counselors, only to health care professionals licensed by the state and subject to professional discipline under the licensing system.

MICHIGAN – Noting the interpretive trend in federal court rulings under Title VII, the Michigan Civil Rights Commission voted on May 21 to issue an interpretive statement "clarifying" that the ban on sex discrimination in the state's Elliott-Larsen Civil Rights Act provides protection against discrimination because of sexual orientation and gender identity. Of the six commissioners in attendance, five voted for the motion to issue the statement and one abstained. The statement was proposed in response to a request from Equality Michigan, the statewide LGBT rights lobbying group, asking the Commission to issue such an interpretation in light of developments under Title VII, including a decision by the EEOC adopting such an interpretation and a court of appeals ruling in the 7th Circuit. (Since EM submitted its request, the 2nd Circuit has issued a similar decision, and the 6th Circuit, within which Michigan is located, has endorsed the EEOC construction of Title VII to cover gender identity discrimination claims.) The Commission's action sparked immediate criticism from Republican state legislators, who may try to amend the Act to overrule it. It is uncertain how the state's courts will deal with this issue in actual cases.

NEW HAMPSHIRE – The legislature approved bills to ban conversion therapy for minors and to amend the state's civil rights law to add gender identity as a prohibited ground for discrimination. The measures were sent on to Governor Chris Sununu, a Republican, who was expected to sign them during June.

NEW YORK – The Gender Expression Non-Discrimination Act, which would amend the state's Human Rights Law to expressly prohibit discrimination because of a person's gender identity,

was approved by the State Assembly yet again during May, but was blocked in Committee in the Senate, where a group of renegade "Democrats" have joined with Republicans to provide the Republicans with control and a majority on each Senate committee. The Assembly has passed similar measures over and over again, and finally last year Governor Andrew Cuomo, responding to frustration about the lack of progress and reacting to EEOC and federal court decisions construing the sex discrimination ban in Title VII to extend to gender identity claims, directed the State Division of Human Rights to issue an interpretive regulation extending coverage to such claims, which has yet to be fully tested in the courts. The governor has brokered a deal by which all but one of the renegade Senators has purportedly agreed to return to the Democratic fold in the Senate which, together with the lieutenant governor, should give Democrats a change to enact their legislative agenda, but many in the party have committed to supporting primary opponents of the renegade Democratic Senators, in hopes of electing a controlling Democratic majority that will end legislative gridlock in Albany.

OKLAHOMA – Governor Mary Fallin, a Republican, signed into law a measure widely described as the first anti-gay state law enacted in the U.S. in 2018. (The second was signed just days later in Kansas, see above) The Oklahoma measure, described by opponents as a "license to discriminate," provides that adoption or foster agency may not be required to place a child into any home where the placement would "violate the agency's written religious or moral convictions or policies." The pairing of "religious" and "moral" was intended to avoid charges that the measure violates the Establishment Clause but, at the same time, arguably extends the right to discriminate beyond religious agencies to any agency whose management disapproves of LGBT people on any "moral" ground. Litigation is expected.

RHODE ISLAND – The House of Representatives voted on May 23 to prohibit the "gay or trans panic defense," a legal strategy that sets up a victim's sexual orientation or gender identity as a justification for a violent crime against them. The measure now goes to the Senate. The bill is patterned on legislation recently enacted in California and Illinois. Although there is no record of such a defense being raised in Rhode Island, the bill's sponsor, Rep. Kenneth Marshall, said the ban was a "common sense measure" necessary to ensure that it is not used in Rhode Island in the future. *AP State News*, May 23.

VERMONT – Governor Phil Scott, a Republican, signed into law H. 333 on May 11. The measure requires that all single-user public restrooms be marked as gender neutral. The intent is to increase available restrooms for transgender individuals. Scott stated that the measure, which takes effect July 1, is "especially important for kids in school who face anxiety and bullying over something as simple as using the restroom." *Huffington Post*, May 14.

LAW & SOCIETY NOTES

By Arthur Leonard

CHESS – On May 20, the U.S. Chess Federation's Executive Board unanimously adopted a transgender policy, as recommended by the Board's legal counsel: "Allow a person to identify as they choose, and allow each person one change to their gender identification. If an individual attempts a second change to gender identification, at that time the individual must provide U.S. Chess a birth certificate, and the birth gender indicated on the birth certificate will be used to determine gender for U.S. Chess purposes." A news release from the organization state that this policy "codifies current U.S. Chess practices about self-identification" and "recognizes that there is a complicated, evolving legal landscape in which state and federal laws are often at odds." The organization characterized their policy as a "middle ground position that will allow for players to affiliate with U.S. Chess regardless of gender identification." The organization is a 501(c)(3) organization that oversees thousands of chess tournaments held through the United States and provides an organizational structure for their activities.

2018 ELECTIONS – The 2018 elections involve many historic firsts for the LGBTQ community. Out Lesbian Latina Lupe Valdez, former sheriff of Dallas County, won the Democratic primary to become the party's nominee for governor of Texas, opposing incumbent Greg Abbott. Given Texas's political complexion, Abbott is heavily favored to win the race, but Valdez's primary victory makes her the first openly-LGBT candidate to win a state gubernatorial primary of either party. * * * Nickie J. Antonio won the Democratic primary for an Ohio State Senate seat in a solidly blue district, making it likely that she will be elected the first out LGBT member of the Ohio Senate. She currently serves in the State House of Representatives.

SCANDAL – Stan Rosenberg, the out gay President of the Massachusetts Senate, announced that he was resigning as a result of an investigation showing that he had failed in his leadership responsibilities by giving his husband,

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Bryon Hefner, inappropriate access to attempt to influence legislation. In a statement he released on May 3, Rosenberg noted that the investigation had found no conduct by him that had violated Senate rules or state ethics laws and no evidence that his own actions had been influenced by his husband, but he was resigning in light of the investigation's conclusion about his failure to reign in his husband's activities. *Boston Globe*, May 3.

TRANSGENDER PEOPLE IN ICE DETENTION – Immigration and Customs Enforcement, the agency within the Department of Homeland Security that, among other things, oversees detention of non-citizens being held for illegal entry or illegally overstaying visas, had detained transgender women in all-male facilities, locking them up on average "for more than twice as long as immigrants overall," according to data the agency released in response to a request from U.S. Rep. Kathleen Rice (D-N.Y.), reported the *Huffington Post* on May 30. The result, inevitably, is that such detainees suffer sexual assaults in detention at much higher rates than cisgender women detained in female facilities. The data showed that self-identified LGBTQ people are only 0.14 percent of immigrants detained by ICE during the last fiscal year, but accounted for more than 12 percent of alleged victims of sexual abuse and assault while in detention, at the hands of other detainees or security personnel." A group of three dozen House Democrats have written to Homeland Security Secretary Kirstjen Neilsen asking ICE to release more immigrant on parole in light of the dangerous conditions in detention facilities revealed by the data. ICE has failed to comply with requirements in the Prison Rape Eliminate Act that all detention facilities publish annual reports on sexual assault allegations in their facilities. ICE received 227 reports of sexual abuse and assault during fiscal 2017, include 28 involving an LGBTQ victim.

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By Arthur Leonard

AUSTRALIA – Victoria's legislature has approved a new law that will end the requirement that transgender people who get new birth certificates must divorce their spouses. This is an obvious change after Australia adopted marriage equality.

BERMUDA – With no ruling by the Supreme Court before the end of May, Bermuda's new domestic partnership law, intended to supplant last spring's marriage equality ruling by the court, formally went into effect on June 1. A challenge to the law was argued with hopes that there would be a ruling by the end of May, but there was not. Same-sex couples seeking to formalize their relationship can enter into domestic partnerships that carry most marital rights. A ruling by the Court was likely to take place imminently.

BOLIVIA – The Organization of Feminine Travestis, Transgenders and Transsexuals of Bolivia announced that it will file an appeal of a marriage equality case with the Inter-American Court of Human Rights, seeking a reversal of a negative decision by the Plurinational Constitutional Court in the city of Sucre against transgender marriage and adoption. *Agenia Boliviana de Informacion*

CANADA – Bill C-66, which will expunge the criminal records of persons convicted crimes of sexuality that are no longer illegal, passed the Senate on May 30, and was expected to become law shortly. The bill was described by *Globe and Mail* (May 30) as "the direct result of Prime Minister Justin Trudeau's apology in the House of Commons late last year to those who were criminally prosecuted or persecuted at work because of their sexuality." Some activists criticized the measure for failing to expunge records of people arrested and convicted of "gross indecency" during police bathhouse raids in the 19970s and 1980s, after Canada had followed the U.K.'s lead in decriminalizing consensual gay sex. Courts had subsequently found that the police raids were illegal. Despite this flaw, advocates of the bill opposed sending it back to the House for amendment, which would delay passage, arguing that expungements of these records might be achieved through regulatory changes. Douglas Elliott, the out gay lawyer who led a project by Egale to obtain the legislation, said "It's not a perfect bill, but it's a very good bill." Elliott is also litigating a class-action suit on behalf of thousands of public servants (both civilian and military) who were dismissed or harassed because of their sexuality. It is expected that the case will settle soon with compensation for individuals.

CHILE – The Supreme Court approved a transgender person's request to change their name and registered gender without reassignment surgery. Thus, Chile's judiciary has brought the country into line with a recent ruling by the Pan-American human rights court. Legislation that would accomplish the same result for adults has been stalled in Congress, attributed to heavy lobbying against it by the country's Roman Catholic Church leadership. Some conservative legislators indicated they could approve the bill so long as it did not apply to minors and teenagers. Law Professor Lorena Lorca was lead

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attorney for the lawsuit in which the anonymous plaintiff's petition was granted. *Canadian Press*, May 31. * * * The new government has promised to comply with the agreement to bring in marriage equality that the former government had made with LGBT group Movilh to settle a complaint pending at the Inter-American Human Rights Commission. The agreement obligates the government to introduce marriage equality, gay adoption, anti-discrimination protections, to modernize gender identification policies, to repeal homophobic laws, and to implement related policies concerning education, health care, work and women, according to a summary prepared by Rex Wockner from reports in the Spanish-language press.

CHINA – *Global Times* (May 14) reported that local government authorities in several regions of China stopped LGBT rights events that had been planned for the International Day Against Homophobia. The events were labelled as "illegal gatherings." Although gay sex is not illegal in China, many public authorities are hostile to the LGBT community and seek to keep gay people and issues out of the public eye. * * * The *South China Post* (May 14) reported that Hong Kong's top court had granted a transgender woman the right to marry her boyfriend. This is not a full-blown marriage equality ruling, but rather a recognition that a person identified male at birth who has fully transition should be able to marry in the gender in which she is living. The decision specifies that the marriage will have all the usual legal rights identified with marriage, including in inheritance and adoption.

COSTA RICA – The Supreme Electoral Court approved a resolution that will allow people to change the name by which they are registered to accord with their gender identity, according to a May 15 *Associated Press* report. This means that the gender a person is registered with a birth will no longer appear on identity documents, seeking to avoid discrimination against those who have transitioned. The court said on May 14 that the procedure will be simple and free. This action responds to the Inter-American Court of Human Rights ruling earlier this year requiring Costa Rica to take the steps necessary to allow same-sex marriages. Legislative measures are still necessary for complete compliance with the court's ruling.

ECUADOR – The Constitutional Court ordered the Civil Registry Office to register a seven-year-old girl being raised by a lesbian couple with their last names, bringing an end to years of struggle to legitimize documents that were first filed with the Registry in September 2012, according to a May 30 report on *telesurtv.net*. Satya Amani Bicknell Rothon will finally be registered with the last names of her mothers, Helen Bicknell and Nicola Rothon. Satya is Nicola's biological daughter. Judge Tatiana Ordenana stated in the court's decision that all children being raised by same-sex couples should be allowed to be registered with both parents' last names, regardless of the type of family they are coming from, according to the news report.

INDIA – The appellate process moves slowly in India, but there were signs late in April of progress in the effort to get the nation's highest court to focus on deciding the question whether a prior two-judge panel ruling upholding Section 377 of the Indian Penal Code (informally referred to as the sodomy law) should be reversed. On April 23 the court gave the government a week to disclose its stand on the constitutional validity of the law in response to several petitions that have been filed with the court by individuals and groups. A five-member bench will be considering a curative petition seeking to overturn that prior ruling, as well as the various petitions that have been filed more recently. On May 17, the Supreme Court agreed to hear a new petition filed by a group of twenty people – all current or former students of the Indian Institutes of Technology – calling for scrapping Sec. 377. This will be heard together with the other petitions new pending in the Court. The Indian press has been reporting frequently on the progress in the case, and there seems to be a consensus, at least among the nation's media, that the failure to strike down the statute is an embarrassment.

JAPAN – Tokyo's Nakano Ward announced on May 9 that it will start issuing certificates recognition same-sex partnerships beginning in August, becoming Tokyo's third ward to adopt such a policy. Couples age 20 or older living together can apply for certificates after submitting sworn documents that include mutual support pledges as life partners. The other Tokyo wards that issue such certificates are Shibuya and Setagaya. Similar systems have been adopted in the cities of Sapporo, Naha, Iga, and Takarazuka. There is a nascent marriage equality movement in Japan that has drawn inspiration from the adoption of marriage equality in the United States. *Kyodo News*, May 9.

LEBANON – Lebanon became the first Arab country to have a gay pride celebration in 2017. An attempt to hold another this year was cut short during the celebrations after its organizer was briefly detained, reported the *Associated Press* on May 15. Organizer Hadi Damien

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told the Associated Press that he was detained overnight for organizing Beirut Pride Week, which began on May 12. Authorities first tried to halt a theater reading on Monday, May 14, complaining that it was not approved by state censorship authorities. This led to Damien being summoned by the police and interrogated, and authorities asked him to sign a pledge to call off the rest of the festival's scheduled events. Damien faced misdemeanor charges if he did not sign. The only gay pride celebrations in the Middle East that take place with the approval of authorities are in Israel.

MALTA – Responding to a constitutional court ruling in favor of seven transgender prison inmates, the government announced it would not appeal the decision and would take steps to adjust prison conditions accordingly. Judge Silvio Meli, in a "strongly worded ruling" according to a report by *MaltaToday* (May 30), awarded the inmates each 5,000 euros in damages. Despite their female gender identity, they had been placed in a male section of the Corradino Correctional Facility where they were subjected to "inhuman treatment," according to the court's findings. The government stated that appropriate new procedures have been adopted for the treatment of transgender prisoners, and that it had undertaken gender diversity training for prison workers. An official statement indicated that "the government has also introduced a specific legal provision to ensure that inmates who are unable to change their legal documents in their home country are still able to be accommodated in prison according to their lived gender."

MEXICO – Even though the state of Baja California has not yet altered its laws to allow same-sex marriage, the city of Tijuana has issued licenses to same-sex couples recently without requiring them to obtain a court order (amparo). Baja state human rights officials were said to have persuaded the city hall staff not to insist on the empty formalism of an amparo, when it is clear under existing legal precedents that the trial court is obligated to issue such orders upon application by qualified same-sex couples.

NIGERIA – *The Sun* (Nigeria) reported May 30 that Benue State House of Assembly had approved a bill prohibiting marriage contracts or civil unions between same-sex couples. The bill is titled "Same Sex Marriage Prohibition Act 2018." All places of worship in Benue State are prohibited from solemnizing such relationships. The Bill also prohibits the registration of Gay Clubs, Societies and Organizations, prohibits their meetings, and outlaws any public show of same-sex "amorous relationships" either directly or indirectly. Anyone who makes a forbidden same-sex marriage contract is subject on conviction to a term of 14 years imprisonment. The Speaker of the Assembly, Terkimbi Ikyange, stated that the measure was necessary to preserve the culture and tradition of the state.

NORTHERN IRELAND – Although public opinion polls show overwhelming majority support for marriage equality by the public, Northern Ireland's persisting lack of a functioning government due to inconclusive election results and part squabbling preventing the formation of a governing coalition have so far blocked progress on a bill that had received majority support in the previous parliament but was blocked by the Unionist Party exercising its veto under the coalition agreement. Attempts to get the UK parliament to enact marriage equality for Northern Ireland in default of a functioning local government fell short in May. *PinkNews* (May 11) reported that a private member's bill introduced by Labor's Conor McGinn which was not formally opposed by Prime Minister May's government was nonetheless blocked from a floor vote by objections from the Conservative MP. The proposal may be taken up again in the fall.

PAKISTAN – The House passed the Transgender Persons (Protection of Rights) Bill 2018 on May 8. The measure had previously been passed by the Senate. Transgender persons will be able to register to obtain drivers' licenses and passports, and have the option to get their gender changed in the National Database and Registration Authority's records. The measure prohibits harassment of people because of their gender identity, and prohibits discrimination in educational institutions, employment, trade and health services, and when using public transport or engaging in real estate transactions. *2018 Dawn*, 2018 WLNR 14119694 (May 9).

PORTUGAL – President Marcelo Rebelo vetoed a bill that would have allowed persons as young as 16 to change their gender identity simply by providing evidence of parental consent, with no need for a medical report. The president said he thought that there should be a required medical report for minors to change their gender identity. Under Portugal's Constitution, the legislature can make the requested changes, in which case the measure goes into effect, or it can attempt to override the veto. *AP Worldstream*, May 10.

SWITZERLAND – The Swiss government has announced plans to modify the

rules governing official recognition of gender transition with name changes, according to a May 25 report in the *Boston Globe*, which stated: "The Federal Council, Switzerland's seven-member executive body, plans to cut through administrative red tape by making it possible for individuals to make a 'simple declaration' for the civil register. Current law requires applicants to appear for an administrative or court proceeding." The government also plans to end the practice of terminating existing marriages automatically after a gender change. The government's announcement of its proposal starts a public comment period that will run through September 30, followed by a parliamentary debate. In light of the usual legislative timetable, changes are unlikely to take place before 2020.

THAILAND – Advocates for LGBT rights reported progress in securing legislation that will allow same-sex couples to form legally-recognized partnerships. They saw this as a "first step" towards marriage equality in the future. *The Nation* (Thailand) reported on April 25 that a Justice Ministry subcommittee was working on a draft bill, and hoped to have it ready for adoption during the term of the present government. Work had begun on such legislation in 2012 in response to a petition by same-sex couples, but was interrupted by the military coup that took place in 2014.

PROFESSIONAL NOTES

By Arthur Leonard

GLBTQ LEGAL ADVOCATES AND DEFENDERS, New England's LGBTQ and HIV public interest legal organization, has an opening for a full-time staff attorney for its legal work in the New England states. The Boston-based organization has been serving the LGBTQ community of New England for 40 years. GLAD seeks an attorney with a minimum of 3-5 years of litigation experience, legal research and writing, and policy experience, who has a passion for and interest in LGBTQ and/or HIV-related work. The job requires strong analytical skills, open-mindedness, and public speaking. "Independence, as well as the ability to work as part of an integrated team, is a must," insists their job posting! Bar admission in one of the New England states is preferred; salary consistent with experience, "excellent benefits." Send a confidential resume, cover letter and writing sample to Gary Buseck, GLAD, 18 Tremont Street, Suite 950, Boston, MA 02108, or by email to gbuseck@glad.org. Applications will be considered on a rolling basis until the position is filled. "GLAD is committed to building and maintaining a diverse staff. People of diverse racial and ethnic backgrounds and language abilities, transgender individuals, people living with HIV and people living with disabilities are particularly encouraged to apply."

THE TRANSGENDER LEGAL DEFENSE & EDUCATION FUND is conducting a search for a new Executive Director to be based in New York. The specifications for applicants emphasize management experience more than legal background, and in fact being a lawyer is not a firm qualification for the position. In its own words, the organization seeks a new Executive Director who "will be an energetic, passionate, and mission-driven leader with proven commitment to justice and equality for transgender individuals and the broader transgender community." Applicants much have a bachelor's degree but, as noted, a J.D. is not required (although it "could be beneficial in this role"). Kevin Chase Executive Search Group has been retained to lead the recruitment effort for this position. Those interested should send inquiries, nominations, or applications (including a cover letter and resume/curriculum vitae) electronically to Catie DiFelice, Senior Associate, at Catie@kevinchasesearch.com and to Kevin Chase, Managing Partner, at Kevin@kevinchasesearch.com. For a copy of the full search announcement, visit their website at www.kevinchasesearch.com.

President Trump surprised a lot of people by announcing that he was nominating out lesbian **CHAI FELDBLUM** to another full term as an Equal Employment Opportunity Commission member. Commissioner Feldblum is the leading champion at the EEOC of covering sexual orientation and gender identity claims as sex discrimination under Title VII. Trump's nomination was part of a negotiated package of three appointments (the other two are Republicans) who would be confirmed as a group by unanimous consent in the Senate. But the negotiated package is running into trouble because some of the religious-right-wing groups are absolutely opposed to Chai, even though she has active support from the business community, which respects the work she has done on the Commission since being nominated by President Obama during his first term to fill an uncompleted term, and subsequently renominated for a full term, which expires this summer. Four Republican Senators have put "holds" on the entire package because of opposition to Chai: Senators Lee, Rubio, Daines and Lankford. They would block unanimous consent on the Senate floor, which would require voting on the individual nominees. Senate Democrats agreed to the package, but could stall confirmation of the individual Republican appointees. Under Title VII, no more than 3 of the 5 commissioners can be members of the same party, so one of Trump's

nominees has to be a Democrat. Senator Lee insists Feldblum is a "radical" LGBT rights activist, and he would vote for a more moderate Democrat. At present the EEOC is operating with a bare quorum of 3 commissioners, of whom two are Democrats appointed by Obama and the one Republican is serving as interim chair, so technically the Democratic majority is still controlling EEOC decisions more than 500 days into the Trump Administration. And the EEOC is still litigating to advance LGBT coverage under Title VII, a situation that could change this summer if the confirmation roadblock is broken and the EEOC finally has a Republican majority after for the first time in a decade. This was all reported in the June 6 issue of BloombergLaw's *Daily Labor Report*.

LAMBDA LEGAL has announced that **DIANA FLYNN** will serve as the organization's Litigation Director, based in the Washington, D.C., office. Also, **SHARON MCGOWAN**, who is leading the organization's Legal Department, has been given the title of Chief Strategy Officer and Legal Director.

A **SUMMER SCHOOL ON SEXUAL ORIENTATION & GENDER IDENTITY IN INTERNATIONAL LAW** will take place in The Hague and Amsterdam on July 30-August 8, 2018, organized by Professor Kees Waalkijk of Leiden Law School. Details are on the Leiden University website. The school sessions are almost fully booked, but a special public event will be held on August 1, 2018: Rights Out there 2018 – Heroes of LGBTI+ Worldwide. This will take place that evening at Amsterdam's Old Lutheran Church (Singel 411, corner spui), and is co-organized by Amnesty International, COC Netherlands, Hivos, and Human Rights Watch, and takes place in the midst of Amsterdam's Pride Week celebrations. Door open at 7:30 pm. For more information, see: https://pride.amsterdam/events/rights-out-there-2018-hereos-lgbti-worldwide/?lang=en.

PUBLICATIONS NOTED

1. Abrams, Kerry, The Rights of Marriage: *Obergefell*, *Din*, and the Future of Constitutional Family Law, 103 Cornell L. Rev. 501 (March 2018).
2. Aviel, Rebecca, Faithful Unions, 69 Hastings L.J. 721 (April 2018) (interstate marriage recognition).
3. Bedi, Sonu, An Illiberal Union, 26 Wm. & Mary Bill Rts. J. 1081 (May 2018) (the writer is unhappy about the Supreme Court's exaltation of marriage in *Obergefell*).
4. Breslaw, Amanda, Recent Developments in Law & Sexuality: II. The Fair Housing Act and LGBT Discrimination, 267 Tulane J. L. & Sexuality 149 (2018).
5. Brown, Rachel, *Pidgeon v. Turner*: Insidious Inertia – Texas' Refusal to Extend Spousal Benefits to Same-Sex Couples, 27 Tulane J. L. & Sexuality 133 (2018).
6. Cabrera, Cristian Gonzalez, The Role of International Human Rights Law in Mediating Between the Rights of Parents and Their Children Born with Intersex Traits in the United States, 24 Wm. & Mary J. Women & L. 459 (Spring 2018).
7. Cacchio, Jennifer, Title IX and the Constitution: Equal Protection Violations and Sexual Harassment, 86 UMKC L. Rev. 627 (Winter 2018).
8. Chemerinsky, Erwin, Trump, the Court, and Constitutional Law, 93 Ind. L.J. 73 (Winter 2018) (undiluted pessimism).
9. Craig-Karim, Mallory M., Subverting the Perverted Practice of Provocation: Eliminating Modern Day Uses of LGBT Panic Defenses, 27 Tulane J. L. & Sexuality 33 (2018).
10. Cronin, Kelley O., Judicial Ethics – Judicial Words May Speak Softer Than Actions, but They Do Still Speak: The Code of Judicial Conduct; *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), 18 Wyo. L. Rev. 81 (2018) (the tale of a judge who spoke out-of-step with the marriage equality rulings).
11. Curtis, Darren, The Track to Freedom: Canada's Path to Legal Same-Sex Marriage Compared to the United States, 9 Creighton Int'l & Comp. L.J. 68 (May 2018).
12. Dailey, Anne C., and Laura A. Rosenbury, The New Law of the Child, 127 Yale L.J. 1448 (April 2018) (proposal to radically reconceptualize family law toward the perspective and best interest of children).
13. Das, Alina, Administrative Constitutionalism in Immigration Law, 98 B.U. L. Rev. 485 (March 2018) (argues that administrators should take on a more affirmative role in applying constitutional principles in immigration cases, with particular emphasis on the Board of Immigration Appeals).
14. Dent, George W., Jr., Meaningless Marriage: The Incoherent Legacy of *Obergefell v. Hodges*, 17 Appalachian J.L. 1 (2017/18) (not a fan of *Obergefell v. Hodges*, or of LGBT rights, for that matter).
15. Diedrich, Joseph S., Transgender Rights in Wisconsin, 91-MAR Wis. Law. 24 (March 2018).
16. Gross, Jaclyn, Neither Here Nor There: The Bisexual Struggle for American Asylum, 69 Hastings L.J. 985 (April 2018).
17. Hipskind, Fernanda, The Persecution of LGBT Individuals Fleeing to America from Muslim-Majority Nations: Has the Door to Refuse Been Closed?, 27 Tulane J. L. & Sexuality 53 (2018).
18. Hoechst, Judith A., and Sean C. Sobottka, Roadblocks to Surrogacy, 40-WTR Fam. Advoc. 44 (Winter 2018).
19. Horsting, Marina, *Barber v. Bryant*: The Fifth Circuit Holds that LGBT Plaintiffs Lack Standing to Challenge Mississippi's Response to *Obergefell*, HB 1523, the Protecting Freedom of Conscience from Government Discrimination Act, 27 Tulane J. L. & Sexuality 117 (2018).
20. Jensen, Andrew, Compelled Speech, Expressive Conduct, and Wedding Cakes: A Commentary on *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 13 Duke J. Const. L. & Pub. Pol'y Sidebar 147 (April 18, 2018).
21. Jolicoeur, Isabel, *Custody Rights of Same-Sex Couples in the United States v. Chile*: More Progress Needed, 49 U. Miami Inter-Am. L. Rev. 64 (Spring 2018).
22. Kreis, Anthony Michael, A Fresh Look at Title VII: Sexual Orientation Discrimination as Sex Discrimination, 35 Ill. Pub. Emp. Rel. Rep. 4 (2018).
23. Landau, Joseph, New Majoritarian Constitutionalism, 103 Iowa L. Rev. 1033 (March 2018).
24. Lang, Matthew J., Examining the Trump Administration's Transgender Service Ban Through an International Human Rights Law Framework, 25 Duke J. Gender L. & Pol'y 249 (Spring 2018) (the author is [unduly?] pessimistic about ultimately defeating the ban through litigation in the Article III courts, and suggests resort to international human rights forums as an alternative approach).
25. Legarre, Santiago, A New Natural Law Reading of the Constitution, 78 La. L. Rev. 877 (Spring 2018).
26. Litman, Leah M., Legal Innocence and Federal Habeas, 104 Va. L. Rev. 417 (May 2018) (how should the law deal with people who have been convicted under statutes subsequently held to be facially unconstitutional? E.g., sodomy laws).
27. Makris, Sophia, Adam & Even, Adam & Steve, and Ada & Eve: Gender Neutrality in Defining Parental Status in Assisted Reproduction, 36 Rev. Litig. 743 (Winter 2018).
28. Martin, Craig, Striking the Right Balance: Hate Speech Laws in Japan, the United States, and Canada, 45 Hastings Const. L.Q. 455 (Spring 2018).

29. Masri, Alexandra, Equal Rights, Unequal Protection: Institutional Failures in Protecting and Advocating for Victims of Same-Sex Domestic Violence in Post-Marriage Quality Era, 27 Tulane J. L. & Sexuality 75 (2018).
30. Menkel-Meadow, Carrie, Why We Can't "Just All Get Along": Dysfunction in the Policy and Conflict Resolution and What We Might Do About It, 2018 J. Disp. Resol. 5 (2018).
31. Mincer, Elizabeth, Fifty Shades and Fifty States: Is BDSM a Fundamental Right? A Test for Sexual Privacy, 26 Wm. & Mary Bill Rts. J. 865 (March 2018) (suggesting a "quasi-right" for adults to engage in consensual adult BDSM activities free from criminal law enforcement as consistent with evolving notions of sexual privacy under the Due Process Clause).
32. Novak, Erik, Recent Developments in Law & Sexuality: I. The Post-*Obergefell* Landscape, 27 Tulane J. L. & Sexuality 145 (2018).
33. Phillips, George Theodore, Thwarting Thrasymachus: A New Constitutional Paradigm for Direct Democracy & Protecting Minority Rights, 106 Geo. L.J. 1161 (April 2018) (ballot measures that reduce the rights of minorities should be presumptively unconstitutional).
34. Pomerance, Benjamin, Inside a House Divided: Recent Alliances on the United States Supreme Court, 81 Alb. L. Rev. 361 (2017-18) (with specific reference to the October 2016 Term of the Court, including *Pavan v. Smith*).
35. Schragger, Richard C., The Attack on American Cities, 96 Tex. L. Rev. 1163 (May 2018) (critiques state laws that preempt municipalities from legislating on LGBT rights).
36. Sheahan, Luke C., The First Amendment Dyad and *Christian Legal Society v. Martinez*: Getting Past "State" and "Individual" to Help the Court "See" Associations, 27-SPR Kan. J.L. & Pub. Pol'y 223 (Spring 2018) (criticizes *Martinez* as analytically flawed in its failure to take account of the rights of associations; in *Martinez*, the Court upheld the right of a state university law school to deny official recognition to a CLS chapter that excluded "unrepentant homosexuals" and non-Christians from membership).
37. Smith, George P., "Dignity in Living and Dying": The Henry H. H. Remak Memorial Lecture, 25 Ind. J. Global Legal Stud. 413 (Spring 2018) (the role of "dignity" in human rights law).
38. Talks, Chalk, and Michael Schay, Gordon College, Religious Liberty and Accreditation, 47 J.L. & Educ. 275 (Spring 2018) (Should private associations that accredit educational institutions be subject to the 1st Amendment Free Exercise Clause when considering religious educational institutions that refuse to ban discrimination because of sexual orientation and/or gender identity?).
39. Tsai, Robert L., Obama's Conversion on Same-Sex Marriage: The Social Foundations of Individual Rights, 50 Conn. L. Rev. 1 (March 2018).
40. Vartak, Kavan, Title IX Protections Against Bullying in Schools for Sex, Gender, and Orientation, 27 Tulane J. L. & Sexuality 91 (2018).
41. Wexler, Rachel, Artificial Reproductive Technology and Gendered Notions of Parenthood after *Obergefell*: Analyzing the Legal Assumptions that Shaped the *Baby M* Case and the Hodge-Podge Nature of Current Surrogacy Law, 27 Tulane J. L & Sexuality 1 (2018).

"Prisoner Claims" cont. from pg. 300

This case shows the importance of specific allegations of deliberate indifference to risk of harm, based on either personal involvement with an inmate's medical care or particularized knowledge thereof. Unlike the many contexts where the common legal doctrine of *respondeat superior* applies, plaintiffs cannot rely on supervisors being held responsible for all their subordinates' actions in the context of a constitutional claim against a state. Insufficiently specific allegations risk dismissal for failure to state a claim.

Henderson is represented by Jane Catherine Hogan (lead attorney) and Thomas Joseph Hogan, Jr., of Hogan Attorneys, Hammond, LA. ■

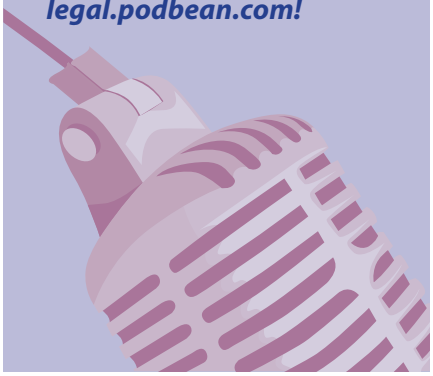
Robert Watson and Carl Rogers are attorneys at Kobre & Kim LLP.

"Pro Se Complaint" cont. from pg. 304

However, the magistrate ruled that, on a motion to dismiss, it must accept Stevens's allegations as true, including his allegation that no reasonable medical professional would have believed that denying surgery despite previous medical recommendations would be reasonable. Therefore, the magistrate rejected Defendants' final argument and recommended that the court permit Stevens's claims to proceed.

Magistrate Boone's findings and recommendation will be presented to the U.S. District Judge assigned to the case. ■

Joseph B. Rome and Deborah Sparks are attorneys at Kobre & Kim LLP.



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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