

L G B T  
LAW NOTES

December 2016

PRESIDENT-ELECT  
TRUMP

*With Republicans Also Retaining Both Houses of Congress,  
Great Uncertainty Looms Over the Future of  
LGBT Rights in the United States*

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# Election of the Trump/Pence Ticket and Republican Majorities in Congress Will be Consequential for LGBT Law

Perhaps this is too obvious to need saying, but the unexpected triumph by Donald J. Trump and Mike Pence in acquiring sufficient votes in the Electoral College to win the Presidency and Vice Presidency on November 8, together with the ability of Republican congressional candidates to win enough seats to maintain control in both chambers, will have significant consequences for the ongoing development of LGBT rights law, and may generate some immediate setbacks. The national platform adopted by the Republican Party at its July

decision and support for appointing Supreme Court justices who would vote to overrule it, although this was hardly one of the central themes of his campaign, voiced initially in response to an inquiry. He somewhat contradicted himself only days after the election in a *60 Minutes* interview, describing himself as a “supporter” of the LGBT community and saying his personal view on marriage equality is “irrelevant because it’s already settled.”

In the immediate aftermath of the vote, there was speculation that the incoming Trump Administration

*Windsor* will remain intact for now. The list of potential nominees he had released during the campaign, made up almost entirely of sitting federal and state judges, did not include any person notable for supporting LGBT rights, the unifying thread among their selection (at the recommendation of The Federalist Society) being an acknowledged predisposition to overrule *Roe v. Wade* and thus remove the constitutional support for women who seek to terminate pregnancies. A justice who would overrule a frequently-reaffirmed forty year old precedent

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convention was generally deemed the most explicitly anti-LGBT in the party’s history, calling for a rollback of marriage equality, protection for those who practice conversion therapy on minors, opposition to bans on discrimination because of sexual orientation or gender identity, and specific support for religious exemptions from compliance with general laws through a First Amendment Defense Act. The Republicans have consistently criticized the Obama Administration’s non-legislative efforts to advance the rights of LGBT people through regulations, guidelines, rules, and interpretations, and called for these to be rescinded, revoked, and overruled. On top of that, during the presidential campaign candidate Trump had voiced disagreement with the *Obergefell*

would move quickly to repeal Obama Executive Orders, rescind guidelines and rules, change positions being taken in litigation by the Justice Department and various administrative agencies, such as the Equal Employment Opportunity Commission, and initiate the repeal and replacement of regulations. Since the Republicans in control of the Senate had refused to consider President Obama’s nomination of U.S. Court of Appeals for the District of Columbia Circuit Chief Judge Merrick Garland to fill the vacancy created by the death of Justice Antonin Scalia last February, the new president would have an immediate opportunity to appoint a justice to the Court, although such an appointment would not change the balance in support of LGBT rights, where the five-member majority that decided *Obergefell* and

such as *Roe v. Wade*, perhaps the most celebrated application of the Court’s “liberty” jurisprudence under the 14th Amendment, would probably be inclined toward the similar overruling of more recent liberty decisions, such as *Obergefell*.

However, as panicked LGBT people called the various LGBT rights legal and political organizations, which were sounding alarms about the perils to gay rights from the new administration, they heard reassurances when it came to marriage equality. For one thing, the President and Congress do not have authority to reverse or overturn a Supreme Court opinion, and the replacement of Scalia would not change the Supreme Court calculus on marriage equality or abortion, as Scalia was a dissenter on both issues. A

constitutional amendment to ban choice or marriage equality is a non-starter, since it would require super-majorities in Congress that the Republicans do not command, their margins of control having been slightly reduced in the election, and it would also require an extraordinary national consensus on subjects as to which the public is sharply divided, with a majority now in support of choice and marriage equality. In those circumstances, it is very unlikely that three-quarters of the states would ratify anti-abortion and anti-marriage-equality measures, even if they could win two-thirds majorities in both houses of Congress.

Even if or when Mr. Trump got a second opportunity to make a Supreme Court appointment during his four-year term, and even if it involved a member of the *Obergefell* majority (which includes the three oldest justices, Ginsburg, Kennedy, and Breyer) stepping down, this would not result in an immediate overruling, because it would require getting a new case to the Court and persuading a majority of the new Court to take the drastic step of overruling precedents that had worked their way into the social fabric of America – in the case of marriage equality, rather quickly, but there are already many thousands of married same-sex couples since U.S. marriage equality began in Massachusetts in May 2004 and there is growing public support even in the “red states” according to public opinion polling. As to abortion rights, it is well to note that every Republican president elected since 1980 has vowed to seek the overruling of *Roe v. Wade*, and each of them has been able to appoint at least two justices to the Court, but still *Roe* stands, albeit narrowed somewhat in effect, as some justices appointed by Presidents Reagan and George H.W. Bush (O’Connor, Kennedy, and Souter) have backed away from overruling, collectively and most strikingly as co-authors of the central opinion upholding abortion rights in the *Casey* decision shortly after Souter was appointed. This has, however, stiffened the spine of anti-choice advocates, who inveigh against the appointment of “another Souter” by a Republican president. The next time around, expect “extreme vetting”

on this issue, to use the President-elect’s terminology.) A possible hopeful sign is that one of the most prominent names on Trump’s Supreme Court list, 11th Circuit Judge William Pryor, was part of the unanimous three-judge panel that decided *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), a landmark decision holding that gender identity discrimination is a form of sex discrimination subject to heightened scrutiny under the 14th Amendment’s equal protection clause. But perhaps joining this decision will undermine his appointment or confirmation by a Republican Senate.

The more immediate threat to LGBT rights comes from the ability of an incoming administration to change many of the policies of the outgoing administration that had not been frozen into statutory law or significantly cemented in appellate rulings. For example, President Obama built on President Clinton’s legacy of executive orders to strengthen regulations establishing non-discrimination because of sexual orientation (and adding gender identity) in federal agencies, secured the repeal of the “Don’t Ask, Don’t Tell” policy, obtained the addition of sexual orientation and gender identity to federal hate crimes laws, and issued a new executive order requiring federal contractors to include sexual orientation and gender identity in their own employment policies. Numerous agencies responded to the president’s directives to determine how they could adapt their policies and procedures to be more LGBT-friendly regarding their employees and the public they service. Agencies enforcing federal law became more receptive to the needs of LGBT citizens, reflected in the relative speed with which they adopted new rules and policies in the wake of *Windsor* and the demise of the “Defense of Marriage Act.” The State Department made the process for changing sex indications on passports much more user-friendly for transgender citizens as the Tax Court made the expenses of gender transition tax-deductible and the bureaucracy modified their treatment under Medicare and Medicaid. The Board of Immigration Appeals quickly clarified the rights of same-sex spouses of

immigrants, the agencies dealing with federally regulated employee benefit plans quickly modified rules governing rights of same-sex married couples, and so forth. The EEOC, emboldened by President Obama’s appointment of new commissioners, embraced an expansive definition of discrimination “because of sex” under Title VII to extend to sexual orientation and gender identity discrimination, first in rulings on federal sector discrimination claims, and more recently in affirmative litigation against state government and private sector employers. Most other federal agencies have followed the EEOC’s lead, including DOE, HUD, DOL, and DOJ. President Obama, again building on the accomplishments of the Clinton Administration, appointed more openly LGBT judges, diplomats, policy-level agency officials, and White House staffers than any prior president, and these appointees in the independent agencies and the executive branch helped to effectuate changes in emphasis in foreign and domestic policy.

Much of this is threatened by a new administration elected on an anti-LGBT platform. The Defense Department is not required by statute to discriminate against LGBT people, but there is no statute forbidding it from doing so, and the recent changes in policy towards transgender service members are not locked into regulations and could be easily rescinded, putting numerous careers in danger. The service branches moved quickly after the DADT repeal to lift the ban on military service by openly-gay people, but once again these are policies rather than “locked-in” statutory or administrative requirements that could not be rescinded. The Equality Act, which if enacted would make federal bans on LGBT discrimination statutory, has not moved in Congress and won’t move in the new one if the Republican platform is any indication. Although a body of court precedents has begun to grow embracing the broader interpretation of sex discrimination under various federal laws, there is not yet a strong body of appellate precedent to support these interpretations and nothing explicit at the level of the Supreme Court, which means these interpretations

are vulnerable to overruling. A new administration could refocus civil rights enforcement authority away from vindicating LGBT rights without changing any existing laws, could stop bringing pro-LGBT rights cases and filing affirmative amicus briefs in private litigation, and might even file briefs arguing to the contrary. President Trump could revoke President Obama's pro-LGBT executive orders with the stroke of a pen. The Education Department's policy supporting the right of transgender students to gender-appropriate facilities access under Title IX could be quickly rescinded. Openly LGBT people could be shut out of the kind of high-level executive and judicial appointments that were made during the Obama administration, and the numerous openly-gay federal district judges appointed by President Obama who might have been prime candidates for promotion to the courts of appeals may have to shelve those aspirations for at least four years, despite stellar records of performance as trial judges. The federal bureaucracy, which has become the welcoming home and employer for numerous LGBT public servants, may turn hostile or, at best, non-supportive.

These are worst-case scenarios, of course. President Bush did not revoke President Clinton's anti-discrimination executive orders, and there were many openly gay federal workers who fared reasonably well during his administration. Bush even appointed some openly gay people, although nowhere near the numbers of Clinton or Obama. But progress on many fronts halted, and the Bush Administration was no champion of LGBT rights in the courts, mounting a stiff defense of the Defense of Marriage Act amidst the president's call for a constitutional amendment banning same-sex marriage. And, despite the more extreme anti-LGBT views of some of Bush's policy-level employees, none is quite extreme as Vice-President-Elect Mike Pence, champion of conversion therapy and religious exemptions from civil rights laws, who is widely expected to be the CEO of the Executive Branch under Trump "presiding" as Chairman of the Board along a business model.

One clear sign to watch will be how

the incoming administration deals with a case now pending before the Supreme Court, *Gloucester County School District v. G.G.*, in which the Justice and Education Departments played a key role in supporting the plaintiff's claim that he – Gavin Grimm, a transgender boy in a Virginia high school – should be entitled to use restroom facilities provided for boys and not restricted to using inconveniently located single-sex restrooms. The 4th Circuit ruled in that case that the district court should defer to the Education Department's interpretation of Title IX's ban on sex discrimination, overruling the district court's initial dismissal of the claim and remanding, upon which the district court promptly issued a preliminary injunction mandating Gavin Grimm's restroom access, which was ultimately stayed by the Supreme Court pending consideration of the school district's expected petition for certiorari. (The stay was granted by the four conservatives on the Court and Justice Breyer, who explained his vote as "a courtesy," presumably based on his expectation that the four conservatives would vote to grant the forthcoming cert petition.) The Supreme Court has not set the case for argument yet, and because of the vacant seat there is speculation that the Court is holding off on scheduling arguments for cases in which it might be evenly divided. The two questions on which certiorari was granted are whether the Education Department's position in the case, articulated in a position letter provided to the district court, is entitled to judicial deference under the Court's *Auer v. Robins* standard, and whether, with or without such deference, the Education Department's interpretation of Title IX should prevail. (The Court declined the petitioner's invitation to decide whether *Auer*, which mandates judicial deference to reasonable agency interpretations of ambiguous regulations, should be overruled.) The Education Department could quickly affect this case by officially reformulating its Title IX interpretation to eschew coverage of gender identity discrimination, or less drastically to opine that such coverage would not invalidate a school district's "biological sex" policy on restroom use, thus taking

away the *Auer* deference basis for the 4th Circuit's ruling and providing a ground for the School District to ask the Court to remand the case to the 4th Circuit for reconsideration without ruling on either question. Alternatively, of course, the new administration could file an amicus brief supporting the school district and the Solicitor General (not yet appointed) could even seek argument time, as Obama's Solicitor General did in support of marriage equality in *Obergefell*. Betsy DeVos, whom Mr. Trump announced he would nominate as Secretary of Education, and Senator Jeff Sessions, whom Trump announced he would nominate as Attorney General, seem highly unlikely, based on their publicly announced opposition to LGBT rights, to maintain the government's current position on the case, but only time will tell.

Meanwhile, LGBT advocates at the federal level, preparing for the worst, will be looking to the LGBT legal organizations and lobbying groups to move quickly and decisively to counter any backsliding on existing LGBT rights gains through lawsuits and administrative complaints. Moving forward quickly to push promising lines of case law through to appellate rulings will be high on the agenda. And stiffening the spine of the embattled Democratic caucus in the Senate, accompanied by heavy lobbying of the handful of remaining Senate Republicans whose assistance would be needed to block anti-LGBT measures in the event of floor votes on the merits, will also be crucial. Another sign of how things might go will be whether the controlling Republicans in the Senate decide to exercise the so-called "nuclear option" and adopt procedural rules for the new Senate that end the filibuster and the ability of individual Senators to block confirmation votes on presidential nominations of people from their states (the blue slip rule). With the filibuster rule in place, the Democratic caucus can effectively block the passage of the most anti-LGBT legislation, such as possible attempts to amend Title VII to prevent courts from following the EEOC's broad interpretation of sex discrimination. Loss of the filibuster would take away that important firewall. ■

## 7th Circuit Conducts En Banc Rehearing in *Hively* Title VII Sex Discrimination Case

The nine active judges of the 7th Circuit Court of Appeals and two senior judges who participated in the three-judge panel heard oral argument on November 30 in *Hively v. Ivy Tech Community College*, 830 F.3d 698 (2016), rehearing en banc granted, 2016 WL 6768628 (Oct. 11, 2016), in which the three-judge panel of Judges Ilana Rovner, William Bauer, and Kenneth Ripple held that it was bound by circuit precedent to reject a sexual orientation discrimination claim under Title VII. The 7th Circuit is the first federal appeals court that has agreed to reconsider its precedent on this question.

appointment to the 7th Circuit conduces to judicial longevity with a vengeance. Several of the Republican appointees are libertarian conservatives, and the circuit produced one of the most strongly worded pro-marriage equality rulings in 2014, authored by Richard Posner.

Lambda Legal attorney Gregory Nevins represented the lesbian plaintiff, Kimberly Hively, who alleged she was not renewed as an adjunct professor by the college because administrators discovered she was a lesbian when they heard reports she had kissed her same-sex partner in the parking lot. Nevins argued that the court should

are there lesbians?” Posner’s question was part of a sequence of questioning that led Posner to posit that lesbians and “homosexual men” are a “different sex” from heterosexual women and men, leading to the natural conclusion that sexual orientation discrimination is sex discrimination, *simpliciter*.

Other judges seemed more comfortable with treating the issue as a logical extension of the Supreme Court’s *Price Waterhouse v. Hopkins* decision from 1989 and *Oncale v. Sundowner Offshore Services* from 1998, suggesting flexibility in adapting the meaning of “because of sex” in response to change social understanding. Judge Posner rejected the college’s suggestion that Title VII must be interpreted in light of the intentions of Congress in 1964, asserting that the courts do not treat statutory language as “frozen” at the time it is adopted. He cited as an example the Sherman Anti-Trust Act, adopted in 1890, whose modern interpretation would be unrecognizable to its drafters, and the 14th Amendment, whose framers would have been shocked at *Loving v. Virginia* and *Brown v. Board of Education*.

The 2nd and 11th Circuits will shortly hear oral arguments about whether sexual orientation discrimination claims can be brought under Title VII, but it is possible that the 7th Circuit will likely be the first to issue an *en banc* opinion in this new wave of cases postdating the EEOC’s 2015 decision in *Baldwin v. Foxx (Department of Transportation)*. Out lesbian EEOC Commissioner Chai Feldblum, widely considered to be the architect behind the federal agency’s push in recent years to protect LGBT employees, attended the argument and spoke to the press afterwards.

It is interesting that the oldest senior judge on the Circuit, William Bauer, appointed by President Ford in 1974 and in his 90th year, joined with Judge Rovner in suggesting that the circuit reconsider its precedent (he

**The attorney for the college, John Maley, appeared particularly flustered by Judge Richard Posner’s question, “Why are there lesbians?”**

All three of the panel judges were appointed by Republican presidents. Two of them, Rovner and Bauer, joined in part of the opinion suggesting that the circuit precedent was out of sync with the times and should be reconsidered, while Ripple joined only the part of the opinion dismissing the appeal on grounds of circuit precedent. The 7th Circuit may have the smallest representation of judges appointed by Democratic presidents, as President Obama achieved only one confirmation of a 7th Circuit nominee, David Hamilton, and two judges appointed by President Clinton are sitting as active judges. All the remaining active judges on the Circuit were appointed by Presidents Reagan, George H.W. Bush, and George W. Bush. Of the senior judges, one was appointed by President Ford and two were appointed by President Reagan. It appears that

overrule its prior decisions and adopt an understanding of the prohibition on discrimination because of sex that would encompass sexual orientation discrimination claims, on the theory that this was consistent with the statutory language and supported by the Supreme Court cases that rejected employer reliance on sex stereotypes in making adverse decisions about employees. The court also heard briefly from EEOC attorney Gail Coleman, who put forth the agency’s position that sexual orientation discrimination claims are “necessarily” sex discrimination claims.

An audio recording of the oral argument is available on the 7th Circuit’s website, and it is fascinating, especially to consider the pointed questioning of the attorney for the college, John Maley, who appeared particularly flustered by Judge Richard Posner’s question, “Why

also offered a cringeworthy answer to Judge Posner's question about why there are lesbians: "ugly men"). Among the actively serving Republican appointees, the most senior is Posner, who has in recent years become an LGBT rights champion, having written the circuit's marriage equality decision. Another prominent Reagan appointee to the Court, Frank Easterbrook, questioned the failure of the college's brief to respond to the appellant's citation and reliance on *Loving v. Virginia* as presenting an analogy between race and sex discrimination that Easterbrook suggested was telling.

BNABloomberg *Daily Labor Report* summarized the argument in an article published later on Nov. 30, suggesting that at least six judges (a majority of the eleven) had appeared skeptical of the college's arguments in their questioning and comments. The only judge whose questioning of Nevins communicated disagreement with the plaintiff's position seemed to be Diane Sykes, George W. Bush's only appointee, who is on President-Elect Donald Trump's list released during the campaign of judges he would consider appointing to the Supreme Court. A vote that Title VII covers sexual orientation discrimination would probably be disqualifying for a Supreme Court nomination in the eyes of Attorney General-designate Jeff Sessions and Senate Republicans.

It will be interesting to see whether the *en banc* court issues its opinion *before* the inauguration. Posner may end up writing it, which seems distinctly possible since he is rumored to have opinion drafts ready even before he hears oral argument, and in light of his seniority and eminence would have the "least to lose" from taking a position inconsistent with the official position of the Republican Party. A reporter from the *Washington Post* who attended the argument speculated in an article published on December 1 that the only real question at the end was which theory the court would use to rule in favor of Kimberly Hively's position that Title VII covers sexual orientation claims. ■

## Pennsylvania District Court Holds That Title VII Sex Discrimination Complaint States a Cause of Action on the Basis of Sexual Orientation

On November 4, 2016, U.S. District Court Judge Cathy Bissoon of the Western District of Pennsylvania held Title VII's "because of sex" provision prohibits discrimination on the basis of sexual orientation. *U.S. Equal Employment Opportunity Commission v. Scott Medical Health Center*, 2016 U.S. Dist. LEXIS 153744, 2016 WL 6569233. Judge Bissoon accordingly denied defendant Scott Medical Health Center's motion to dismiss the Equal Employment Opportunity Commission ("EEOC") claim on behalf of Dale Baxley, an openly gay man. The EEOC's complaint alleged sex discrimination against

employee since July 2015, when the EEOC's official position became that Title VII's ban on sex discrimination extended to sexual orientation claims. *Baldwin v. Dep't of Transportation*, 2015 WL 6150868.

The EEOC alleged discrimination under Title VII based on Baxley's failure to conform to McClendon's notion of male gender stereotypes. The Defendant, in turn, argued Title VII does not prohibit discrimination based on sexual orientation and moved to dismiss the complaint for failure to state a cause of action, citing in support two precedents from the third circuit, *Bibby v. Philadelphia Coca-Cola Bottling Co.*,

### Judge Bissoon grounded her ruling in *Price Waterhouse*.

Baxley, specifically sexual stereotyping, by defendant's telemarketing manager, Robert McClendon.

Baxley was employed by defendant as a telemarketer for approximately one month in 2013 before he quit because of offensive comments made by his manager, McClendon. Allegedly McClendon regularly called Baxley "fag," "faggot," "fucking faggot," "queer." According to the complaint, McClendon also made highly offensive statements about Baxley's relationship with his partner such as "I always wondered how you fags have sex" and "Who's the butch and who is the bitch?" The EEOC instituted their action on behalf of Baxley in the fall of 2015 after the foregoing was uncovered during a separate investigation of defendant accused of sex discrimination by five female former co-workers of Baxley's.

Baxley's was the first case brought by the EEOC on behalf of a gay

260 F.3d 257 (3d Cir. 2009) and *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009). Defendant pointed to Bibby and Prowel for the proposition that the third circuit has consistently held Title VII could not be extended in the fashion envisioned by the EEOC.

Judge Bissoon, however, was persuaded by the EEOC's argument that, but for Mr. Baxley's sex, he would not have been subjected to McClendon's discriminatory and harassing statements. That is, had Baxley been a woman, McClendon would not have leveled the same insults against him or subjected him to the same treatment.

Judge Bissoon grounded her ruling in *Price Waterhouse* in which the Supreme Court held "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex

stereotypes.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). Judge Bissoon continued, “[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality . . . [t]his discriminatory evil is more than reasonably comparable to the evil identified by the Supreme Court in *Price Waterhouse*.”

In a footnote, Bissoon also recognized as “compelling” the EEOC’s and amici’s alternative theory that McClendon’s conduct was illegal because it was analogous to discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race, which Title VII also prohibits.

Judge Bissoon distinguished the adverse third circuit rulings. As to Bibby, Judge Bissoon noted that, unlike the EEOC in Baxley’s case, the *Bibby* plaintiff made no argument that sexual orientation discrimination was sex stereotyping and that the *Bibby* parties “simply assumed there was a legal distinction between discrimination ‘because of sex’ and ‘sexual orientation discrimination.’” “Furthermore,” wrote Bissoon, “the Title VII precedent relied on by the Court of Appeals in *Bibby* either predated *Price Waterhouse* or contained little to no analysis, merely accepting as a given that Title VII did not cover sexual orientation discrimination.” Bissoon further disposed of *Bibby*, as well as *Prowel*, by pointing to the Supreme Court’s recent legalization of gay marriage as recognition of the “illegality of discrimination on the basis of sexual orientation” and the endorsement by district courts throughout the country of an interpretation of Title VII that includes a prohibition on discrimination based on sexual orientation.

Bissoon also denied defendant’s motion to dismiss based for a lack of subject matter jurisdiction based on what it claimed were procedural deficiencies in the EEOC’s commencement of Baxley’s suit. – *Matthew Goodwin*

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## Mindless Bureaucracy Temporarily Foiled as District Judge Refuses to Dismiss a Challenge to Gender-Binary Requirement on U.S. Passports

“Just because” is not a good enough answer when the question is whether the State Department’s Passport Office was “arbitrary or capricious” when it refused to process a passport application from an intersexual applicant who declined to check either M or F on a passport application. U.S. District Judge Richard Brooke Jackson of the District Court in Colorado rejected the government’s motion to dismiss Dana Alix Zzyym’s challenge to the gender binary requirement under the Administrative Procedure Act on November 22 in *Zzyym v. Kerry*, 2015 Westlaw 6879827, 2016 U.S. Dist. LEXIS 162659, while reserving any ruling on the plaintiff’s constitutional claims. Instead, Judge Jackson returned the matter to the Department for “reconsideration.” Zzyym is represented by attorneys from Lambda Legal.

Zzyym identifies as an intersex person, who was born “with sex characteristics that do not fit typical binary notions of bodies designated ‘male’ or ‘female,’” according to an explanation contained in the complaint. To avoid having to use sex-based pronouns, the court refers to Zzyym through the opinion by the plaintiff’s first name, Dana, as we will do in reporting on the case. In a press release about the court’s ruling, Lambda Legal mentions that Dana’s birth certificate says “unknown” in the space for sex, reflecting the ambiguous genitalia that are sometimes characteristic of intersex newborns.

Dana applied for a passport in 2014 and wrote the word “intersex” below the “sex” category on the application form, rather than checking the box labeled male or the box labeled female. Dana identifies as neither. In a separate letter, Dana explained this and requested that an X be used as an acceptable marker in the sex field, to conform to International

Civil Aviation Organization (ICAO) standards for machine-readable travel documents. Some other countries have adopted the X for documents issued to intersexual people as well as transgender people who have rejected a gender binary choice in describing their sexual identity.

The Passport Office reacted like a typical hide-bound bureaucracy and rejected the application immediately, without any evident thought or policy consideration, merely explaining that “the Department of State currently requires the sex field on United States passports to be listed as ‘M’ or ‘F’” and that the Department would be “unable to fulfill your request to list your sex as ‘X’.” The Department noted that Dana had submitted a copy of Dana’s driver’s license which identified Dana as “female” and offered to list Dana that way, or, if Dana could supply a doctor’s letter certifying such, they could list Dana as “male.”

Dana rejected this suggestion, submitting a letter to the Department appealing the Passport Office’s refusal to process the application, and included sworn documents from physicians with the U.S. Department of Veterans Affairs Medical Center in Cheyenne, Wyoming, where Dana had received treatment as a Navy veteran, verifying Dana’s sex as “intersex.” Dana also met with staff members at the Colorado Passport Office to explain that a passport identifying Dana as either male or female would be inaccurate. The Department rejected Dana’s appeal, providing no explanation other than its original response, but suggesting that Dana could obtain a passport by submitting a new application and checking the box for “M” or “F”. Dana’s request for further reconsideration was rejected, and this lawsuit followed.



Dana attacked the State Department's position on several grounds. First, Dana relied on the Administrative Procedure Act, a statute that forbids administrative agencies from making decisions that are "arbitrary or capricious" in their interpretation and application of their statutory authority. Dana also alleged that the Department's requirement that passport applicants identify as male or female exceeded the authority Congress delegated to the Department in administering the passport program, as there is no statutory requirement that gender be listed on a passport. (Indeed, prior to 1976, the passport application did not require applicants to indicate gender.) Dana also alleged that the refusal to process the application was a violation of rights protected by the due process and equal protection obligations imposed on the federal government by the 5th Amendment of the Bill of Rights, and asked the court to order the Department to issue Dana a passport, as Dana is otherwise fully qualified to get one. The State Department filed a motion seeking judgment on the APA claims and dismissal of the remaining claims in the Complaint, and the court held a hearing on July 20.

Judge Jackson decided to focus on the APA claim in his November 22 Order, reserving judgment on the constitutional claims. The essence of the arbitrary and capricious standard is to require the government to have a reason for its policy. "I find that the administrative record contains no evidence that the Department followed a rational decision-making process in deciding to implement its binary-only gender passport policy," wrote the judge. He noted that the "policy" to which the Department referred in rejecting Dana's application was actually a "collection of rules pertaining to gender contained within the Foreign Affairs Manual," and that "these rules do not explicitly state that the Department cannot issue a passport containing an alternative gender marking. Rather, they simply explain how the Department deals with different issues related to gender on passport applications. The rules collectively do not contemplate the

existence of a gender other than male or female."

What should an agency do when presented with a "new issue" that has not been previously resolved? Under the Administrative Procedure Act, it should undergo a reasoned examination of the issue and come forth with a policy that makes sense in light of any relevant statutory requirements and the reasons for which the policy exists. If the purpose of a passport is to accurately identify the person to whom it is issued and to certify that person's status as a citizen, is it sensible to insist on identifying a person as having a sex that both the person and qualified medical authorities reject as inaccurate?

Judge Jackson pointed out that the Department "simply justified the Department's decision to deny Dana's application by referring to" its policy. After litigation commenced, the Department realized that it had to come up with some sort of rational justification for its policy, and submitted a declaration from a Division Chief, Bennet S. Fellows, but Judge Jackson found that the explanation "falls short." Much of it merely describes the background information underlying the policy, such as that the Department considers sex to be part of the "key data" necessary to identify somebody, and that an application without a sex designation is thus "incomplete." Fellows pointed out that no other federal agency that issues citizenship documents recognizes the use of a "third marker," but Jackson said that none of this "rationalizes the decision-making process behind this policy."

Fellows also insisted that the "key data" had to be supported by documentation from other official sources, such as "birth certificates, driver's licenses, social security cards, third-party affidavits, and/or other documentation consistent with the information submitted by the applicant," but that none of these sorts of documents "currently authorize the use of 'X' or any marker other than 'M' and 'F'."

Jackson found this rationale "unpersuasive" because "it is entirely self-fulfilling" and the Department's own

response to Dana's application indicated that it would accept an application showing either "M" or "F" depending whether Dana sought to rely on Dana's driver's license (showing "female") or a physician's certification of Dana's gender as "male." That is, the Department was not concerned with accuracy, as such, but rather with being able to fit into its predetermined formal classifications. The Fellows declaration also argues that the computer chip embedded in identity documents only accommodates "M" or "F" as gender identification. "To the extent that is just another recitation of the Department's current policy," wrote the judge, "it does not advance the ball." If that means that reprogramming the chips to accept additional categories would be necessary, "that does not explain why the government first began to require passport applications to choose either sex in 1976, but it would at least provide a reason for the Department's reluctance to change course now," he continued. "In any event, the Department hasn't yet made that argument or attempted to show why it would consider that to be worse than accommodating this presumably small population of intersex individuals."

The declaration also argued that it was necessary for U.S. passport information to "sync with law enforcement databases that exclusively use binary gender systems," but it concedes that not every such database actually includes sex designations and that "a field left blank in the system is assumed to reflect that the particular datum is unknown or unrecorded, and not to indicate 'intersex' or other possible alternative categorization." Jackson expressed puzzlement, asking why if this is a critical factor, the Department was willing to record Dana as "male" knowing that Dana had state identification documents – the driver's license – listing Dana as "female"? "How does the Department sync a transgender individual's passport information with law enforcement records that might list that very same passport holder as the opposite sex," he asked. "Without answers to these questions, I cannot conclude that the government rationally decided to formulate a binary-only gender policy."

The Fellows declaration also suggested that the holder of a U.S. Passport without a male or female gender designation or with some third marker, such as “X”, might encounter difficulties in travel to other countries that insisted on a binary classification. “Is this pure speculation,” asked Jackson. “Is it a fact that other countries validate the information contained within a passport, as opposed to simply verifying the authenticity of the passport itself? And if a third gender marker did lead to inconvenience or difficulty entering other countries, isn’t that solely the problem of the passport holder who made the choice? The current record does not explain why these factors rationally support the policy in place.”

Judge Jackson found that this first attempt by the Department to supply a rationale for its position was lacking. “That is not to say that it can’t be done,” he continued, “but the Department’s first effort to get over the arbitrary and capricious hump was not convincing.” Jackson’s remedy was to return the matter to the Department for “reconsideration,” without dismissing the complaint or ruling on Dana’s constitutional claims.

Given the pending change of administration, there remains some question whether a second attempt will be made by incumbent officials to satisfy the court before January 20, 2017, or whether they will just capitulate and, consistent with the Obama Administration’s decision a few years ago to liberalize the procedure for allowing transgender people to change the sex designation on their passports, accept the reality of people who do not identify either as male or female and figure out a way to accommodate them on U.S. passports, as some other countries have done. Otherwise, the task of responding to the court’s Order will be left to officials of the incoming administration.

Judge Jackson, previously a Colorado state court judge, was appointed to the federal bench by President Barack Obama in 2010, and was confirmed by unanimous consent of the Senate in 2011. ■

## Massachusetts Appeals Court Upholds Gay Bar Patron’s Indecent Assault and Battery Conviction

The Appeals Court of Massachusetts upheld a jury’s conviction of Victor Huaman, Jr. in *Commonwealth v. Huaman*, 90 Mass. App. Ct. 1115 (2016). The defendant, a patron at a local neighborhood gay bar in Boston, was found guilty of indecent assault and battery for allegedly groping another patron’s genitals. The victim, Thomas Ryan, claims he and his friend, Glen Hurme, were playing a game of pool when the defendant grabbed the genital-area outside of Ryan’s pants. At trial, the defense argued that men at gay bars tend to act more affectionately with each other and engage in “flirtatious and sometimes sexual touching.”

Prior to the incident, neither Ryan nor Hurme had ever met the defendant. The pair arrived at the Boston gay bar around 11:00 p.m., and began playing pool. Sometime after, the defendant approached them and asked to play. Wishing to play only with each other, Ryan and Hurme declined, and the defendant walked away. According to the defendant, Ryan later approached the defendant and began talking to him. At one point, the defendant claims he complimented Ryan’s arms, which prompted Ryan to take off his shirt. However, Ryan denied having any such interaction with the defendant.

Later, when Ryan returned playing pool with Hurme, the defendant made a “beeline” for him and the alleged groping occurred. In defense of his friend, Hurme became angry and a physical altercation broke out between him and the defendant, which resulted in the defendant’s discharge from the bar. Thereafter, the defendant waited for the bar to close and the pair to leave before confronting them in the parking garage, where yet another physical altercation ensued. When asked by Ryan why he groped his genitals, the defendant allegedly responded “it’s a gay bar . . . [t]hat’s what people do.” In his statement to the police, the defendant claimed he

only touched Ryan’s abdomen while recommending that he tuck in his shirt.

At trial, the defense’s strategy aimed at justifying the defendant’s actions given the context in which they occurred. The defense attempted to undermine the prosecution’s evidence of indecency, or evidence that the defendant’s touching was “fundamentally offensive to contemporary standards of decency,” by submitting evidence of the environment in which it occurred – a gay bar. After submitting evidence of the character of the bar and the events held there, the defense ultimately asked the jury whether the touching was “acceptable, given the place, time, [and] people involved.”

Before closing arguments, the parties tendered their proposed jury instructions to the court. The prosecution requested an instruction on simple assault and battery as a lesser included offense of indecent assault and battery, given the defendant’s statement that he only touched Ryan’s abdomen. The defense objected to this instruction. Defense counsel argued that the prosecution should not have the opportunity to change their theory, which was always that the defendant had grabbed Ryan’s genitals. The trial judge agreed and failed to instruct the jury on simple assault and battery as a lesser-included offense. Thereafter, the jury convicted the defendant of indecent assault and battery.

On appeal, the defendant, without bringing an ineffective assistance of counsel claim, took the opposition position and argued that the trial judge erred in failing to instruct the jury on simple assault and battery. Because this objection went unpreserved by defense counsel, the court reviewed the defendant’s claim for a substantial risk of miscarriage of justice.

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*continued on page 540*

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# Another Federal Judge Lets a Gay Plaintiff Pursue a Discrimination Claim under Title VII

One of the nation's most senior federal trial judges, Warren W. Eginton (age 92) of Connecticut, rejected an employer's motion to dismiss a Title VII sex discrimination claim brought by an openly gay employee in a November 17 ruling. *Boutillier v. Hartford Public Schools*, 2016 U.S. Dist. LEXIS 159093, 2016 WL 6818348 (D. Conn.). Eginton, who was appointed by Jimmy Carter in 1979 and has been a senior judge (semi-retired) since 1992, accepted the argument that Title VII can be interpreted to ban sexual orientation discrimination, despite prior contrary rulings by the U.S. Court of Appeals for the 2nd Circuit, to which his decision can be appealed.

Eginton's ruling came less than two weeks after a federal district judge in Pennsylvania, Cathy Bissoon, appointed by Barack Obama, issued a similar ruling in *EEOC v. Scott Medical Health Center* (see above), bucking contrary appellate precedent in the 3rd Circuit Court of Appeals. Could this be the beginning of a trend?

Lisa Boutillier, a lesbian who formerly taught in the Hartford Public School system, claimed that she had suffered discrimination and retaliation because of her sexual orientation and physical disability in violation of the Connecticut Fair Employment Practices Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act. Because Connecticut law explicitly bans sexual orientation and disability discrimination, she could have brought her case in state court and, by confining her claims to state law, she could have avoided ending up in federal court where adverse circuit precedent might have doomed her Title VII claim. Instead, however, her attorney, Margaret M. Doherty, included the federal claims and filed in the U.S. District Court, prompting the school district to file a motion arguing that Title VII does not cover this case.

The case could remain in Judge Eginton's court only if he found that Boutillier could assert a potentially valid claim under either or both of the Americans with Disabilities Act or Title

VII of the Civil Rights Act. Eginton concluded that Boutillier failed to allege facts sufficient to qualify as a person with a disability under the ADA, so her ability to maintain the action in federal court turned entirely on whether she could allege a sex discrimination claim under Title VII. There is little doubt from her factual allegations that if Title VII covers this case, Boutillier will have stated a potentially valid claim and avoid summary judgment against her.

Judge Eginton devoted most of his opinion to the Title VII question. He sharply disputed the Second Circuit's prior rulings refusing to allow sexual orientation discrimination claims under Title VII. "Early interpretations of Title VII's sex discrimination provisions reached illogical conclusions based on a supposed traditional concept of discrimination, which, for example, determined that discrimination based on pregnancy was not discrimination based on sex," he began his analysis, noting that Congress had overruled that mistaken early Supreme Court decision by amending Title VII. He said that the pregnancy case, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), "and other similar decisions that imposed incongruous traditional norms were misguided in their interpretations regardless of whether Congress had been able to overrule them." He charged that these early cases were mistaken because "they failed to take the ordinary meaning of the Act's text to its logical conclusions . . . . The converse of the majority's decision," wrote Eginton, "and equally absurd, would be to hold that an exclusion in coverage for prostate cancer does not discriminate against men based on sex. Such conclusion represents a fundamental failure of ordinary interpretation."

He found a similar error of reasoning in the Second Circuit's approach to sexual orientation claims. He noted that when Congress overruled the pregnancy case, the House Report stated: "It is the Committee's view that the dissenting Justices correctly interpreted the Act." The 2nd Circuit has premised its view on lack of legislative history showing

that Congress intended to protect gay people from discrimination when it included "sex" in Title VII in 1964. "Acknowledging that the legislative history on whether sexual orientation should be included in the category of sex under Title VII is slight," wrote Eginton, "it is difficult to glean the absence of prior intention merely from subsequent efforts by Congress to reinforce statutory civil rights protections" by adding "sexual orientation" to federal law, as the 2nd Circuit has repeatedly done. He pointed out that the Supreme Court has cautioned against relying on legislative inaction as an indication of legislative intent.

More importantly, however, he wrote, "straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex: the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination."

The judge pointed out the inconsistency between the 2nd Circuit's approach to sexual orientation and its cases about race discrimination. The 2nd Circuit has accepted the argument that it is race discrimination when an employer discriminates against an employee for engaging in an interracial relationship. "The logic is inescapable," wrote Eginton: "If interracial association discrimination is held to be 'because of the employee's own race,' so ought sexual orientation discrimination be held to be because of the employee's own sex." The 2nd Circuit's cases are "not legitimately distinguishable," he argued. "If Title VII protects individuals who are discriminated against on the basis of race because of interracial association (it does), it should similarly protect individuals who are discriminated against on the basis of sex because of sexual orientation – which could otherwise be named 'intrasexual association.'"

He pointed out that the Supreme Court's key decision in *Price Waterhouse v. Hopkins* "bolsters" his conclusion,

in holding that “sex stereotyping could constitute discrimination because of sex . . . Indeed, stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender non-conformity.” The 2nd Circuit has refused to extend this reasoning to sexual orientation cases, however, using an analysis that Eginton maintains is “inherently unmanageable, as homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus.”

He quoted extensively from a recent 7th Circuit decision, *Hively v. Ivy Tech Community College*, where a 3-judge panel of that court dismissed a sexual orientation discrimination claim because of circuit precedent, but two members of the panel submitted an opinion suggesting that the circuit should be reconsidering its position. Since then, the 7th Circuit has voted to grant *en banc* review in the case, and reargument occurred on November 30.

Eginton pointed out the paradox stemming from the 2nd Circuit’s position. “Essentially, employers are prohibited from discriminating against employees for exhibiting stereotypical gay behavior, yet, at the same time, employers are free to discriminate against employees for actually being gay.” Thus, Eginton, concluded, he would follow the lead of the 2nd Circuit’s interracial discrimination case instead of its past dismissal of sexual orientation discrimination claims “by interpreting the ordinary meaning of sex under Title VII to include sexual orientation, thereby obviating the need to parse sexuality from gender norms.”

Eginton pointed out that the EEOC adopted this view in 2015, the 7th Circuit agreed to a full rehearing in *Hively*, and a 2nd Circuit panel will soon rule on appeals from trial court dismissals of sexual orientation claims in several cases from New York. While the 2nd Circuit’s expected ruling on those appeals “may ultimately decide the fate of plaintiff’s Title VII claims,” he wrote, “in the meantime, summary judgment will be denied. Plaintiff has adequately established a right to protection under Title VII.” ■

## Colorado Appeals Court Reverses Teen’s Conviction in “Fighting Words” Analysis

Reversing a ruling by Boulder County District Judge Ingrid S. Bakke, a panel of the Court of Appeals of Colorado voted 2-1 that a 14-year-old middle school student did not commit an actionable “breach of the peace” when he drew a picture of “an ejaculating penis” over the cellphone photo he took of one of his classmates and then exhibited it to the subject as well as other friends. *People of the State of Colorado, Petitioner-Appellee, In the Interest of R.C., Juvenile-Appellant*, 2016 COA 166, 2016 Colo. App. LEXIS 1612, 2016 WL 6803065 (Nov. 17, 2016).

Writing for the panel, Justice Elizabeth Harris related the facts: “During class one afternoon, R.C. used his cell phone to take a photo of L.P. Then, using the mobile application Snapchat, he drew a picture of an ejaculating penis next to L.P.’s mouth. R.C. showed the altered photo to L.P. and three other friends. R.C. was ‘giggling’ when he showed the other boys the photo. One of the other boys laughed too, but L.P. felt ‘bad.’ About five minutes later, class ended and the boys went to lunch. In the cafeteria, a few other students looked at the photo and laughed, which made L.P. feel even worse. Two of L.P.’s friends told R.C. to apologize and R.C. agreed to, but when he approach L.P., L.P. pushed R.C. away. L.P. and his friends reported the incident to the principal later that day.”

In the way these things escalate in the age of “zero tolerance” for bullying conduct, the principal instituted criminal charges against R.C. under the disorderly conduct statute, and District Judge Bakke ruled “that R.C. knew that his drawing would make L.P. feel humiliated and ashamed and would have tended to incite an immediate breach of the peace, in large part because the drawing implied that L.P. was ‘homosexual or behaves in that kind of behavior or has some sort of demeanor about that.’ The court sentenced R.C. to three months of probation, therapy, and eight hours of work crew.”

The statute in question, Colorado R.S. Sec. 18-9-106(1)(a), provides that

a person commits disorderly conduct if he or she “intentionally, knowingly, or recklessly: . . . makes a coarse or obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace.”

In reversing the conviction, the majority of the appeals court held that the disorderly conduct statute has been narrowed in interpretation to cover “fighting words” only, and that what R.C. had done failed to come within that narrow class of communicative conduct that is subject to criminal prosecution. Dissenting Judge John Webb sharply disagreed, asserting, with Judge Bakke, that fighting words include those that “inflict injury” even when they may not incite immediate violence. The majority rejected this reasoning, pointing out, strikingly, that the Supreme Court has so shrunken the category of “fighting words” that it has “overturned every single fighting words conviction it has reviewed since *Chaplinsky* [the historic Supreme Court case recognizing a “fighting words” exception to First Amendment protection] was decided in 1942.”

“The district court concluded that the drawing constituted fighting words because its display would tend to make the subject of the photo feel humiliated and ashamed,” wrote Judge Harris. “But speech that embarrasses or disgraces another is insufficient to qualify as fighting words. Even vulgar and insulting speech that is likely to arouse animosity or inflame anger, or even to provoke a forceful response from the other person, is not prohibited,” she continued, pointing to a 10th Circuit case from 1993, *Cannon v. City of Denver*, 998 F.2d 867. “Rather, fighting words are limited to ‘speech that, in the context in which it is uttered, is so inflammatory that it is akin to dropping a match into a pool of gasoline.’” (This vivid quote is from a 2015 Vermont Supreme Court decision.)

“Our position would not change even if we believed, as the district court apparently did, that the photo

might have implied that L.P. was gay. Indeed, this assumption was the basis of the court's ruling; if R.C. had drawn a mustache or a big nose on the photo, the court explained, it would not have amounted to disorderly conduct, even, presumably, if the big-nose photo had hurt L.P.'s feelings. But R.C. drew a picture that was 'sexual in nature' and went 'directly to L.P.'s gender being male,' which made the photograph much more offensive, according to the court; so much so that, upon seeing the photo, L.P. would reasonably have been incited to violence."

Two problems with this, wrote Harris: "First, there was, in fact, no evidence that R.C. intended to imply that L.P. was gay or that L.P. perceived the photograph as any sort of commentary on his sexual orientation. Second, even if we assume such commentary, we cannot conclude that, as a matter of law, the mere insinuation that a person is gay amounts to 'fighting words.' We disagree with the district court, and the dissent, that the suggestion of homosexuality or homosexual conduct is so shameful and humiliating that it should be expected to provoke a violent reaction from an ordinary person."

Furthermore, the court doubted that such a characterization would be appropriate in the full context of what happened. The court found no authority to support the idea that the label "fighting words" automatically applied to this particular doctored photo. And, indeed, L.P. did not react violently, and "there was no evidence that R.C.'s display of the photo caused any sort of commotion or that it was even noticed by other children or the teacher." In this case, said the court, disagreeing with the dissenter, "R.C.'s display of the photo did not amount to fighting words because it was not likely to incite an immediate breach of the peace. We certainly have not foreclosed the possibility that, under other circumstances, references to a person's sexual orientation might indeed rise to the level of fighting words."

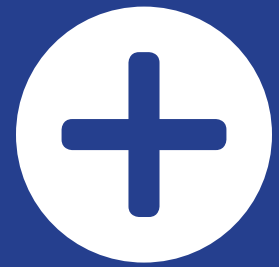
The court also rejected the state's argument that "the photo was akin to R.C. calling L.P. a 'cocksucker,' a term that by its mere utterance qualifies as fighting words." Responded Harris,

"The word 'cocksucker' is not an innocuous expression; it is vulgar and profane. But uttering the word is not a crime unless its mere utterance would tend to provoke a reasonable person to immediately retaliate with violence." Although the state could point to several past cases where that word had been deemed a "fighting word" in context, those cases were all distinguishable from the circumstances of this case, and the court found that "more recent cases suggest that 'cocksucker' has lost its former incendiary quality." Indeed, in some circles it is now a term of endearment as "street language," although Harris dropped a footnote pointing out how Maine Governor Paul LePage recently inspired criticism – but no criminal consequences – for using the word directed in a communication to a legislative opponent, and commented, sarcastically, "We are reluctant to hold a middle school student to a higher standard than the Governor of Maine."

"A middle school student of average sensibilities and maturity might have told R.C. that the photo was not funny, as L.P.'s friends did, or reported the hurtful conduct to a school administrator, as L.P. and his friends did later that day. But the average person – even an average fourteen-year-old – would not be expected to fly into a violent rage upon being shown a photo of himself with a penis drawn over it. R.C.'s display simply does not fall within the 'exceedingly narrow' class of insults for which violence is a reasonably expected response." The court found that a school administrator could discipline R.C. for such conduct, and that a state bullying statute even authorized principals to impose discipline in appropriate cases, but that criminal prosecution was definitely overdoing it.

Judge Webb dissented at length, concluding, "I would hold that the image R.C. created and circulated showing an ejaculating penis adjacent to L.P.'s mouth constituted fighting words. Therefore, I would deny it First Amendment protection and affirm the judgment of conviction."

Public Defender Douglas K. Wilson and Deputy Public Defender Elizabeth Porter-Merrill represented R.C. in appealing his conviction. ■



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# Supreme Court of Hawai'i Rules That a Parent's Rights Are Less Exclusive When Voluntarily Shared with a Same-Sex Partner

Reminiscent of Disney's *Lilo & Stitch*, *A.A. v. B.B.*, 2016 Haw. LEXIS 280 (Nov. 3, 2016), tells the story of an unconventional family living in the island paradise of Hawai'i. This is the only thing the two stories share. In *A.A. v. B.B.*, the Supreme Court of Hawai'i reversed and remanded a decision by the Family Court of the Third Circuit (family court), which previously denied A.A.'s petition for joint custody. The supreme court held that the family court wrongly interpreted HRS §571-46(a)(2), the state's statutory provision for awarding custody to a nonparent. Furthermore, the supreme court held that the family court improperly shifted the burden onto A.A. to prove the constitutionality of HRS §571-46(a)(2), and that the provision did not infringe upon B.B.'s parental rights under the state's constitution.

A.A. and B.B. are gay men who were in a committed relationship between 2009 and 2013. From October 2011 until October 2013, the men raised B.B.'s biological granddaughter (the Child) together and lived as a family unit along with B.B.'s teenage son. B.B. was the only legally adoptive father of the Child; however, the couple intended for A.A. to become an adoptive father too and retained an attorney to accomplish this, although the procedure was never completed. The couple jointly named the Child, giving her a hyphenated version of their last names as her own last name. When the Child began talking, she called A.A. her "Daddy." After their separation, the couple continued to share parental responsibilities through a written 50/50 co-parenting agreement. Prior to B.B. revoking the agreement, he wrote emails to A.A. that indicated he wanted the latter to have custody of the Child should anything happen to B.B. Eventually, however, B.B. revoked the agreement, claiming the right as the child's only parent to do so.

The Supreme Court of Hawai'i first addressed whether the family court correctly interpreted and applied HRS §571-46(a)(2). The provision creates a presumption in favor of a nonparent seeking custody if he can present prima facie evidence showing: (1) he is a fit and proper person (2) who has de facto custody of the child (3) in a stable and wholesome home.

One of the issues presented here is what "de facto custody" means. The family court interpreted the term to mean that A.A. must show he was the Child's "psychological father." Under its reasoning, A.A. could not be regarded as the Child's psychological father because he and B.B. did not avail themselves of a marriage or civil union, although these became available while the couple was still together. Apparently, according to the family court, Hawaii is such a proponent of legally-recognized same-sex unions that a court will question why a couple did not get married.

The family court erred in basing its custody decision on the relationship between A.A. and B.B., as opposed to whether the best interests of the Child would be served by continuing her relationship with A.A., according to the supreme court. Recognizing this error, and that HRS §571-46 overall imposes no marriage requirement for custody, the Supreme Court of Hawaii interpreted "de facto custody" to mean sole or shared physical custody along with the incidents of legal custody — the duties to provide a minor with protection, discipline, food, shelter, ordinary medical care, and etc. Thus, the Supreme Court of Hawai'i remanded the decision for further proceedings consistent with its interpretation of the de facto custody requirement.

The Supreme Court of Hawai'i also rejected the family court's decision to impose on A.A. the burden of demonstrating "by strict scrutiny a compelling state interest" as to why the de facto custody requirement applied

to himself. Instead, the supreme court appeared to opt for a more deferential level of scrutiny by concluding that B.B. bore the burden to support his facial challenge against the constitutionality of HRS §571-46(a)(2). Instead of remanding the matter, the supreme court conducted a constitutional analysis because this case presented a matter of first impression: whether a parent has a constitutionally protected liberty interest in deciding whether a de facto custody parent should no longer have custody?

For the purposes of its constitutional analysis, the supreme court assumed that A.A. met the three requirements of HRS §571-46(a)(2). Its analysis consisted of a two-step inquiry of: (1) whether a liberty interest was interfered with by the State; and (2) what specific procedures are required to satisfy due process? Under the U.S. and Hawai'i constitutions, parents maintain some liberty interests in raising their children. Even so, it has been suggested that these parental rights are not absolute or exclusive, and are subject to other concerns including the rights of the children and the state's authority to protect them. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). The U.S. Supreme Court previously recognized in *Troxel* that the due process clause of the 14th Amendment protects certain liberty interests that parents possess in maintaining relationships with their children and in directing their upbringing. Additionally, under Article 1 of the Hawai'i Constitution, parents have a substantive liberty interest in the custody of their children, which is protected by the due process clause of §5 and the right to privacy in §6. *Doe v. Doe*, 116 Hawai'i 323, 334, 172 P.3d 1067, 1078 (2007). Yet, neither *Troxel* nor *Doe* addresses what these parental rights are or what is the scope of these rights in relation to a nonparent who has de facto custody of the child.

With no binding precedent to determine whether B.B.'s parental rights were interfered with, the Supreme Court of Hawai'i turned to a decision by the Intermediate Court of Appeals (ICA) that addressed the issue of when a parent may not have exclusive parental rights over a child. In *Inoue v. Inoue*, the ICA held that the biological mother did not have exclusive parental rights against her husband, and awarded custody to the latter. See 118 Hawai'i 86, 185 P.3d 834 (App.), cert. denied, 118 Hawai'i 194, 186 P.3d 629 (2008). Although her husband was not the child's biological father, the biological mother had voluntarily rendered her parental rights less exclusive and less exclusory by marrying her husband and adding his name to the child's birth certificate. This holding was based of the Supreme Court of Rhode Island's decision in *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000), which stated that a parent's interests may be rendered less exclusive if she allowed her former partner to establish a parental bond "by word or deed." Funny how a Hawaiian court chose to turn to another "island" to reach this conclusion!

Applying *Inoue* to the case at hand, the Supreme Court of Hawai'i determined that B.B.'s parental rights were not infringed upon by the State because his rights were no longer exclusive. He and A.A. had chosen to raise the Child together as a family, did so for two-years, and entered into a written 50/50 co-parenting agreement granting A.A. physical custody. Thus, HRS §571-46(a)(2) was found to be neither facially unconstitutional nor unconstitutional as applied to this case. Consequently, the statutory provision also satisfies due process under the U.S. and Hawai'i constitutions.

Same-sex marriage may no longer be a hot issue among most of the states, but their responses to changing family dynamics can be groundbreaking at times. In Hawaiian culture, 'ohana' means family. Among the states, family can mean any number of things. – *Timothy Ramos, NYLS '19*

## California Appeals Court Finds Superior Court Abused Its Discretion by Awarding Attorney Fees against a Lesbian Teacher who Unsuccessfully Sued Her School for Sexual Orientation Discrimination

A unanimous three-judge panel of the California 1st District Court of Appeal ruled in *Young v. Burlingame School District*, 2016 WL 6745505 (Nov. 15, 2016), that San Mateo County Superior Court Judge Susan Irene Etezadi abused her discretion by ordering a lesbian physical education teacher to pay the attorney fees and costs incurred by her employer in its defense against her claim of sexual orientation discrimination under the state's Fair Employment and Housing Act (FEHA).

In her opinion for the court, Justice Marla J. Miller recounted in detail the sorry story about how local school officials, upon discovering that their physical education teacher was a lesbian, undertook an effort to get her dismissed from her job for imagined sexual improprieties with students. She fought the charges, and ultimately a Commission on Teacher Competence made up of a state administrative law judge and representatives designated by the teacher and the school district conducted an investigation and issued a written decision clearing the teacher of virtually all the charges of any significance against her. Where the school district had sought dismissal or at least a lengthy suspension without pay, the Commission concluded that a 10-day suspension without pay would be sufficient, and ordered back-pay for the teacher for about ten months that she had been suspended while the case was pending.

Based on this experience and inferences she drew from the course of events, the teacher then brought an action against the school district, claiming to be the victim of sexual orientation discrimination in violation of the FEHA. The trial judge, however, granted the school district's motion for

summary judgment, and the teacher decided not appeal the matter further.

Then, in what appears to be an act of vengeance for having to defend the action, the district filed a motion against the teacher for attorney fees and costs, and won a ruling from a second trial judge ordering the teacher to pay the district \$16,175.50, under a state statute that authorizes an award of fees against an FEHA plaintiff who litigates a discrimination claim without having an objective basis for believing it had potential merit. Judge Etezadi concluded that although the teacher may have filed her action in a good faith belief that the district had discriminated against her, her answer during a deposition suggested that she had no objective evidence to support her case, so her insistence on litigating a case that "obviously" lacked merit through the summary judgment motion met the standard for vexatious litigation that would justify the unusual award of fees and costs to the defendant.

Justice Miller explained that the court of appeal consider the trial judge's decision to turn on an inaccurate characterization of the teacher's deposition testimony. The deposition question in issue asked only "did any district office employee ever tell you or suggest to you through their words" that she had been discriminated against based on her "sexual identity," to which the teacher answered "no." The teacher's counsel argued in this appeal that construing this answer to be a concession that the teacher had no evidence of discrimination was faulty. The question was asking whether the teacher had "direct evidence" of discrimination, which she did not, as her case relied upon inferences drawn from what the district had actually done or not done in connection with

the many spurious charges against her, and under the FEHA a plaintiff can win based on circumstantial evidence; direct evidence of discriminatory intent is not invariably required. (The same is true, of course, under federal employment discrimination law.) Thus, drawing the conclusion that the teacher persisted in litigating even though she had no evidence of discrimination was incorrect, and, in the view of the court of appeal, the standard for awarding attorney fees and costs had not been met.

The court of appeal agreed with the teacher's counsel, finding that the award was an abuse of discretion, "appearing to us to be based on the conclusion that Young lost the summary judgment motion, and not on supportable findings that the action was unreasonable, frivolous, meritless or vexatious." Recalling her summary of the deposition testimony, Miller wrote "there is no basis to conclude that Young testified at her deposition that she had no evidence of a discriminatory animus on the part of the District. She may have testified that she had no direct evidence, but that is not the end of the story. Our Supreme Court has recognized that 'direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially.' (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) As a leading practice treatise has noted, 'pretext may also be shown by circumstantial evidence that casts doubt on whether the employer's stated reason was the true reason for its action, creating an inference that the employer acted for some other, discriminatory reason . . . . And this court noted in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283, 'proof of discriminatory intent often depends on inferences rather than direct evidence.'" Justice Miller then reviewed in detail the circumstantial evidence underlying the teacher's case.

Rejecting the district's collateral estoppel argument against the FEHA suit, Miller wrote, "As we understand it, Young's FEHA complaint was not an attempt to relitigate the claims decided against her in the [Commission] Decision. Assuming for these purposes

that collateral estoppel applied to the Decision's findings, the District itself would also be estopped from arguing that the sexual misconduct charges had any merit. Young's point was that she believed that she was charged with sexual misconduct because she is a lesbian, and that the District intended to fire her because of rumors. Young contended that the District could not fire her just for minor infractions, and that this was proven correct, since her discipline was a 10-day suspension, not the 60 days or termination sought by the District. Further, she argues that even if the district 'may have been justified' in suspending her for a few days because of the 'minor infractions involving her mishandling the discipline of several students, it did not stop there. Instead, in an attempt to fire Young, it piled on false accusations of serious sexual misconduct and harassment that led to months of suspension, withholding of pay, a police investigation, public scrutiny of Young's personal life, disruption of her career, and the emotional distress caused by [the District's] false accusations.'" The court found easily distinguishable the cases that the District relied upon in support of its demand for a fee and costs award, and concluded that the answer to the question whether such an award was justified in this case was "plainly no."

Justice Miller's quotations from and summaries of deposition testimony and argument include some priceless gems, among them (quoting Young's argument on appeal): "Young testified that Scott, her school principal, knew that she was a lesbian because she had asked for time off to attend her girlfriend's grandmother's funeral. Scott, on the other hand, testified that she knew Young had a female partner, but didn't know that it meant Young was a lesbian, or even what the term 'lesbian' meant – she asked counsel to 'clarify lesbian.' An intermediate school principal who, in 2015, feigns not to understand what it means to be a lesbian cannot be believed. Young presented evidence that Scott denied knowing that Young was a lesbian, yet had told a student she did not want to work with 'somebody like Jodi Young.'

When it comes to discrimination, people lie as to their motivations."

One may wonder about the correctness of Superior Court Judge Elizabeth K. Lee's earlier decision to grant the school district's motion for summary judgement, as Justice Miller's lengthy factual account of the case makes it sound unlikely that any neutral factfinder could believe Jodi Young was not the victim of an anti-lesbian vendetta by her school principal. Unfortunately, Judge Lee's opinions, at least as discoverable on Westlaw and LEXIS, are cursory and seem to be based in significant part on the collateral estoppel argument, that the Commission found some basis for discipline to be imposed on the teacher, without placing any weight on the fact that the Commission found that the overwhelming majority of charges pressed by the school district were found to be unsubstantiated. The teacher's decision not to appeal the summary judgment leaves that ruling undisturbed. But Justice Miller's opinion in this case gives rise to the inference that Young might have won an appeal from that ruling had she decided to pursue the matter, in light of the way that Miller summarizes and characterizes the evidence. Clearly, the court of appeal opinion leaves the impression that Judge Lee's response to the school district's collateral estoppel argument was faulty.

The school district's decision to wreak vengeance by seeking an award of fees against the teacher now results in spreading on the record the entire unsavory tale through Justice Miller's detailed opinion. While the court designated this opinion as "not to be published in the official reports," it has appeared on Westlaw (but not yet on LEXIS when last we checked on November 26). If the school district does not want to call more attention to its conduct in this matter, it should probably refrain from appealing the court of appeal's ruling to the California Supreme Court. As things stand, money spent on a further appeal would appear a questionable use of taxpayers' dollars.

Young is represented by Charles J. Katz, of Millbrae, California. ■



# Army Court of Criminal Appeals Vacates Aggravated Assault Conviction in HIV Exposure Case

The U.S. Army Court of Criminal Appeals has found the legal and factual basis of an aggravated assault conviction of an HIV-positive U.S. Army Specialist to be insufficient in *U.S. v. Sosa*, ARMY 20140869, 2016 CCA LEXIS 635 (U.S. Army Ct. Crim. Appeals, October 28, 2016).

Sosa was informed that he had tested positive for HIV in August 2012, and his commanding officer reviewed with him the rules requiring disclosure of his status to sexual partners. After indicating to his sexual partner, “SS,” that he was “clean” during September and October of 2012, Sosa had anal sex five times with “SS,” three times using a condom during which one time the condom broke, and two without a condom in the shower. Months later SS testified positive for HIV.

Sosa was convicted by a court martial of aggravated assault and two specifications of willful disobedience of a superior commissioned officer, and adjudged a sentence of a bad-conduct discharge, confinement of twelve months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

During the hearings, a witness who stated “I am not a physician. I classify specimens,” testified regarding the risk of HIV transmission with respect to the viral load of the transmitting person based on the fact that Sosa’s was reportedly “high” at nearly 16,000, that there was maybe a 1 in 256 chance of transmitting HIV during an unprotected sex act, adding the caveat: “this is not my area of expertise.”

The military judge gave the following instructions to the panel: “the likelihood of death or grievous bodily harm is determined by measuring two factors. Those factors are; one, the risk of the harm and two, the magnitude of the harm. In evaluating the risk of the harm, the risk of death or grievous bodily harm must be more than merely a fanciful, speculative, or remote possibility.” Government counsel argued that since

SS had tested HIV-positive, “Sosa gave a potentially fatal disease to [SS] . . . there is extremely strong circumstantial evidence, that [Sosa] gave [SS] the virus through his reckless actions” and that such conduct could sustain an aggravated assault conviction.

On appeal, at issue was whether the panel erred in finding Sosa’s conduct constituted a “means likely” to inflict grievous bodily harm or death to SS, whether the military judge erred in denying the defense’s motion to exclude evidence that SS had later tested HIV positive, and regarding the judge’s instruction regarding the risk of harm of HIV infection.

stated the government’s position that showing SS had been infected with HIV factually and legally supported Sosa’s aggravated assault conviction to be “circular,” and that even if SS’s HIV status was relevant, its probative value to a charge of aggravated assault, which focused on the act of exposure, was “at most, marginal,” but highly prejudicial to Sosa and therefore should have been excluded.

Finally, Judge Penland found the instruction on the definition of risk was erroneous, noting that a case involving a person with a “significant viral load, [who] had unprotected anal intercourse with the victim after

**Col. R. Tideman Penland, Jr. cited to prior precedent that transmission risk was “insufficient to establish the appellant engaged in conduct likely to inflict grievous bodily harm or death.”**

Writing for a panel, Col. R. Tideman Penland, Jr. cited to prior precedent, *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), regarding a “means likely” aggravated assault conviction “in which an HIV-positive service member engaged in sexual activity with persons unaware of his medical condition,” noting that in that case, the evidence established that at most there was a 1-in-500 chance during unprotected sex of transmitting the virus, and that the case held that that transmission risk was “insufficient to establish the appellant engaged in conduct likely to inflict grievous bodily harm or death.” He discounted the testimony in Sosa’s case, particularly since the doctor indicated “this is not my area of expertise.”

With respect to allowing evidence of SS’s infection, Judge Penland

causing rectal bleeding by inserting a metal shower enema into the victim’s anus against his will” had been returned by a higher court affirming only lesser-included offenses. Stating that “the instruction error amounted to a denial of due process, because it incorrectly described an element of aggravated assault in a manner that reduced the government’s burden of proof,” Judge Penland ruled: “We cannot be confident under the facts and circumstances that the error did not contribute to the panel’s finding appellant guilty.”

Accordingly, Sosa’s aggravated assault conviction was vacated, and his sentence was affirmed “only so much of the sentence as provides for a bad-conduct discharge.” – *Bryan Johnson-Xenitelis*

# Texas Criminal Appeals Court Finds Four Lesbians Innocent of Child Sexual Abuse in Habeas Proceeding

Sometimes justice is severely delayed, but finally arrives. On November 23, seven of the nine judges of the Texas Court of Criminal Appeals, the state's highest court for criminal cases, announced their agreement that the felony child abuse and indecency convictions of four lesbians arising from alleged incidents in the summer of 1994 must be set aside, with a majority of the panel holding that the women had succeeded in proving their actual innocence, while two members of the court concurred to the extent of finding that the women would not have been convicted if newly-available scientific evidence, undermining that presented at trial, had been presented to the jury. (Two members of the nine-

the new evidence to conclude that in fact the showing by the four women in support of this habeas corpus petition was sufficient to establish their actual innocence on the charges against them.

This was a case that generated a "sense of outrage" acknowledged by Judge Newell, who began his opinion by quoting one of the expert witnesses in support of the Applicants for Habeas Corpus relief, Dr. Alexandria Doyle, who said that the allegation in this case do not pass "the smell test." Newell noted that the case has been the subject of several published exposes in the press as well as a well-received documentary film. Wrote Newell, "But we are not asked to apply a 'smell test.' Rather, we are asked to decide whether the

mother's fitness in the custody dispute. It later came out that the father had brought similarly bogus charges of sexual assault against other individuals, and that the father's mother (the child's grandmother) may also be implicated in how the case developed. This happened against a background of a period of national hysteria about allegations of child abuse, sometimes embracing weird notions of satanic cults and lurid rituals that enveloped many innocent adults, particularly operators of child-care centers. Also drawn on were "expert witnesses" who purported to be able to determine whether children were recounting these stories accurately (the cases generally did not involve eye-witness testimony by adults of actual sexual assaults), many of whom were later exposed as having relief on faulty science or engaging in suggestive interviewing techniques that telegraphed to impressionable youngsters what the experts wanted to hear. In many cases, such as this one, children who sought to recant their testimony were threatened with retribution by adults. In this case, one of the two girls later recanted as an adult despite her father's threats, and he retaliated by initiating proceedings threatening her custody of her own children. A key piece of "scientific" evidence in this case was testimony by a doctor that a scar on one of the girls was evidence that she had been sexually abused. The court found that this could have prejudiced the outcome, since the conflicting stories told by the two young girls under questioning and at trial provided weak direct evidence in support of the charges. The doctor has recanted her earlier testimony, pointing to more recent scientific evidence showing that the scarring in question was not evidence of sexual abuse.

At the original trials, the children's aunt was tried individual for sexually assaulting one of the girls, and totally refuted all the charges against her, but was convicted and sentenced to 37 years for aggravated sexual assault of a child

## A vengeful ex-husband intimidated two little girls into inventing a fantastical story of sexual assault.

member bench did not participate in this proceeding.) The court designated the plurality and concurring opinions as "not to be published" for reasons not explained by the court. *Ex parte Kristie Mayhugh, Ex parte Elizabeth Ramirez, Ex parte Cassandra Rivera, Ex parte Anna Vasquez*, 2016 Tex. Crim. App. Unpub. LEXIS 1057, 2016 WL 6909811.

The opinion for the court was written by Judge David Newell, joined in full by Judges Cheryl Johnson and Bert Richardson, and in part by Judges Sharon Keller and Michael Keasler, who jointed only with respect to the finding that newly-discovered scientific evidence would have led to acquittal. The concurring opinion was by Judge Elsa Alcalá, who was joined by Judge Lawrence Meyers. Together, Judges Newell, Johnson, Richardson, Alcalá and Meyers went beyond finding that acquittal would have occurred with

newly available evidence of innocence undermines the legally sufficient, but hard-to-believe version of events that led to the convictions of these four women. We hold that it does and that these four women have unquestionably established that they are innocent of these charges."

The two unpublished opinions released by the court rehash the allegations, testimony, and factual findings at great length. What it boils down to is that a vengeful ex-husband seeking to wrest custody of his children from his ex-wife intimidated two little girls into inventing a fantastical story of sexual assault against their mother's lesbian sister, the sister's partner, and two other women (partners) who were their friends. The girls had been left to visit with their aunt for a week, and the father evidently hoped to use these stories as evidence against their

and 15 years for indecency with a child. The other three women, tried together for assaulting both of the girls, also denied any inappropriate conduct with the girls, but were each convicted of two counts of aggravated sexual assault of a child and two counts of indecency with a child. They were each sentenced to 15 years imprisonment for the first count and 10 years imprisonment for the second. The court of appeals, in “nearly identical opinions,” upheld all these verdicts. After the case was taken up by investigative reporters and then the documentarian, new evidence was developed, and habeas corpus proceedings were initiated. First there was the claim that new science made the medical testimony faulty, which led to a ruling by Judge Mary Roman that the verdicts should be set aside as it was more likely than not that they women would not have been convicted in the absence of valid scientific corroboration that there actually had been a sexual assault. This is as far as two of the judges on the Court of Criminal Appeals were willing to go.

But a second habeas hearing on a claim that the women were actually innocent brought out the substantial evidence explaining how these allegations had been made up as part of a custody battle, together with testimony from a forensic psychologist, Dr. Doyle, who examined three of the women and subjected them to a variety of psychological tests, leading to her compelling opinion testimony that “the original claims were fantastic – nothing similar to what is typically seen in true child sex-abuse cases – but that the recantation [by one of the girls as an adult] was credible.” Dr. Doyle testified that these women were not child sex abusers.

The state prosecutors, called to defend their work in this case, “did very little throughout the whole hearing,” wrote Judge Newell, “asking very few questions on cross-examination and declining to put on any evidence.” The state also took no position on how the habeas petitions should be decided, merely asserting that since the medical testimony from the original trials was wrong, “what is left is ‘purely the

credibility of the witnesses, which is for the Court to determine.”

Newell summarized the evidence for the plurality opinion: “Applicants have presented considerable and extremely persuasive evidence to support their claim of innocence. The medical testimony relied upon to secure the convictions is now known to be unreliable. One of the complainants has not only recanted her testimony, she has provided eyewitness testimony that no assaults ever occurred and that she and her sister were forced to testify falsely against the Applicants. New psychological evidence corroborates Applicants’ claims that these allegations were generated through the manipulation of the complainants by their father in order to gain leverage in a custody dispute. Substantial evidence regarding a history of claims of abuse brought forth by the

they are exonerated. This Court grants them the relief they seek.”

Judge Alcalá’s concurring opinion, substantially longer than the plurality opinion, goes into much more detail about the trial testimony and its flaws, describing the “astonishingly weak and excessively contradictory testimony that was introduced at the two jury trials in which the applicants were convicted,” and reciting with much more colorful detail the efforts undertaken by the children’s father to manufacture this case against their aunt and the other three women as part of a scheme to wrest custody from his ex-wife. She concluded that “the evidence clearly and convincingly shows that the four applicants are actually innocent of these offenses, even assuming that V.L. [the non-recanting girl] would maintain the validity of her trial testimony accusing the four applicants

## A second habeas hearing brought out the substantial evidence explaining how these allegations had been made up.

complainants’ father that we now know were equally false further corroborates the recantation evidence in this case. And evaluations of each Applicant showing that they are not sex offenders and have never engaged in deviate sexual behavior, further establishes the claims of actual innocence. When this new evidence is compared to the State’s exceedingly weak case for guilt, it is patent that the Applicants have unquestionably established their claim that no jury could rationally find them guilty.” He described the defendants’ burden in this kind of habeas corpus proceeding as “Herculean,” and insisted that, the burden being met, they “have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And

of having sexually abused her.” There was evidence that V.L. would have been pressured by her father not to recant. Both appeals opinions suggest that the original trial testimony of the two girls was so intertwined that the recantation by one destroyed the credibility of both.

Neither opinion goes into any details about the consequences of “actual innocence relief” as granted by the court. For example, are they entitled to compensation from the state for the years of prison time they served and the expense of proving their innocence? Will any prosecutors suffer consequences for having presented what was inaccurate and, in some cases, possibly perjured testimony? Will the father be prosecuted for suborning perjury by pressuring the girls to offer false testimony against the defendants? The immediate press reporting on the case was not totally enlightening. ■

# Missouri Appeals Court Prohibits Judge From Requiring Transgender Youth Seeking a Name Change to Submit to Mental Examination

A Missouri trial judge exceeded his authority by refusing to grant a name change petition for a transgender minor unless the minor agreed to submit to a mental examination. Ruling in *State ex rel. N.N.H. v. Wagner*, 2016 Mo. App. LEXIS 1233, 2016 WL 6958715 (Mo. App., W.D., Nov. 29, 2016), the court of appeals ruled in an opinion by Judge Lisa White Hardwick that Cass County Circuit Judge Michael Wagner could not raise this issue on his own motion, and that a statute authorizing a judge to grant a motion for a mental examination of a party whose mental status was an issue in a pending case was not relevant to this situation.

The minor, called “Relator” by the court, is a transgender boy who filed a petition for a name change in July 2015 through his “next friend,” i.e., his mother. The petition sought a name change from Natalie to Nathan, and the mother filed a consent to the change of name.

Judge Wagner requested to speak to the Relator in chambers and informed the Relator’s attorney, Blaine H. Elliott of Belton, Missouri, that he would require the appointment of a guardian ad litem before setting the matter for a hearing. Relator refused such an appointment. Wagner then set a hearing date.

At the hearing, the Relator testified that he was 14 years old and desired the name change, felt it was in his best interest and would not be detrimental to the interests of anyone else. He testified that his father was deceased. His mother testified that the Relator had used the name Nathan for about two years and was known by that name at school. She testified that the change was in the Relator’s best interest and would not be detrimental to the interests of any other party. (These two factors are normally the dispositive issues in a Missouri name change case.) Wagner

asked whether the name change was the Relator’s own idea, and received an affirmative response from him. Wagner then said that without a guardian ad litem, he would need more information to determine whether the name change was in the child’s best interest, and ordered him to submit to a mental examination.

The Relator then filed this writ of prohibition and, alternatively, a writ of mandamus requesting the court of appeals to order Judge Wagner to approve the application. The appeals court issued a preliminary writ of prohibition, which it made absolute in this decision.

The court noted that the Relator had complied with all the requirements for a minor seeking a name change, proceeding through his parent. “The circuit court’s scope of discretion to deny a petition for a name change is narrow,” wrote Judge Hardwick. “A general concern of possible detriment is insufficient to deny a petition for change of name in light of the obvious legislative intent that such a procedure be available.” The court found that Wagner had acted in contravention of the governing Rule, since the Relator’s mental condition was not “in controversy” and no party had filed a motion seeking a mental examination.

Wagner argued that the Relator’s mental condition was in controversy “because ‘the testimony and demeanor of Relator’ raised questions as to whether the child was being coerced to pursue the name change,” wrote Hardwick, continuing: “Respondent further contends that, whether a party’s mental condition is in controversy is ‘determined by the credibility and demeanor of the witnesses during the trial.’” But, Hardwick insisted, “A party’s credibility, however, is a collateral issue that does not satisfy the requirement of putting the party’s

mental condition ‘in controversy’ under Rule 60.01,” which governs the court’s authority to order such an examination.

Rejecting Wagner’s argument that his concerns about the child’s mental state were “clearly expressed on the record,” Hardwick wrote, “We disagree. Respondent’s concerns were merely conclusory statements and, as such, were insufficient to create a controversy with regard to Relator’s mental condition in an action seeking a name change. Missouri citizens are permitted to have their name changed upon proof that the name change would be proper and would not be detrimental to any other person. The mental state of the party requesting the name change does not directly relate to any material element of the cause of action. Accordingly, Respondent has failed to demonstrate that Relator’s mental condition was in controversy and, therefore, that he had the authority to order a mental examination.”

Furthermore, the court held, the Rule only authorizes such an order in response to a motion from a party, and no such motion was made. A statute allow Family Court judges to order mental examinations of parties on their own motion was irrelevant because Judge Wagner is not a Family Court judge. The court also rejected an argument that Wagner could order the examination to determine whether a guardian ad litem should be appointed.

The court found no need to address constitutional equal protection arguments raised by the Relator in light of its disposition on state law grounds. Since the preliminary writ was granted only on the issue of whether the mental examination could be ordered, the court declined to issue a writ of mandamus ordering Wagner to grant the application, and denied Relator’s application to impose sanctions on Judge Wagner. The ball is back, quite literally, in Judge Wagner’s court. ■

# North Carolina Judge Grants Trial to African American Gay Man who Alleges Rape and Sodomy by Prison Guards

State prison inmate Demarcus Blakely alleges he was sexually harassed in the shower (including grabbing his genitals) by Correction Officer Matthew Bates at Craggy Correctional Facility in Asheville, to the point that Blakely changed his shower time to try to avoid Bates. He also filed grievances and a complaint under the Prison Rape Elimination Act [PREA], stating in part that Bates said: “If I had my way I kill all you gay son of bitch [sic].” Thereafter, Blakely alleges that, with the assistance of Officer Michael Boler, the following events occurred: Bates and Boler removed him from his cell at night, telling him: “All niggers run their damn mouth too much, it’s time we teach some respect.” They forced him to undress, cuffed him, took him to a storage room, and slammed him into a wall until he was unconsciousness. When he awoke, Boler held him over a table while Bates put on plastic gloves and anally raped him with his fingers. Blakely alleges that Bates then put on a condom and anally penetrated him with his penis. Finally, Bates forced Blakely to perform oral sex on him until he ejaculated.

Internal investigations found no “credible evidence” that any of this occurred. Shift logs and statements of other officers had Bates and Boler in different places at the time. Blakely did not report the incident until after the officers’ shift, and no rape kit was done. Investigators did not interview Blakely about the assault while he was at Craggy, although he was questioned and given a medical examination after his transfer to another prison some two months later. Eighteen inmates were interviewed; two said they did not know Blakely; sixteen refused to give a statement. There were no regular round notes of the cell area involved, and video surveillance was recorded over under recycling protocol prior to its review. The PREA investigation closed the case without action, the State Bureau of Investigation said there was “no evidence to support the claims,” and the District Attorney found “no probable cause.” Neither Bates nor Boler were ever disciplined

for inappropriate conduct. Blakely was actually charged and found guilty of making a false allegation of misconduct against Bates and Boler.

In *Blakely v. Corr. Officer Bates*, 2016 U.S. Dist. LEXIS 162605 (W.D. N.C., November 23, 2016), U.S. District Judge Martin Reidinger denied summary judgment to defendants Bates and Boler. He found a jury question for trial, based primarily on Blakely’s allegations. In reviewing the allegations for assault, Judge Reidinger applied the “deliberate indifference to safety standard” of *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), and he found the right to be free of guard assault was clearly established. [Note: The point is true: the right was clearly established, but not by *Farmer*, which deals with officers’ preventing inmate-on-inmate assault. When the officers themselves are the aggressors, their conduct is covered by *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), and its progeny. Judge Reidinger is correct that the right to safety is clearly established (under either case). The rest of his discussion, however, focusing on the second prong of *Farmer* and the subjective intent of the defendant officers, misses the mark. Under *Hudson*, no balancing occurs unless there is a reason for initiating force in the first place, as to restore order, quell a disturbance, and the like, none of which is alleged here.]

Instead, officers Bates and Bolen simply argue that their version of events is so overwhelming that they should get summary judgment, citing *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the Supreme Court allowed summary judgment despite disputed facts where a videotape conclusively established one side’s story. There, a motorist’s defense depended on safe driving, when a video showed erratic high-speed driving. The motorist’s version was “utterly discredited” by the video. Some courts have tried to apply *Scott* to inmate-officer disputes where there is no video, arguing that other evidence “blatantly discredits” the inmate. See, *Armstrong v. Wetzel*, 2015 WL 2455418 (W.D. Pa., May 22, 2015), reported in *Law Notes*

(Summer 2015 at 326-7), where this writer criticized the approach.

Judge Reidinger did not follow *Scott* here. He ruled that it was up to the jury to draw the reasonable inferences from Blakely’s detailed testimony, the nature of the investigations, the silence of so many other inmates, and the entire milieu. Although Blakely has a “mountain” of defense evidence to overcome, it cannot be said that it “utterly discredits” him, noting that guards are not always where they write that they are; and a reasonable jury could conclude that Blakely was “in fact, sexually assaulted by Defendant Bates, with the assistance of Defendant Boyer.”

Judge Reidinger granted summary judgment for the supervisory defendants on grounds of qualified immunity, despite allegations of policies of shoddy recordkeeping, of leaving cell areas unsupervised at night, and of inadequate internal investigations, in part because Blakely’s grievances did not portray a clear record of Bates’ propensities. The evidence was also unclear that the supervisors had any actual or constructive notice that officers routinely left the dorms unsupervised as alleged or that there was a substantial risk of sexual assault of prisoners as a result of this alleged practice. Blakely also failed to show that the supervisors’ investigative procedures were defective, even if they did not uncover the assaults. “Plaintiff has failed to present a forecast of evidence that would tend to show that the Supervising Defendants had any actual or constructive knowledge of a substantial risk of harm posed by the correctional officers. Accordingly, the Supervising Defendants could not have been deliberately indifferent to the officers’ conduct or tacitly authorized the same.”

Blakely is represented by North Carolina Prisoner Legal Services, Inc., Raleigh. – *William J. Rold*

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

# CIVIL LITIGATION

## U.S. COURT OF APPEALS, 7TH CIRCUIT

– The 7th Circuit issued a brief *per curiam* opinion on November 14, dismissing an interlocutory appeal by the Kenosha Unified School District from U.S. District Judge Pamela Pepper’s refusal to dismiss a Title IX claim against the district by a transgender student who was denied appropriate restroom access. *Kenosha Unified School District No. 1 Board of Education v. Whitaker*, 2016 WL 6677720 (Nov. 14, 2016). The school district filed a motion in response to Judge Pepper’s ruling, seeking certification to file an interlocutory appeal, which she promptly granted, leading to the filing of this appeal. But before the 7th Circuit had taken any action on the appeal, plaintiff Ashton Whitaker had filed a motion seeking reconsideration of the certification decision, and Judge Pepper withdrew the certification, acknowledging that defendants had actually not made any substantive argument in support of their motion and that she should not have issued it before giving the plaintiff an opportunity to oppose it. The court of appeals concluded that the withdrawal of the certification deprived it of appellate jurisdiction over the school district’s appeal. Meanwhile, Judge Pepper had partially granted plaintiff’s motion for a preliminary injunction, which the school district has appealed. The district argued that the court of appeals could exercise pendent jurisdiction over the appeal of the denial of the motion to dismiss in the proceeding appealing the injunction, but the court concluded that there is no proper jurisdictional basis for it to do so in the absence of the district court’s certification, suggesting that the school district needs to request pendent jurisdiction “in the appeal from the preliminary injunction order.” We included this brief summary for the amusement of procedural junkies, since it has no substantive LGBT law significance whatsoever!

## U.S. COURT OF APPEALS, 9TH CIRCUIT

– Completely rejecting factual and legal conclusions by the Board of Immigration Appeals, a three-judge panel of the 9th Circuit granted a petition for review and remanded a gay Mexican man’s application for withholding of removal and protection under the Convention against Torture in *Izquierdo v. Lynch*, 2016 U.S. App. LEXIS 20860, 2016 WL 6835376 (November 21, 2016) (unpublished disposition). (The court’s brief memorandum is more than usually obscure in its failure to relate underlying facts. Sometimes this means that the facts are so horrific that the court wants to avoid recounting them in an opinion, perhaps to avoid embarrassing the agency!) “The agency determined that Pintor Izquierdo’s past harm rose to the level of persecution and that the government was unwilling to control his persecutors,” wrote the panel, “but that he failed to show that he was harmed on account of his sexual orientation. The record compels the conclusion that one central reason Pintor Izquierdo was harmed was on account of his sexual orientation,” citing *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009), for the proposition that “persecution may be caused by more than one central reason.” The court said that the applicant “is entitled to the presumption that his life or freedom would be threatened if returned to Mexico.” Thus, the petition for withholding of removal was remanded “for the agency to address in the first instance whether the government has rebutted this presumption.” Proceeding to the CAT claim, where the BIA found that he “failed to establish that he could not relocate,” the court noted that subsequent to the BIA’s decision the 9th Circuit had ruled in *Maldonado v. Lynch*, 786 F.3d 1155 (2015)(*en banc*), that such a demonstration was not necessary for a grant of relief under the CAT. Thus, the petition as to that relief was also remanded, for the agency to determine what impact *Maldonado* might have

on its decision to deny relief under that Convention. Petitioner is represented by Ian Silverberg of Reno, Nevada.

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**FLORIDA**–Life–and death–sometimes happens when nobody (who will testify) is looking. So how is the court to apply Florida’s “Slayer Statute” (Fla. Stat. Sec. 732.802) to a case where a man’s legal heir, his surviving sister, claims that his sole life insurance beneficiary, his surviving same-sex partner, should be precluded from receiving the proceeds of his life insurance policy because the partner “intentionally” caused the man’s death? *Stephenson v. Prudential Insurance Co.*, 2016 U.S. Dist. LEXIS 153299 (M.D. Fla., Nov. 4, 2016). At issue are life insurance proceeds totaling \$466,000.00 from a policy insuring the life of Terry Rigby, designating Rigby’s domestic partner, Maurice McGriff, as sole beneficiary. The men got into a “physical altercation” on February 18, 2015. McGriff at first told police that he “acted in self-defense when he caused Rigby to fall and hit his head,” wrote District Judge Susan C. Bucklew, but he later gave various differing accounts to police, including that Rigby had hit him first, or that Rigby swung at him and missed, to which McGriff responded. Rigby died from his wounds. The police treated McGriff as the prime suspect, but the State Attorney determined after investigation not to prosecute McGriff, noting that “because Rigby died and there were no other witnesses to the incident beyond McGriff, the State would be unable to ‘rebut all reasonable hypothesis of [McGriff’s] innocence.’” That is, the State Attorney did not determine McGriff was innocent, but considered the case not winnable, so declined to prosecute. McGriff then contacted Prudential to apply for the death benefit, but Rigby’s sister, Theresa Rigby Harding, also submitted a claim, asserting that McGriff was disqualified by the Slayer Statute, which prohibits awarding death benefits to a beneficiary

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who has intentionally and unlawfully caused the death of the insured, so the money should go to Rigby's estate. Harding purported to be acting on behalf of Rigby's estate, but subsequently the court appointed a Curator for the estate, Robert Pope, Esq. Prudential would not honor any contested claim for the benefits, and paid the money over to the Court's registry once the litigation got under way. To complicate matters, McGriff, the only person who might testify in a civil proceeding about how Rigby was injured, passed away, and his own estate's representative, Millette Stephenson, ended up being the lead plaintiff in this case, in which all the claimants are involved as parties. Judge Bucklew wrote that in ruling on the motions for summary judgment before her, she would view the evidence "in the light most favorable to Harding" and pointed out that Stephenson "concedes that McGriff acted intentionally by arguing that McGriff acted in self-defense," as "killing in self-defense is an intentional act." But that did not end the matter, she wrote, stating that "the only issue before the Court is whether McGriff acted unlawfully." After reviewing all the available evidence, Judge Bucklew ruled for Stephenson, McGriff's representative, finding that "the totality of the evidence before the Court does not prove that it is more likely than not that McGriff acted unlawfully when he pushed Rigby, rather than that he acted in self-defense." Placing the burden on Harding to show this by a preponderance of the evidence in order to disqualify McGriff's estate from receiving the insurance benefit, the judge concluded that "the Slayer Statute does not apply to this case, and this was consistent with "the state probate court's determination on the same set of facts with the same parties before it." Stephenson is represented by Lisa A. Hoppe of St. Petersburg, Pope represented the Rigby estate *pro se*, and Russell Kirk Boring represented Harding.

**GEORGIA** – In *Roberts v. Archbold Medical Center*, 2016 U.S. Dist. LEXIS 158240 (M.D. Ga., Nov. 16, 2016), Senior U.S. District Judge W. Louis Sands granted the employer's motion for summary judgment on a claim by a married heterosexual male former employee of the defendant that he had been subjected to a hostile work environment and suffered retaliation because of his sex in violation of Title VII. James Roberts, represented by James Garrity of Tallahassee, Florida, also alleged constructive discharge, but Judge Sands found that this claim had not been adequately exhausted through the administrative process and declined to address it. Roberts had kept detailed notes of incidents of harassment that he contended fell afoul of the Supreme Court's case law on gender stereotyping, but Judge Sands concluded that, offensive as the comments and conduct of co-workers may have been, they did not make out a case under Title VII because they did not support a contention that Roberts was ridiculed or teased because of any failure to conform to gender stereotypes. "Even viewing the evidence in the light most favorable to Roberts," he wrote, "a reasonable jury could not conclude the implications were true, were believed by the harassers to be true, or that Roberts' level of compliance to stereotypes of his gender were a basis for the harassment. Counsel's assertion that 'the chief reason for creating a hostile work environment for Plaintiff was that saw [sic] him as a feminine male, and all its [sic] harassment was oriented around their perception of his gender characteristics' does not contain a citation to the record and is unsupported by the evidence." In brief, and summarizing a long, detailed factual recitation in the opinion, it appears as if Roberts' co-workers, virtually all male, continually engaged in sexually-charged teasing of each other. "There is no evidence any of these employees failed to adhere to gender stereotypes or were otherwise

discriminated against on the basis of sex. Were the Court to conclude that these comments were sufficient to establish a *prima facie* case of sex discrimination absent any other supporting evidence, seemingly every employee in the Bio-Med department could bring a claim of sex discrimination – regardless of their gender, presentation of their gender, or their sexual orientation. Sex stereotyping would divorce from the statutory requirement that the discrimination be because of sex." Similarly dismissive of the plaintiff's retaliation complaint, which was based on a transfer he accepted in the context of the employer's investigation of his discrimination charge, the court rejected the contention that this transfer constituted an adverse employment action, noting that Roberts' pay and job level remained the same and that the employer even compensated him for extra transportation costs he incurred in traveling to the new work location.

**ILLINOIS** – Former Speaker of the U.S. House of Representatives John Dennis (Denny) Hastert failed in his attempt to win dismissal of a lawsuit for breach of contract by a John Doe plaintiff who alleges that Hastert failed to comply with their agreement for payment in response for Doe's silence about his allegation that Hastert sexually abused Doe decades ago when Hastert was Doe's high school wrestling coach. In an Order issued on November 7, 2106, in *Doe v. Hastert*, 2016 L 35 (Ill. Cir. Ct., 23d Jud. Cir., Kendall County), Judge Robert P. Pilmer rejected Hastert's argument that the suit should be dismissed because the alleged contract could not be enforced on grounds of public policy, finding that the plaintiff had sufficiently pleaded "the necessary elements to allege a claim for contract" to "survive a motion to dismiss." "Whether the consideration was valid is an issue to be determined at a later date," wrote the judge. "The defendant also suggests that the plaintiff's own

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breach of the parties' agreement excuses the performance of the agreement by the defendant," the court noted. "This is not an element which the plaintiff needs to allege or prove. It may be an affirmative defense for the defendant, but it is not a basis for dismissing the plaintiff's claim for failure to state a cause of action." Hastert also made a public policy argument, contending that the agreement was void on that ground, in effect a blackmail defense. "Whether an agreement is void due to public policy depends upon whether it expressly contravenes the law or a known public policy of this state," responded Judge Pilmer, continuing that "not all contracts for silence violate public policy. In fact, 'there is a presumption of validity and enforceability attaching to settlement agreements which include confidentiality provisions,' citing Illinois case law, and "the defendant has not established any such basis sufficiently to warrant a dismissal pursuant to section 2-619." If this was an agreement to settle a potential legal claim in exchange for compensation, it could fall within this well-established doctrine and not be void, but that can only be determined through discovery of the circumstances under which the alleged agreement was made, precluding dismissal of the claim at this stage. The court also rejected a statute of frauds defense, stating that "this affirmative matter has not been established sufficiently for the purposes of this motion. Hastert was given 28 days to file an answer to the complaint, and Judge Pilmer set a status conference for January 18, 2017.

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**ILLINOIS** – The Illinois Human Rights Commission declined to review and adopted the report and recommendation of an administrative law judge holding that Bed & Breakfast in Paxton, Illinois, violated the state's public accommodation law by denying Mark and Todd Wathen the use of the facility to celebrate a civil union in 2011, shortly

after the state's civil union law went into effect. (Illinois subsequently legislated to allow same-sex marriages before the U.S. Supreme Court ruled that same-sex couples have a constitutional right to marry.) The ALJ ordered the respondent to pay \$30,000 to the Wathens to compensate for emotional distress, out of a total award of about \$80,000 in damages and legal fees. As a final order of the Commission, the ruling can be appealed to the state courts, which Bed & Breakfast is expected to do. Jason Craddock, an attorney for the respondent, promised a court fight after asking for a full commission review. *Capital Fax Blog*, Nov. 30; *DeKalb Daily Chronicle*, Nov. 30.

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**INDIANA** – On November 16, Hamilton Superior Judge Steven R. Nation refused to dismiss lawsuits challenging anti-discrimination ordinances in Indianapolis, Carmel, Bloomington and Columbus, rejecting the argument that the Indiana Family Institute and the American Family Association of Indiana lacked standing to assert their challenge to the local ordinances on behalf of their members. Nation's ruling also requires the plaintiffs to add the state as a defendant, since they are challenging the constitutionality of the "fix" to the state's Religious Freedom Restoration Act under which religious beliefs cannot be relied upon by discrimination defendants to avoid complying with anti-discrimination laws. The plaintiffs claim that this "fix" is unconstitutional for refusing to honor their conservative Christian beliefs. *AP State News*, Nov. 18.

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**IOWA** – On November 23, the Court of Appeals of Iowa upheld a decision by which Jasper County District Court Judge Paul Huscher appointed the son of an elderly, mentally-impaired woman to be her residential guardian, in preference to the woman's lesbian daughter,

with whom she had been living. *In re Guardianship & Conservatorship of Colleen Rose Shannon*, 2016 Iowa App. LEXIS 1251. According to the opinion by Judge Thomas N. Bower, Colleen Shannon, a mother of eleven children who was 82 at the time of the hearing, "has been diagnosed with dementia, Alzheimer disease, and depression." An expert witness at the guardianship hearing put her mental function at age 6-9. She was hospitalized in 2013 after an accident in her home, and was moved to the home of her daughter Deb, Deb's wife, and their eight children (all of whom were minors). Deb claimed that her mother integrated well into the busy home and enjoyed interacting with the children. Colleen's husband, also elderly and ailing, was hospitalized and in June 2015 many of the children came to Des Moines to visit in the hospital. Then Deb's brother Larry (who lives on a farm in Missouri with his wife) and several of the siblings came to Deb's house to visit their mother. They took Colleen out for ice cream, and "when they returned, Larry asked to take Colleen to his home to visit for a week. Two weeks later, Larry drove back to Iowa with Colleen. Larry informed Deb that Colleen had decided to move to Larry's home. Deb disagreed, the confrontation escalated, and eventually law enforcement was called. Colleen told the officer that she wished to go with Larry. Deb claims she told the officer her brother disagreed with her sexual orientation and marriage because he 'was really religious,' to which the officer responded, "I am, too.' The officer eventually allowed Colleen to leave with Larry." Deb then filed a guardianship petition, and Larry intervened, also seeking appointment as the guardian. After a sharply contested hearing, the trial judge awarded the guardianship to Larry, with the proviso that all of Colleen's children were entitled to unsupervised visitation with their mother. (Deb had shown Larry's refusal to extend this courtesy to her in the past.) In affirming the trial court's



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decision, Judge Bower wrote, “Both Deb and Larry have issues that cause us concern. While it is likely not all of these claims are true, or are at least exaggerated to some degree, we give deference to the district court in this determination in recognition of the unique ability to view the testimony first hand . . . . The district court focused heavily on two issues in deciding the case – first, Colleen’s expressed desire to reside with Larry; second, ensuring fair and equitable visitation.” Judge Bower noted that although the expert witnesses assessed Colleen’s “mental age” at “between six and nine,” the same expert testified that Colleen “should be allowed some input into significant decisions in her life and her opinions should be taken into ‘consideration.’” Bower also noted the trial judge’s concern to be sure that Deb and the other children would have equitable visitation rights and that the guardianship would be revoked if Larry failed to comply. On that basis, the Court of Appeals found that the trial judge did not abuse his discretion, but noted a remaining statutory issue: since Larry’s residence is outside of Iowa, there needed be a hearing in order for the trial court to make an appropriate finding that “good cause” had been shown to award the guardianship to a nonresident of Iowa. Apart from recounting Deb’s statement to the police officer that Larry disapproved of Deb’s sexual orientation and same-sex marriage, Judge Bower’s decision offers no further comment on the issue and any roll that such disapproval may have played in the decision of the district judge or the appellate court. It is noteworthy, however, that the Iowa Supreme Court was the first state high court in the nation to rule unanimously for marriage equality, and that several members of that court were subsequently voted out of office in clear retribution for that vote. The state government subsequently had to be sued for failing to accord full equality to same-sex marriages. Iowa remains, paradoxically, a state that is

at once a leader on LGBT rights and a place with significant residual anti-LGBT feeling among a portion of the public and state government officials.

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**KANSAS** – Shawnee County District Court Judge Mary Mattivi has ruled that a man who responded to a Craigslist advertisement to provide semen to a lesbian couple seeking to conceive a child was not the legal father of the child and thus not legally obligated to contribute to the child’s support. Although the court used the initials of the people involved in its decision, they have all been public and are referred to by name in news reports about the case. In 2009 Angela Bauer and Jennifer Schreiner offered \$50 for a sperm donation on Craigslist, and William Marotta responded. He signed a contract with the women in which he waived any parental rights or obligations regarding a child conceived with his sperm. The women performed the insemination without the assistance of a doctor and subsequently Jennifer Schreiner bore a child, whom the women raised together until they broke up. Schreiner applied for public assistance and the state decided to go after Marotta for child support. He protested that he was not the intended father of the child. The court ordered him to submit to genetic testing, which showed that he is the biological father. Under Kansas law, if a child is conceived through donor insemination by an unmarried woman without the use of a doctor, the donor may be deemed the father, but Judge Mattivi concluded that Marotta should not be deemed the father in this case, citing – according to an account in *The Topeka Capital-Journal* published online on Nov. 28 – ten reasons why Marotta should not be considered the child’s legal father, not least because Marotta has no relationship with the child, and has no children of his own that could be considered siblings of the child, and Bauer has a continuing relationship

with the child which she wishes to continue with Schreiner’s approval despite the women’s termination of their relationship. Actually, the judge wrote, Bauer is the child’s second parent, de facto. A friend of Marotta’s told the newspaper that Marotta never even took the \$50 payment, figuring that he was doing a good deed for the women by donating his sperm. The judge said she found it “inexplicable” that the women didn’t consult a lawyer before going ahead with this scheme. Bauer told the newspaper that the women decided not to use a doctor because of a “previous awkward encounter” with a doctor and also to make the act of conceiving the child “more personal.” There was no immediate response from the Kansas Department of Families and Children, plaintiff in the case, about whether it would appeal. Marotta’s reward for his good deed is four years of bills for legal services defending this case. *Christian Science Monitor* published a detailed account of the case on November 30.

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**KENTUCKY** – Chief U.S. District Judge Joseph H. McKinley, Jr., of the U.S. District Court for the Western District of Kentucky, applied 6th Circuit precedent to reject an employer’s argument that a transgender employee could not assert a discrimination claim under Title VII. *Mickens v. General Electric Company*, 2016 U.S. Dist. LEXIS 163961 (Nov. 29, 2016). The plaintiff, who was employed by G.E. from October 2014 to June 2016, identifies as a transgender black male. G.E. claims he was terminated for “attendance issues,” but he claims he was subjected to harassment and disparate treatment due to being a transgender black man who does not conform to gender stereotypes. Judge McKinley found that the complaint “contains facts that would support an inference that G.E. discriminated against Plaintiff with respect to race and gender. In his complaint, Mickens alleges that he was a member of a protected class at the time

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of the unlawful termination and was subject to gender stereotyping; he was harassed, discriminated against, or fired based upon his race or his violation of gender stereotypes; and he was treated differently than white, non-transgender employees.” The complaint recited specific incidents, and the court found it sufficient to state a case for pleading purposes. As to G.E.’s argument that neither Title VII nor the state’s ban on sex discrimination “supports a claim of discrimination on the basis of transgender status,” Judge McKinley pointed out that the 6th Circuit in *Smith v. City of Salem*, 378 F.3d 566 (2004), relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), has recognized that “the prohibition against gender discrimination in Title VII can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms,” as other district judges in the circuit have recognized. The judge also pointed out that cases pending in various circuits and the Supreme Court under Title IX present the same question, and that pending Title VII appeals in other circuits also address this issue. “These cases may have implications for employers in the Title VII context,” he wrote. “Notwithstanding, at this stage of the litigation, what is clear is that the Plaintiff’s complaint sufficiently alleges facts to support discrimination or disparate treatment claims based upon race and gender non-conformity or sex stereotyping,” so the defendant’s motion to dismiss is denied. Mickens is represented by Shannon Renee Fauver of Louisville, Kentucky.

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**MARYLAND** – Anybody interested in plowing through a lengthy and fascinating domestic relations story should consider *Burak v. Burak*, 2016 Md. App. LEXIS 232 (Nov. 10, 2016), which came within our radar due to a polyamorous relationship involving the divorcing couple and another woman, which actually plays only a tiny role

in an extended and complicated tale of marital discord and family dysfunction. One might teach a significant part of a domestic relations course out of the extended opinion by Justice Nazarian for the Court of Special Appeals (the state’s intermediate appellate court).

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**MINNESOTA** – The mother of a transgender teenager is seeking the assistance of a federal court to prevent her offspring from transitioning by enjoining government officials from making the procedure possible. In a complaint filed in the U.S. District Court for Minnesota on November 16 in *Calgaro v. St. Louis County*, Anmarie Calgaro, who names her child J.D.K. as a co-defendant with the various government agencies and officials even though she is not seeking any direct relief against the teen, claims that her due process rights under the 14th Amendment as the teen’s birth mother are being violated by county health and education officials, who are treating J.D.K. as “emancipated” despite the lack of any formal hearing procedure to adjudicate the question for the 17-year-old. (Under Minnesota law, J.D.K., who does not live with Ms. Calgaro and is obtaining support by part-time jobs and public assistance while attending school, will be automatically considered emancipated upon reaching age 18 in July 2017.) Identified as male when born to the unmarried Anmarie Calgaro in 1999, J.D.K. left home at age 16, lived for several months with J.D.K.’s biological father, but then determined to live independently, and at some point decided to transition. J.D.K. sought legal assistance from Mid-Minnesota Legal Aid in Minneapolis, where a staff attorney provided a letter for J.D.K. to use in seeking a name change and financial and medical assistance. The letter, dated June 29, 2015, recites J.D.K.’s version of the story, including that J.D.K. had lived apart from his mother for about six (6) months and

that she, knowing where he was living, made no attempt to bring him home and let him know she did not desire contract, asserted that he was legally emancipated. Minnesota statutes are a bit ambiguous on the point, but appear to allow public agencies to treat teens as emancipated under circumstances such as those described by J.D.K., and thus entitled to receive public assistance and to make their own decisions about health care and education. Calgaro complains that health and education authorities, who are treating J.D.K. as emancipated and have facilitated the transition, have rejected her attempts to access J.D.K.’s medical and educational records. Two states judges have rejected J.D.K.’s name-change applications, on grounds that such applications must be brought by parents on behalf of a minor, a problem that will be cured with the passage of time. Meanwhile, Calgaro seeks a federal court order requiring health and educational authorities to cease assisting J.D.K. with transition, to pay damages to her, to void any determination that J.D.K. is emancipated without affording her a hearing. Characterizing gender transition as a “life changing” event, Calgaro asserts, in effect, that a minor cannot undertake such a transition without the participation of a parent, and that it violates a parent’s due process rights for any determination of emancipation to be made without affording the parent a hearing before a court. The complaint repeatedly asserts that Minnesota laws afford no vehicle for the parent to assert her due process rights, and are thus constitutionally defective. Minneapolis attorney Erick G. Kaardal signed the complaint on behalf of Anmarie Calgaro. He is identified on a website as an attorney who specializes in suing the government when he believes it has overstepped its proper role.

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**MINNESOTA** – U.S. District Judge Wilhelmina M. Wright granted a

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motion by a transgender woman student in Independent School District No. 706 to intervene in a lawsuit brought by an organization of parents and students challenging a school district policy that allows the proposed intervenor to use facilities consistent with her gender identity. *Privacy Matters v. U.S. Department of Education*, 2016 WL 6436658 (D. Minn., Oct. 26, 2016). The Plaintiffs contend that the policy adopted by the District, consistent with communications received last May from the U.S. Departments of Education and Justice, will violate the privacy rights of other students who are required to share these facilities with transgender students. Judge Wright held that because the outcome of this lawsuit could directly affect the rights of the Jane Doe intervenor, she had standing to intervene, and the court exercised its discretion to grant her motion, opining that doing so would no prejudice the defendants or impede the timely litigation of the matter. The judge also granted Doe's unopposed motion to file unredacted versions of her papers and exhibits under seal, in order to protect her own privacy, and also granted the plaintiff's request to be allowed to exceed the local court rule word-count limits in its submissions, in light of the additional papers being filed in opposition to the plaintiff's pending motion for preliminary injunctive relief by Doe. A hearing on the motion was to be held on November 16.

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**NEW YORK**—Employment discrimination law can be both procedurally and substantively complex, and it is frequently inadvisable for an outraged employee to bring a *pro se* employment discrimination claim, especially to federal court, and especially in light of the exacting civil pleading requirements that a *pro se* litigant is unlikely to meet on his or her own. A prime example of the problem is found in U.S. District Judge Mae A. D'Agostino's opinion in *Dollinger v. New York State Insurance*

*Fund*, 2016 U.S. Dist. LEXIS 160086, 2016 WL 6833993 (N.D.N.Y., Nov. 18, 2016). Robert Dollinger, an employee of the New York State Insurance Fund, the agency that administrators the state's Workers Compensation Program, claims various kinds of harassment and mistreatment, as well as retaliation for his attempts to pursue complaints within the agency and wrongful denial of promotions for which he applied. From the court's summary of his allegations, it appears that he is a gay man who believes he has been singled out for discriminatory treatment by others in the agency who associate gay men with HIV/AIDS. He filed suit in federal court alleging violations of Title VII and the ADA, and in an amended complaint also alleged violations of the federal Rehabilitation Act, suing the agency and a variety of named agency officials. Unsurprisingly, the court granted a motion to dismiss the Title VII claim in a March 2015 ruling (2nd Circuit precedent rejects sexual orientation discrimination claims under Title VII, although some district judges have recently raised questions about this in light of recent developments elsewhere), and also noted agency immunity from ADA Title I claims as well as immunity of individual agency officials sued in their official capacity. However, the court allowed Dollinger to file an amended complaint, responding to the court's detailed critique his original complaint, and he belatedly did so, but to no avail ultimately. The most recent version of his complaint again appears to center ADA jurisdiction (solely in support of injunctive relief to avoid immunity problems) on the allegation that he was "regarded as" having a disability because his persecutors in the agency regard gay men as susceptible to HIV/AIDS. This didn't cut it with Judge D'Agostino, who pointed out that in order to be protected by the statute as a person "regarded as having" a disability, the plaintiff has to alleged that he, himself, is regarded by his employer as having a disability,

whether he actually has one or not, and Dollinger was not alleging that he was personally so regarded. Furthermore, the judge found that none of Dollinger's various factual allegations (apart from a passing reference to AIDS in one email) suggested that the reason why he was allegedly being persecuted and denying promotions for which he applied were related to any perception that he was or might be a person with a disability. Actually, from the court's summary of his allegations, it sounds more like a garden variety case of sexual orientation discrimination, of a particularly ferocious and widely-disseminated kind if his perceptions are accurate, which begs the question why this case wasn't filed in state court alleging a violation of the NY Human Rights Law? Did Dollinger fear that he could not get a fair hearing from a state court judge in an action against a state agency? (Dollinger is employed in the Binghamton office, so the NYC ordinance would not apply.) But *pro se* plaintiffs have a tendency to run to federal court on the assumption that Title VII bans sexual orientation discrimination – a contested proposition that has won the support of EEOC but not yet any of the federal circuit courts. And perhaps the best advice to those seeking to bring ADA or Rehabilitation Act claims against their employer is "don't try this yourself at home." The heart sinks when reading the court's summary of Dollinger's allegations, because there may be lurking the basis for a valid civil rights case in the hands of an experienced plaintiff employment lawyer, but this claim may have been filed in the wrong court at the wrong time asserting the wrong legal theories.

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**NEW YORK** – Partially reversing the dismissal of a sexual orientation discrimination claim brought by a gay male corrections officer, the Appellate Division, 1st Department, ruled on November 10 that Damon James had adequately stated a prima facie case of

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discrimination in violation of the New York City Human Rights Law in *James v. City of New York*, 2016 WL 6637734. The claim, asserted against the City's Corrections Department and Assistant Deputy Warden Mingo, included the allegation that there was an ongoing policy of preventing a gay C.O. from "searching inmates" who objected to being searched by a "homosexual." "Plaintiff's allegation that he is an openly gay man and was qualified for the positions of corrections officer and captain meet the first two elements of his discrimination claim," wrote the court. "Plaintiff's allegation that he was written up, twice suspended, and ultimately demoted meet the third element of disadvantageous treatment. Defendant's argument that plaintiff has not alleged that he was treated worse than similarly situated captains – as opposed to correction officers – is unavailing," the court continued. "Suspension and demotion are, on their faces, adverse employment actions. Defendant's argument is, effectively, that those actions were warranted by plaintiff's conduct while a captain, but this argument goes more properly to the second leg of the *McDonnell Douglas* burden-shifting framework, namely rebuttal of a prima facie claim of employment discrimination by showing a legitimate nondiscriminatory reason for the adverse action, and is misplaced at this early procedural juncture." The court also found that the plaintiff's factual allegations were sufficient to allege discriminatory animus: he asserted that defendant Mingo "followed him into a control room and poked him in the 'derriere' with her radio antenna, saying, in the presence of other personnel, 'Now I have your attention,'" and alleged that "his superiors prevented him from searching the cells and persons of inmates who objected on the ground that plaintiff is 'homosexual.'" This allegation helped to get plaintiff past a timeliness argument concerning his complaint, invoking the "continuing

violation" doctrine, although the court agreed with trial judge Frank Nervo that certain allegations predating July 25, 2011, were time-barred, as being too vague and disconnected from the allegations supporting the continuing violation. Damon James is represented by the Law Office of Fred Lichtmacher.

**NEW YORK** – The continuing failure of the 2nd Circuit to recognize sexual orientation discrimination claims under Title VII played into a ruling by U.S. District Judge William H. Pauley III in *Bliss v. MXK Restaurant Corp.*, 2016 U.S. Dist. LEXIS 157469, 2016 WL 6775439 (S.D.N.Y., Nov. 14, 2016), dismissing hostile work environment and retaliation claims under Title VII and supplementary state and local law claims. Plaintiff Jamilya Bliss, a lesbian who has worked at the defendants' Remix nightclub since January 2002, claims to have been subjected to a hostile work environment based on her gender and sexual orientation. Most notably, she alleges that the employer "required her to bartend at private 'sex parties' at the nightclub, during which Bliss 'was subjected to nudity, prostitution, and people performing sexual acts in her presence.'" She also claims that the owner of the club, Panagiotis Kotsonis, "routinely and regularly made derogatory comments regarding people within the LGBT community, referring to gay people as 'faggots' . . . in front of Bliss despite the fact that he was aware of her sexual orientation." She also alleges that Kotsonis displayed "a discriminatory animus toward black/African Americans . . . routinely treating African American employees in a derogatory manner," firing them "on a whim," and making frequent use of racial epithets. Bliss claimed she had "continuously objected to these actions" but was ignored by her boss. She did not claim that Kotsonis directed such epithets at her, but that her relationship with him worsened after Kotsonis fired

a black employee and Bliss encouraged the employer to pursue a discrimination claim. "In response, Bliss alleges, Kotsonis undertook a series of retaliatory measures that included yelling at her, threatening to fire her in front of other employees, removing her managerial title (but not her managerial tasks), and withholding shift pay and a portion of her tips." She characterized these actions as "retaliation" against her protected activity in encouraging the discharged employee to sue. (There is no indication in the record that he actually filed a claim.) She asserted claims under Title VII and the New York State and City Human Rights Laws. The court granted the employer's motion to dismiss all claims under Title VII, and then to decline to exercise supplementary jurisdiction over the state and local law claims. Pauley found that Bliss's allegations were not sufficient to state claims of gender or race discrimination and that Title VII (per prior local case law) would not cover sexual orientation discrimination claims. Wrote the judge: "Bliss fails to establish the necessary causal link between Defendants' offensive conduct and her gender. First, Kotsonis's alleged derogatory comments about LGBT persons and African Americans, however loathsome, are irrelevant to her gender discrimination claims; there is nothing to suggest that they created a hostile work environment because of Bliss's gender . . . Bliss cannot simply allege a series of offensive racist and homophobic comments by her supervisor, point out that she is a woman, and thereby state a claim for gender discrimination. Even if we accept – as we must on a motion to dismiss – that Kotsonis is as repugnant as Bliss makes him out to be, the allegations about his racially motivated firings and frequent use of derogatory epithets cannot support a claim for a hostile work environment based on gender." Pauley rejected the proposition that Bliss could sue for race discrimination in this

# CIVIL LITIGATION

connection, observing in a footnote that the complaint “does not mention Bliss’s race, and her claim seems to be that she found Kotsonis’s racism toward others offensive, thus creating a hostile work environment for her as a woman.” As to the allegations about being required to bartend the sex parties, Pauley explains, “Here, Bliss merely alleges that while she bartended she was ‘subjected to nudity, prostitution, and people performing sexual acts in her presence.’ She does not claim that she was subjected to these sights because she is a woman, nor do her allegations suggest that observing these parties was necessarily more offensive to women. Accordingly, Bliss fails to state a claim for a hostile work environment based on gender.” Turning to the sexual orientation claims, after quoting a 2008 district court statement that Title VII does not cover sexual orientation claims, Pauley observed that lacking federal jurisdiction over the claim, he was exercising his discretion to refuse to exercise supplementary jurisdiction over what might be an actionable state or local law claim, advising that “to the extent that Bliss has viable sexual orientation discrimination causes of action against MXK, her aiding and abetting claims against Kotsonis as to those activities are dismissed without prejudice to re-file in state court.” Counsel listed for Bliss in the opinion include Matthew Ian Marks of the Law Office of Steven A. Morelli, Garden City, and Thomas Anthony Ricotta of White, Ricotta & Marks, in Jackson Heights.

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**NEW YORK** – U.S. District Judge Jed S. Rakoff (S.D.N.Y.) issued an Order on November 14, directing the entry of final judgment on a ruling that New York Medicaid officials must provide appropriate coverage for gender transition therapy for transgender persons under age 18. *Cruz v. Zucker*, 2016 WL 6882992. The court had on October 24 granted the plaintiffs’

motion for reconsideration of its earlier decision from July 5, 2016, which found that disputed material facts precluded summary judgment on this issue. Now, wrote Judge Rakoff, the state’s Department of Health had effectively conceded that there are no remaining material issues in dispute when it published a Notice of Proposed Rulemaking on October 5 to change the Medicaid coverage regulations in a way that would “explicitly” authorize the NY Medicaid Program to “cover medically necessary surgeries and hormone therapies to treat gender dysphoria (GD) in individuals under age 18.” Although that notice was subject to a 45-day comment period, after which the agency would have to respond to comments in formulating its final published regulation, Judge Rakoff rejected the defendant’s suggestion that he should wait until the regulatory process was concluded with final publication before ruling on the motion. “Defendant’s admission that there are no longer any disputed issues of fact regarding the Age Exclusion establishes an ongoing and continuing violation of federal law,” wrote the judge. “Defendant does not contest that each day the Age Exclusion remains in effect, minors suffering from gender dysphoria cannot receive Medicaid coverage for medically necessary treatments. Defendant also does not contest that federal law mandates coverage for such medically necessary assistance. Moreover, defendant concedes that, even though the defendant now agrees with the plaintiffs as to both the facts and the law, there still remains the theoretical possibility that the proposed rule may not ultimately be adopted.” In light of this, the court found it appropriate to issue its order so that transgender youth can immediately receive coverage for these procedures. As part of the earlier July 5 order, the court had struck down NY Medicaid’s exclusion of coverage for various procedures it deemed to be cosmetic, but that the court concluded

were part of necessary treatment for gender dysphoria when certified as such by treating physicians. A huge team of attorneys represents the plaintiffs in this case, including volunteer lawyers from Willkie Farr & Gallagher LLP and the Sylvia Rivera Law Project. \* \* \* In response to publication of the proposed regulations, the Committee on Lesbian, Gay, Bisexual and Transgender Rights of the New York City Bar published an extensive comment in November, criticizing the proposed Regulation because of its “lack of clarity regarding coverage for trans youth and for certain gender reassignment procedures.” The Comment suggests that the proposal be simplified to state that “any and all treatments for gender dysphoria that are consistent with contemporary standards of care must be covered.” Attempting to be more specific in the regulation is likely to create problems down the line as treatment standards evolve with experience.

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**NORTH DAKOTA** – The Becket Fund, a conservative religiously-oriented foundation, has filed a federal lawsuit challenging the U.S. Department of Health and Human Services regulation issued last summer that forbids discrimination because of gender identity in the provision of health care. The suit, brought on behalf of the state of North Dakota and several Catholic organizations, asserts that the regulations require doctors to perform “controversial and sometime harmful medical procedures ostensibly designed to permanently change an individual’s sex – including the sex of children.” Becket contends that this will require some health care providers to violate their “deeply held religious beliefs” and thus violates the federal Religious Freedom Restoration Act. Proponents of the regulation state that it does not compel doctors to provide any particular treatment, but requires that there be no discrimination in the provision

# CIVIL LITIGATION

of health care to transgender people. *Legal Monitor Worldwide*, 2016 WLNR 35096469 (Nov. 16).

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**OHIO** – In a curious artifact stemming from the two-year period between *U.S. v. Windsor* and *Obergefell v. Hodges*, the Ohio courts were faced with the argument in *Cahill v. Testa*, 2016-Ohio-7648, 2016 Ohio App. LEXIS 4522, 2016 WL 6599059 (Ct. App., 11th Dist., Lake County, Nov. 7, 2016), that the state had unconstitutionally discriminated against heterosexual married couples by requiring them to file their state income tax returns jointly while not requiring same-sex couples in Ohio who had validly married out of state to do so as well. The claim, asserted as a potential class action by Glenn and Jodi Cahill, observed that under Ohio's tax law those who filed their federal returns jointly as married were required to file their state returns jointly as married, and after *U.S. v. Windsor*, the Internal Revenue Service ruled that same-sex couples who had married in a state where that was possible should file their federal returns in married status, regardless in which state they were domiciled. Ohio tax authorities responded to the IRS advisory by issuing a ruling that because Ohio did not recognize same-sex marriages, same-sex couples in Ohio who filed their federal returns jointly should file their state tax returns as single. The plaintiffs alleged that this unfairly subjected married different-sex couples to the "marriage penalty" that occurred when a couple's joint income put them into a higher tax bracket, but protected same-sex couples from state tax liability for the same. The Lake County Court of Common Pleas dismissed their claim, and was affirmed in a 2-1 vote by the Court of Appeals. Judge Diane V. Grendell wrote for the majority, "Since the class of husband-and-wife Ohio taxpayers who file joint federal tax returns does not involve a fundamental right or suspect class of

persons, the classification is subject to the rational basis test . . . . The disparate legal standing of husband-and-wife couples and same-sex couples under Ohio law in 2013 was rationally related to the government policy that the filing status of 'married filing jointly' only be applied to married couples. Same-sex couples may have been able to file joint federal returns, but they were not recognized as married. Thus, there was a reasonable justification for the classification or disparate treatment." This did not satisfy dissenting Judge Colleen Mary O'Toole, however. "With respect to the time period at issue," she wrote, "this writer finds that R.C. 5747.08(E) is unconstitutional on its face because it penalizes heterosexual husband-and-wife married couples and treats them differently than same-sex couples. Heterosexual couples, like appellants, that file joint federal income tax returns are treated in a disparate manner than their same-sex couple counterparts simply because they are 'husband' (man) and 'wife' (woman). Because the statute is gender specific, it effectively punishes heterosexual married couples. Accordingly, because appellants have stated a claim upon which relief can be granted, the trial court erred in dismissing their complaint and granting appellee's motion to dismiss." In effect, O'Toole argued, this is a form of sex discrimination, and thus heightened scrutiny applies. It will be interesting to see whether this case makes its way to the Ohio Supreme Court . . . .

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**TEXAS** – U.S. District Judge Reed O'Connor has denied a request from the Obama Administration to limit the extent to his "nationwide injunction" against the Administration's affirmative efforts to support the rights of transgender students under Title IX, according to a Nov. 23 report in the *Abilene Reporter-News*. According to the report, O'Connor wrote that his preliminary injunction

is applicable to all states, regardless of whether they were involved in the case, although he added that states are, of course, free to develop their own rules on bathroom access. O'Connor wrote that the injunction only applies to bar enforcement of the May guidelines issued by DOE and DOJ. The federal government has appealed O'Connor's ruling to the 5th Circuit. The Supreme Court may decide this issue next year in the *Gloucester County School District* case from Virginia.

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**TEXAS** – U.S. Magistrate Judge Andrew W. Austin has released a Report & Recommendation to U.S. District Judge Lee Yeakel, recommending that the court grant the defendants' motion to dismiss the complaint in *Hamilton v. Henderson Control, Inc.*, 2016 U.S. Dist. LEXIS 161672, 2016 WL 6892799 (W.E. Tex., Austin Div., Nov. 22, 2016), in which a gay Texas inmate brought claims arising out of his dismissal from employment in a work release program at the defendant company. Hamilton contends that he was let go because he is gay, based on a pretextual claim that he had tried to instigate an "intimate" relationship with two male employees at Henderson. He asserted claims of sexual orientation discrimination in violation of Title VII, wrongful termination under Texas law, and defamation based on the allegations contained in the termination notice he received. Magistrate Austin recommended dismissal of the Title VII claim because the 5th Circuit has rejected the contention that sexual orientation discrimination claims can be brought under Title VII's ban of sex discrimination, most recently in *Brandon v. Sage Corp.*, 808 F.3d 266 (5th Cir. 2015). While commenting that EEOC takes a different position, Austin pointed out that the EEOC's position has yet to be endorsed by any circuit court, while noting that the 7th Circuit is giving this issue consideration in its forthcoming en banc hearing in *Hively*

# CIVIL / CRIMINAL LITIGATION

*v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), *vacated and rehearing en banc granted*, 2016 WL 6768628 (Oct. 11, 2016). In the current state of things, concluded Austin, the district court should dismiss this claim. Furthermore, he found that Hamilton had been an at-will employee, and that discharging such an employee for being gay or based on false allegations about his conduct did not fall into any recognized public policy exception to at-will employment under Texas law. Finally, although Austin concluded that the statements about Hamilton in the dismissal notice could be considered defamatory, the notice fell within the well-established employer privilege to communicate within the company about the reason for a dismissal, requiring rejection of the defamation charge. Hamilton represents himself *pro se*.

**VIRGINIA** – The Supreme Court of Virginia rejected an attempt by a terminated female employee to assert a claim of wrongful discharge in violation of public policy in reliance on the fornication statute, which the court had previously found unconstitutional in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). *Robinson v. Salvation Army*, 2016 WL 6393399 (Oct. 27, 2016). Such wrongful discharge claims in Virginia require the allegation that allowing the employer to discharge an employee would violate an important public policy of the state embodied in the constitution or a statute. Ms. Robinson claimed that she was discharged after complaining to the employer's human resources officer about the employee's male managers persistent sexual importuning of her. The Virginia Supreme Court declared in *Martin v. Zihlerl*, 269 Va. 35 (20015), that the state could no longer impose criminal penalties for extra-marital or non-marital sex. Thus, found the court, the now-unenforceable statute could not serve as a basis of public policy in a wrongful discharge case.

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## CRIMINAL LITIGATION NOTES

### U.S. COURT OF APPEALS, 3RD CIRCUIT

– Frequently, prosecutions of men for attempting to have sex with minors arise from sting operations conducted by law enforcement officials hanging out on sexually-oriented websites seeking to entrap pedophiles, but sometimes, as in *United States v. Steele*, 2016 U.S. App. LEXIS 21297 (3rd Cir., Nov. 29, 2016), an actual minor is involved. In this case, Steele was convicted by a jury on charges related to his communication and sexual conduct with a 14-year-old boy. In the summer of 2013, Steele, an adult, began interacting with the minor on a “gay social networking cell phone app” called “Jack’d.” The boy represented himself as being 18 in his Jack’d profile, but in conversation with Steele using the app, the minor told Steele he was actually 14. This didn’t put off Steele, according to prosecutors, who charged that the two arranged to meet, Steele had sex with the boy, and the boy sent Steele two photographs of himself in which the boy was posed erotically, exposing his genitals. Steele crossed state lines to meet and have sex with the boy. A few months later, the boy’s parents discovered Steele’s communications with their son and contacted the police, who interviewed the boy. The boy identified Steele from a photo array and testified against him at trial, where Steele was charged with several federal offenses. The police found one of the photographs in Steele’s Jack’d account and one stored on his cellphone. The case would seem to be a slam dunk, especially as Steele confessed to the police about having sex with the boy. But at trial Steele claimed he had lied in his confession to protect his ex-partner, who had also met and had sex with the boy! He also claimed that many other people had passwords and access to his cellphone, so the presence of the photo

there did not prove he had personally received and viewed it. He challenged his conviction on several grounds, but the 3rd Circuit panel was unconvinced by his arguments, finding that the trial court had correctly dismissed Steele’s motion for acquittal, having found there was evidence in the record from which the jury could conclude beyond a reasonable doubt that Steele had knowingly received sexually explicit pictures of a minor and had engaged in sex with the minor. Even though the court of appeals found that some of the prosecutor’s statements at trial referring to Steele’s ex-partner were improper, the court found that the evidence of guilt was so overwhelming that this was no basis to set aside the verdict.

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### U.S. COURT OF APPEALS, 4TH CIRCUIT

– A unanimous 4th Circuit panel has affirmed a ruling by Senior U.S. District Judge James A. Beaty, Jr., that some provisions of the North Carolina sex offender registration law are unconstitutionally vague or overbroad. *Doe v. Cooper*, 2016 U.S. App. LEXIS 21412 (Nov. 30, 2016). The registration law, which applies to all convicted sex offenders, regardless whether their offenses involve minor or adults, restricts where they can live, work, or travel. One section deemed unduly vague by the court requires registered offenders to stay away from any place where minors congregate for regularly scheduled events. The court also determined that in light of the state’s articulated purpose to protect minors, many of the restrictions, even those that are not unduly vague, are not narrowly tailored to meet 1st Amendment requirements when they restrict activities that would enjoy 1st Amendment protection, such as attending church services, where the restriction is imposed regardless of how serious the registrant’s sex offense or even whether it involved minors. The lead named defendant is Attorney General Roy Cooper, who as of

# CRIMINAL LITIGATION

November 30 appears to have narrowly defeated Governor Pat McCrory in the race for governor (although a recount in some parts of the state is going on). A determination needs to be made by the state whether to seek en banc review or file a cert petition, if it does not wish to revise its statute to comply with the ruling. The opinion by Circuit Judge G. Steven Agee summarizes the factual allegations of the five John Doe plaintiffs, one of whom was actually arrested for attending church services because the church had a nearby child care center, some of whom have children and are being barred from full participation in their children's lives because of various restrictions, some of which are clearly unrelated to the offense for which they were convicted. The opinion provides clear evidence of the overbreadth and irrationality of the restrictions established by many state sex offender statutes, whose passage was virtually compelled by the threat of losing various federal funds.

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**MICHIGAN** – Publication of a partner study in July 2016 finding that a person on antiretroviral therapy with an undetectable viral load of HIV is non-infectious was rejected by U.S. District Judge Robert Holmes Bell as a basis for waiving the time limit for filing a habeas corpus conviction on a charge of illegally exposing somebody to HIV through sexual penetration. *Merithew v. Klee*, 2016 WL 6927451 (W.D. Mich., Nov. 28, 2016). The petitioner argued that his petition for a writ of habeas corpus came within the exception to the time limit for claims of actual innocence based on newly discovered evidence. He was sentenced on June 17, 2013, in a Michigan state court and did not directly appeal his sentence, so the statute of limitations for a habeas petition began to run immediately, giving him six months to file a delayed application for leave to appeal, and he had one year from that date to file a federal habeas petition, but

he did not file this petition until July 19, 2016, shortly after the published study came to his attention. “Petitioner argues that laws like Mich. Comp. Laws 333.5210, sexual penetration of an uninformed partner while having HIV or AIDS, have not caught up with advancements in HIV treatment and prevention,” wrote Judge Bell. “He further contends that the Michigan legislature’s intent” behind that statute “was to prevent sexual transmission of HIV, and based on advancements in treatment, the law is now overbroad.” Rejecting this argument, Bell wrote, “But this evidence does not show that Petitioner is actually innocent. He has presented no evidence to refute the fact that he engaged in sexual penetration of an uninformed partner while having HIV, much less that no reasonable jury would have convicted him.” Thus, he had not satisfied the “actual innocence” standard and his petition was time-barred. The court agreed with the analysis of the Magistrate Judge, rejected Merithew’s objections to the Report and Recommendations, and denied the petition for the writ.

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**NEVADA** – In *Hill v. State of Nevada*, 2016 WL 6902157 (Nev. Sup. Ct., November 22, 2016) (unpublished disposition), a three-judge panel of the Nevada Supreme Court affirmed a denial of a post-conviction petition for a writ of habeas corpus, which had been filed by Rickie Hill, who was convicted on charges that appear to have involved kidnapping and sexually molesting a male victim. (The word “appear” is used because the opinion for the panel by Justice Michael Cherry never bothers to state the facts or the exact charges on which Hill was convicted.) Hill, proceeding *pro se*, raised many claims of ineffective assistance by trial and appellate counsel. The opinion does not indicate whether counsel were appointed or retained by the defendant. Of most interest was Hill’s challenge to

trial counsel strategy concerning Hill’s homosexuality. Wrote Judge Cherry, “Counsel’s purported strategy was to focus the jurors’ attention on the issues in the case and away from any concerns individual jurors may have with homosexuality, but his execution of the strategy was objectively unreasonable. Rather than focus the jurors’ attention away from homosexuality, counsel emphasized it, both by mentioning it throughout his statements and argument and by expressing disgust, repulsion, and condemnation towards appellants’ sexual orientation. Nevertheless, appellant does not argue that, but for counsel’s comments, there was a reasonable probability of a different outcome at trial. Rather, in citing to *United States v. Cronin*, 466 U.S. 648 (1984), he appears to argue that such disparaging comments should be considered *per se* prejudicial. However, prejudice under *Strickland [v. Washington]*, 466 U.S. 668 (1984) is presumed in limited circumstances, see *Cronin*, 466 U.S. at 659-60, 661 n.28, that are not presented by this case. Because appellant has not demonstrated a reasonable probability of a different outcome, we conclude that the district court did not err in denying this claim.” Hill also contended unsuccessfully that his trial counsel sabotaged the defense by conceding Hill’s guilt, but the Supreme Court panel concluded that this was just a variation on the first objection aimed at counsel’s expressed repugnance for Hill’s conduct and lifestyle, commenting that Hill “fails to explain how those comments conceded his guilt on any specific crime charges.” Reviewing the numerous other claims Hill asserts in support of his petition, it appears that he had quite a few priors, which may well have influence the court in doubting that any flaws he identified in this trial and appeal were sufficient to justify turning him loose.

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**NEW YORK** – In the October issue of *Law Notes* we reported on U.S.



# CRIMINAL LITIGATION

Magistrate decision recommending dismissal of Title VII discrimination claims filed pro se by Sean Garvey, who claimed to have suffered retaliation from several employers because he was “speaking up against” those who “insulted unlawfully transgendered men and women” and “gays.” The magistrate observed that the Second Circuit has not recognized the validity of sexual orientation and gender identity discrimination claims under Title VII, requiring dismissal of the complaints. On November 28, U.S. District Judge Brenda K. Sannes accepted the Magistrate’s recommendation in *Garvey v. Connect Wireless*, 2016 U.S. Dist. LEXIS 163214, 2016 WL 6952155 (N.D.N.Y.), and *Garvey v. GMR Marketing*, 2016 U.S. Dist. LEXIS 163215, 2016 WL 6952157 (N.D.N.Y.). Garvey’s factual allegations were also said to fall short in raising a retaliation claim, as well, even if such discrimination was covered by the statute. “Plaintiff has cited the EEOC website,” wrote Judge Sannes, “but EEOC’s determination that claims for sexual orientation discrimination may be brought under Title VII is not binding on federal courts.” The 2nd Circuit is considering an appeal from a district court decision cited on this point by the court.

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**UTAH** – A unanimous three-judge panel of the Utah Supreme Court ruled, in an opinion by Chief Justice Matthew Durrant, that 6th District Judge Marvin D. Bagley erred in granting summary judgment to the state rather than allowing a sex crimes inmate to have a hearing on his claim that his 5th Amendment rights were violated by the revocation of his parole based on his refusal to answer self-incriminating questions during sex offender treatment. *Bennett v. Bigelow*, 2016 WL 6946817 (Nov. 25, 2016). Bennett pled guilty to one count of rape of a child in August 2000, and was sentenced to an indeterminate sentence of six years to life. After he completed

an in-prison sex offender program, the Board of Pardons and Parole granted him an opportunity to be released on parole in 2007. He was paroled to Bonneville Community Correctional Center. As a condition of parole, he was required to successfully complete the BCCC sex offender program, and the Board was to be notified if Bennett was removed from the program. The program required Bennett to complete forms disclosing all of his sexual contacts with others, make such disclosures in therapy, and submit to a polygraph test during which he would be asked questions about all past sexual activity, whether previously charged as an offense or not. Bennett completed the forms but balked at answering questions during the polygraph test and was bumped out of the program when he invoked his 5th Amendment right against self-incrimination. He was arrested and his parole was revoked after the Corrections Department notified the Board that he had not successfully completed the sex offender program. He challenged the grounds for revoking his parole, and eventually he was given a second chance, but against made clear that he would refuse to talk about uncharged sex offenses, invoking his 5th Amendment right, with predictable consequences. He was even told by one official that invoking his 5th Amendment right automatically meant failing the offender therapy program. His second grant of parole was revoked and he was again incarcerated. His attempt to get counsel appointed for him in this proceeding challenging the revocation of his parole was twice denied by the trial judge, the second time based on the judge’s conclusion that the initial denial could not be considered. In this November 25 ruling, the Supreme Court said that the trial judge erred, both in refusing to consider the second request for appointment of counsel and in concluding as a matter of law that there was no valid 5th Amendment claim. The Supreme Court considered that a serious 5th Amendment issue was

raised, as to which there were factual disputes between Bennett’s accounts of his experience in the sex offender program and the way it was described in testimony presented to the Board. Chief Justice Durrant noted U.S. Supreme Court precedents on point, finding that using the threat of revoking parole to get a sex offender to reveal information about uncharged offenses that might subject him to further criminal prosecution could violate the 5th Amendment right against self-incrimination. The matter was remanded to Judge Bagley for reconsideration of Bennett’s request for appointment of counsel (with the opinion implying that it should be granted) and for a hearing on his 5th Amendment claim in light of the Supreme Court’s analysis of the controlling precedents.

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**WEST VIRGINIA** – Because he evidently believes it is a good thing to attack gay people who dare to kiss in public, West Virginia Attorney General Patrick Morrisey has asked the state’s Supreme Court of Appeals to uphold a ruling by Cabell Circuit Judge Paul T. Farrell dismissing charges of felony civil rights violations against former Marshall University football player Steward Butler, who voiced an anti-gay slur and then struck Zackary Johnson and Casey Williams in the face after they kissed at 5th Avenue and 9th Street in Huntington in April 2015. Farrell’s order rejected the prosecutor’s attempt to bring this under a sex discrimination statute, saying that discrimination based on sex and sexual orientation were separate categories. The prosecutors have appealed the dismissal, asking the court to determine whether the West Virginia State Code protects civil rights “if the violation is based solely on the victim’s sexual orientation or whether a person’s civil rights can be equally violated based on gender,” according to a report on the case in the Nov. 18 issue of the Huntington *Herald-Dispatch*. Morrisey filed a motion to intervene

# CRIMINAL / PRISONER LITIGATION

in the case, presumably to present the state's official view that people should be free to assault gay people who dare to display affection to each other in public, presumably as a way of policing public morality. A spokesperson for the Attorney General, however, disclaimed such intent, stating that the filing did not mean that Morrissey accepted the "despicable behavior" alleged against Butler. Said the spokesperson, Curtis Johnson, "His involvement is solely limited to interpreting the unambiguous definition of the word 'sex.' Any other interpretation of the statute has the potential to set a dangerous precedent for similarly worded law and sidestep the democratic process by which the people's legislative representatives enact law – not the courts or prosecutors." Morrissey's motion points out that the legislature has refused to add the phrase "sexual orientation" to its hate crimes law 26 times, and construing the statute to cover it anyway would not give "a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited." This is a bit bizarre. Doesn't West Virginia law already prohibit unprovoked physical assaults against people? Is Morrissey arguing, in effect, that Butler would have no idea that slugging people in the face might get him in trouble with the law?

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## PRISONER LITIGATION NOTES

**CALIFORNIA** – United States Magistrate Judge Michael J. Seng performs a second screening under 28 U.S.C. § 1915A(a) of transgender prisoner Tristian Crowder's pro se amended complaint in *Crowder v. Castillo*, 2016 WL 6599797 (E.D. Calif., Nov. 8, 2016), and he recommends that she be permitted to proceed on some of her claims. Crowder alleged that she objected to transfer between cell blocks out of fear for her safety because of her "open transgendered lifestyle," but

the officers moved her forcibly. One officer (defendant Castillo) slammed her into a cell, causing her to strike her head and leaving scraping scars on her arms. Three other officers alleged stood by and laughed at her. She did not receive medical attention for three days (and only after filing a grievance), despite a seizure on the evening of the use of force. Judge Seng found no basis to link the use of force to Crowder's transgender presentation or to treat the incident akin to a "hate crime," although the motivation is alleged. He did find that Crowder stated a claim against Castillo for excessive use of force under *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), and (without citation) a claim against the bystander officers who laughed and did not intervene to prevent Castillo's excessive force. [Note: on bystander officer liability, see *Lolli v. County of Orange*, 351 F.3d 450 (9th Cir. 2003) (generally); and *Robins. v. Meacham*, 60 F.3d 1436, 1442 (9th Cir. 1995).] Judge Seng recommended dismissal with prejudice of claims against a supervisor, for inadequate pleading of personal linkage with the alleged constitutional violations; and he likewise recommended dismissal of claims of deliberate indifference to Crowder's medical needs after the use of force because she failed to plead that the defendant officers were aware of her seizure (which was serious but occurred "later in the evening"). He wrote that Crowder failed to show that the defendants were "aware of her serious medical need" and that her pleadings did "not contain any facts to suggest otherwise" – overlooking that she also plead that her injuries from the slamming were sufficient to leave scars. Dismissing the supervisor and the medical claim with prejudice when the incident itself is going forward seems unreasonable to this writer: discovery (medical records, pictures, testimony) may show that the officers deliberately ignored obvious injuries. In this writer's experience, security experts

almost always endorse independent medical screening after use of force and condemn policies relying solely on the officers who used the force to determine the effect of their own behavior. *William J. Rold*

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**CONNECTICUT** – Some *pro se* plaintiffs cannot seem to take "yes" for an answer. U.S. District Judge Victor Bolden has previously whittled down claims against 21 defendants but permitted *pro se* inmate Lloyd George Morgan (who is black and transgender) to proceed on claims alleging: (1) deliberate indifference to her safety; (2) subjecting her to danger by calling her a "snitch" in front of other inmates; (3) failing to protect her from assaults by other officers; (4) retaliation; and (5) Connecticut state claim of intentional infliction of emotional distress. Now, in *Morgan v. Dzurenda*, 2016 U.S. Dist. LEXIS 160100 (D. Conn., November 18, 2016), Judge Bolden denied her further motions to amend and assert some related (and rather incomprehensible) claims for further relief. Morgan is now released from prison, so her injunctive claims are moot. See, *Van Wie v. Pataki*, 267 F.3d 109, 113 (2d Cir. 2001); even a transfer can moot as to the previous prison, *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2011). The opinion has an extended discussion of motions to amend civil rights pleadings in the Second Circuit. Judge Bolden found that Morgan's motions were untimely and also flimsy on the merits, denying assertions of violations of Civil RICO and 42 U.S.C. § 1983(3) (which forbids civil rights conspiracies but requires class-based or racial animus, which he found did not apply to Morgan because his race and sexual orientation claims were conclusory). He found that the Connecticut civil rights laws were not enforceable through a private cause of action, citing *Wilson v. City of Norwalk*, 507 F. Supp. 2d 199, 212 (D. Conn. 2007), and *Garcia v. Saint Mary's*

# PRISONER LITIGATION

*Hosp.*, 46 F. Supp. 2d 140, 142 (D. Conn. 1999). In this writer's opinion the effort would have been better spent trying to find counsel or preparing for the inevitable summary judgment motion on the claims that survived. *William J. Rold*

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**CONNECTICUT** – This is an unusual case in that a transgender inmate is accused of being the aggressor against a straight inmate in a series of assaults and sexual harassments. *Pro se* inmate Anthony Mack alleged his civil rights were violated when officials permitted a transgender inmate to extort him for sex and force him to witness masturbation, under threat of accusing Mack of rape. When Mack reported the activity, he was transferred, but an officer allegedly told the transgender inmate's boyfriend about the report, thereby placing Mack in danger. U.S. District Judge Victor A. Bolden dismissed all claims on screening under 28 U.S.C. § 1915A in *Mack v. Comm'r Semple*, 2016 U.S. Dist. LEXIS 162267, 2016 WL 6902398 (D. Conn. November 23, 2016). Mack failed to allege personal involvement in the events by the Corrections Commissioner or the facility warden. In addition, Judge Bolden could find no case involving a transgender inmate as the aggressor, allowing the defense of qualified immunity: "All reported cases asserting failure to protect based on the housing placement of transgender inmates involve claims filed by the transgender inmate." *Law and Order: SVU* may be prosecuting "woman rapes man" cases, but the notion remains alien in the correctional milieu. There were no allegations that the captain who left Mack unguarded in a dayroom without cameras where the incidents occurred was aware of the assaultive propensities of the alleged assailant, or any history between her and Mack. The complaint against the doctor for failing to treat Mack's post-traumatic disorder after the incidents (which triggered childhood sexual

abuse memories) was not actionable as an Eighth Amendment violation because (although the condition was serious) there were no allegations that the physician knew that Mack would not obtain treatment at the new facility. The transfer amounts at most to negligent failure to assure continuity of care. The officer to whom Mack complained and who told the assailant's boyfriend about the complaint likewise escapes accountability. Judge Bolden relied on Mack's admission that the officer may not have known that the boyfriend did not know about the relationship between the boyfriend and Mack. The opinion ignores the provision of the Prison Rape Elimination Act that require that reports remain "private" and that confidentiality be protected. *See* 28 C.F.R. § 115.51. PREA does not permit officers free reign to gossip so long as they do not actually know that the recipient of the disclosures has a special reason to act on the information. *William J. Rold*

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**ILLINOIS** – *Pro se* federal prisoner Jeremy Pinson is transgender and a frequent litigator, who has accumulated more than "three strikes" under the Prison Litigation Reform Act ["PLRA"] for prior dismissals of lawsuits. Her history is recounted in part in *Law Notes'* discussion of *Pinson v. Santana*, 2015 WL 4270022 (N.D.Tex., July 14, 2015) (reported September 2015 at page 414), where she failed to prevent her transfer to a "Super-Max" facility in Colorado. Her cases have been brought throughout the federal Bureau of Prisons system. Now, in *Pinson v. Fed. Bureau of Prisons*, 2016 U.S. Dist. LEXIS 158006 (S.D. Ill., November 14, 2016), United States District Court Judge J. Phil Gilbert again denies relief. The case is notable, however, because he applied the "imminent danger" exception to the PLRA's "three strikes" rule and allowed her to proceed *in forma pauperis*, because she alleged that, at the time of filing the complaint, she

was suicidal and she claimed urgently to need to see a neurologist and a urologist for head injuries and an infected scrotum. Even before Pinson moved to proceed *in forma pauperis*, however, Judge Gilbert took the highly unusual step of conducting a pre-screening screening: "Given the seemingly urgent nature of her requests for relief, the Court immediately reviewed the case, in order to determine whether Plaintiff was entitled to relief under Federal Rule of Civil Procedure 65. *See Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680 (7th Cir. 2012)." He decided she was not entitled to any injunctive relief, however, because she had been transferred quickly to the United States Medical Center for Federal Prisoners in Springfield, Missouri, which mooted her claims against officials at the federal prison in Illinois. But we can expect to hear from her again. *William J. Rold*

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**ILLINOIS** – *Pro se* transgender inmate Dameon Cole, a/k/a Divine Desire Cole, has filed prodigiously in the Southern District of New York. Her cases have been reported previously or summarized in *Law Notes* in March 2015 and September 2015, at pages 120-21 and 324-25, respectively, raising claims of deliberate indifference to her health care and to her safety, brutality, and discrimination. Many have survived initial scrutiny, but have been bifurcated into multiple cases. Now, in *Cole v. Coe*, 2016 U.S. Dist. LEXIS 159453, 2016 WL 6804486 (November 17, 2016), U.S. District Judge Staci M. Yandle grants summary judgment against Cole in a medical care case in favor of the warden and a medical doctor (Coe). Cole did not file responsive papers to the s.j. motion, perhaps because she is to be released very shortly. Cole's sexual identity issues were not contested, and she was referred to a "Gender Identity Disorder Committee" for follow-up, including her candidacy for sex reassignment surgery. She began extensive hormone treatment

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and one-on-one counselling sessions. She was incarcerated for a time in segregation, and was without medication for a period of three weeks. She had no information that the warden or Dr. Coe were involved in these events. She stated in her deposition that she was generally “happy with her physical progression” despite some minor side effects. She asked for injunctive relief to a physician “more knowledgeable” in gender dysphoria. Judge Yandle found that Dr. Coe was not deliberately indifferent to Cole’s needs. “Gender dysphoria is undoubtedly a serious medical condition,” citing *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011), “but Cole has received consistent medical care and attention,” wrote the judge. “Moreover, Cole has not demonstrated that she has been harmed by the infrequency of the follow up examinations.” Her request for injunctive relief is mooted by her transfer, see *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996), so the warden (sued in his official capacity for injunctive relief) is also entitled to summary judgment. *William J. Rold*

**MASSACHUSETTS** – A gay prisoner’s claim that his civil rights were violated when a lieutenant ordered him to stop serving juice in the jail mess hall (and to stop handling any food or beverage) because of his sexual orientation survived a motion to dismiss in *Collymore v. McLaughlin*, 2016 WL 6645764 (D. Mass., November 8, 2016). United States District Judge Leo T. Sorokin applied *Romer v. Evans*, 517 U.S. 620, 634-35 (1996), to find a claim for damages for denial of Equal Protection to Steven D. Collymore, regardless of whether (1) the discrimination deprived him of a “liberty interest,” finding none in a food service job but holding that Equal Protection claims do not require deprivation of a “liberty interest”; or (2) Collymore belonged to a class triggering heightened scrutiny under Equal Protection. Judge Sorokin found that the lieutenant was not

entitled to qualified immunity because the law was settled after *Romer* that his action was illegal and that a reasonable officer should have known his action was unlawful. “After *Romer*, any reasonable official would understand that he is not permitted to order gay prisoners to stop handling food or beverages based on animus.” Judge Sorokin specifically found the matter was “not trivial”: “An official order that gay inmates may not handle food or beverages encourages a discriminatory perception that homosexuals are unhygienic, which could easily lead to their ostracization and persecution.” Judge Sorokin denied an injunction because Collymore is no longer at the jail, but he reserved on the issue of declaratory relief. *William J. Rold*

**NEBRASKA** – Although prisoner transgender claims have an inhospitable history in the Eighth Circuit – see *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); cf. *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015) (affirming qualified immunity) – Senior United States District Judge Richard G. Kopf allowed civilly committed inmate Cornelius Brown’s pro se claims to proceed after screening under 28 U.S.C. § 1915(e)(2) in *Brown v. Department of Health and Human Services*, 2016 U.S. Dist. LEXIS 155500 (D. Nebr., November 9, 2016). Brown, openly transgender since age 16, sued the Nebraska Director of Health and Human Services (HHS), which operated the state’s mental health units, and employees at one unit where she was confined, claiming discrimination and unfavorable treatment because she is transgender, as well as retaliation for complaining of same. Brown requested permission to identify and wear clothing and use products consistent with her gender identity. Her requests were rebuffed by ridicule and negative progress comments, loss of privacy and privileges, and more frequent searches

of her quarters; and she was told: “if you ever want to get outa here, just talk in your groups, & let the rest of this go.” When local press (*Lincoln Journal Star*) took an interest in her case, negative evaluations and harassments increased. Judge Kopf denied Brown injunctive relief against the defendants where she is no longer confined, but he allowed her to proceed against the State Director, who has jurisdiction over all mental health units, including her current one, for prospective injunctive relief under the authority of *Ex Parte Young*, 209 U.S. 123 (1908). Judge Kopf allowed Brown to go forward against all defendants for damages and declaratory relief on three theories: Equal Protection; First Amendment retaliation; and Fourteenth Amendment denial of Due Process. Equal Protection claims were viable under “class of one” theory – see *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) – or under gender non-conformity as sex-based discrimination theory, citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) – without resolving level of scrutiny – comparing *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff’d*, 653 F.3d 550 (7th Cir. 2011) (rational basis scrutiny) with *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (“quasi-suspect” class scrutiny). On First Amendment retaliation, Judge Kopf found that Brown stated a claim for retaliation for filing this lawsuit and “for talking to the local newspaper” under a string of Eighth Circuit cases, writing: “Plaintiffs’s allegations of retaliation are plausible. They suggest that the defendants reacted to Plaintiff’s complaining to . . . staff, filing a civil lawsuit, and contacting the newspaper by taking steps to prevent Plaintiff from advancing in her treatment program, such as writing ‘negative entries’ about Plaintiff to the mental health board and denying Plaintiff the proper amount of ‘points’ during certain reporting periods.” On Due Process, Judge Kopf

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applied Eighth Amendment standards to this civilly committed plaintiff under the authority of *Youngberg v. Romeo*, 457 U.S. 307, 315- 316, 320-21 (1982); *Mead v. Palmer*, 794 F.3d 932, 936 (8th Cir. 2015); and *Revels v. Vincenz*, 382 F.3d 870, 874 (8th Cir. 2004). He surveyed transgender prisoner conditions of confinement cases – including *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (which reversed an injunction under the Eighth Amendment for sex reassignment surgery); and *Konitzer v. Frank*, 711 F. Supp. 2d 874 (E.D. Wis. 2010) (denying prison’s motion for summary judgment on female clothing and grooming items) – and he quoted extensively from Bourcicot & Woofter, “Prudent Policy: Accommodating Prisoners with Gender Dysphoria,” 12 *Stan. J. Civ. Rts. & Civ. Liberties* 283 (2016) (exploring “real life” experience” for transgender people in the institutional setting). Because Brown alleges that she is an “openly documented transgender,” her needs are serious. “At this preliminary stage, Plaintiff has stated a due process claim for relief under the Fourteenth Amendment for deliberate indifference to Plaintiff’s serious medical needs,” and further proceedings are necessary. Nebraska corrections officials recently settled a transgender inmate case, *Shadle v. Kohn*, 15-cv-03132 (D. Nebr., August 29, 2016), reported in *Law Notes* (October 2016 at pages 447-8). *William J. Rold*

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## LEGISLATIVE NOTES

**U.S. CONGRESS** – This year’s National Defense Authorization Act (H.R. 4909) was stalled in the Senate over mainly Democratic opposition to the Russell Amendment, which would allow Defense Department contractors with religious objections to homosexuality and transgenderism to discriminate on that basis in their employment policies. Upon receiving assurances from “senior

Trump officials” that the president-elect would be addressing this issue, presumably through an executive order either creating a religious exception or revoking President Obama’s Executive Order that had imposed the non-discrimination requirement on contractors, Rep. Steve Russell (R-Okla.) agreed to drop his amendment from the bill during the conference committee negotiations to resolve differences between the House and Senate versions of the bill. BloombergBNA *Daily Labor Report*, 230 DLR A-2 (Nov. 30, 2016). This is the first “official” confirmation that the anti-discrimination executive order is likely to be among those revoked by Trump soon after being sworn in as President.

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**NEW YORK** – Erie County Legislator Pat Burke (D-Buffalo) has proposed a local law to ban the practice of conversion therapy on minors by licensed health care practitioners. He proposes to call it “Prevention of Emotional Neglect and Childhood Endangerment,” or P.E.N.C.E. for short. The measure is intended to “honor” Vice-President-Elect Mike Pence, who as a candidate for Congress back in 2000 called for federal funding for institutions that provide such therapy. Burke’s proposal would make such practice a misdemeanor subject to a \$1,000 fine and up to a year in prison. N.Y. Governor Andrew Cuomo had previously issued an executive order banning insurance companies from covering such therapy in New York, but state legislation on the subject has stalled in Albany. *twcnews.com*, Nov. 21. At press time, Pence, still serving as governor of Indiana, had not acknowledged the honor.

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**LOUISIANA** – The state’s House Appropriations Committee refused to approve a state employee health benefits contract extension on November 18 because it includes explicit workplace

protection for LGBT state workers. Committee Chair Cameron Henry (R-Metairie) said his committee probably would not approve the agreement until the anti-discrimination clause was removed. The contract with Vantage Health Plan, Inc., would cover 6800 state employees’ medical benefits. The state’s Office of Group Benefits will have to ask the insurance company for an extension of time to make the first premium payment, due December 1, because the legislature does not plan to take up the matter again until later in December. The employees are thus thrust into the middle of a fight between Governor John Bel Edwards, a Democrat, who sought to protect them from discrimination through executive policy, and Republican elected officials, who believe and advocate for discrimination against LGBT people of whom they disapprove because . . . . Well, just because. Elected Republicans in Louisiana hold to a firmly heterosexist creed, evidently. The *Times Picayune*, 2016 WLNR 35598898, reported on the dispute on November 20.

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**SOUTH DAKOTA** – Attorney General Marty Jackley announced on Nov. 22 that a petition had been filed with the state to begin the process of putting a proposal on the ballot for 2018, under which voters could decide whether to restrict transgender students from using restrooms and locker rooms in public schools that were not consistent with their sex as identified on their birth certificates. According to a Nov. 23 article in the *Sioux Falls Argus Leader*, this could become the first such popular initiative addressing transgender access to facilities in the nation, which should make the folks in South Dakota mighty proud that they will be convulsing the state with arguments about bathrooms. The proposal “closely mirrors” a bill that passed the state legislature but was vetoed by Governor Dennis Daugaard earlier this year. The governor opined

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that this was an issue best left to local school boards rather than legislated at the state level. Of course, to the extent they are receiving federal funds, public schools in the state are bound by Title IX to allow transgender students access to facilities consistent with their gender identity, or so says the U.S. Department of Education, which may be changing its tune if/when President-Elect Donald Trump's designee for Secretary of Education, Betsy DeVos, is confirmed.

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**TEXAS** – *Huffington Post* (Nov. 16) reported that Texas Republican legislators are preparing to introduce a bill for the 2017 session that would forbid localities from passing laws banning anti-LGBT discrimination, and would repeal such laws where they now exist in several municipalities. They also plan to introduce several anti-abortion measures, seeking to work around a U.S. Supreme Court ruling from last spring that struck down the last round of legislative restrictions. Lt. Gov. Dan Patrick, referring to the change in national administration and the likely appointment of new conservative Supreme Court justices, suggested that the new legislative agenda showed the state's commitment to "conservative values." "Starting in 2017," he said, "we will have a friend in the White House who was clearly elected because the people of this country believe in conservative principles that have guided the way we govern in Texas – life, liberty and lean government that promotes prosperity." That's interesting; we thought more people voted for Hillary Clinton . . . \* \* \* The *Houston Chronicle* (Nov. 25) reported on another measure, a ban on men using women's restrooms, which is intended to protect Texas womanhood from being exposed to transgender women in their restrooms because who knows what might happen . . . ? Lt. Gov. Patrick said that this one should pass easily through the legislature, even though it is opposed by Texas business

and advocacy groups who fear the kind of backlash North Carolina received last spring over H.B.2. Patrick identified the bill as a "top priority" for the State Senate. Five Texas municipalities already ban gender identity discrimination in public accommodations, but a state law would theoretically supplant this (and a separate bill would repeal such local laws, see above). Contrary to Patrick's contention, some observers suggested that the state's House of Representatives might refuse to pass the measure.

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## LAW & SOCIETY NOTES

BloombergBNA's *Daily Labor Report*, 223 DLR A-6, reported on November 18 that there is a "bisexual wage gap" in the United States. A new study published in the *American Sociological Review* documents that statistical analysis of two "nationally representative samples of over 10,000 people" found a 7 to 28% wage gap for bisexual women and an 11 to 19% gap for bisexual men, when compared to heterosexual comparators. The study's author, a PhD candidate at Indiana University named Trenton D. Mize, said that "the findings are suggestive of discrimination, because I've accounted for all the reasonable explanations for why we have that gap." Previous studies have shown gay wage gaps.

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**FLORIDA** – *Agence France Presse English Wire* (Dec. 1) reports that "Florida's first-ever needle exchange program" was to open on December 1, decades after many other U.S. cities had established such programs. Miami rate of new HIV infections, reported as 51.2 per 100,000 people in the most recent annual figures, exceeds any other metropolitan area in the U.S., according to Centers for Disease Control and Prevention data published at the end of November in conjunction with

International AIDS Day observances. "The nearly 1,500 new HIV infections last year in Miami – a metro area including some 2.7 million people – is about double the rate of all other big American cities, after adjusting for population size," the article reported, with Miami displacing Baton Rouge as the riskiest U.S. city for contracting HIV. Ironic that this situation persists in a state whose governor was previously the head of a large health care business prior to his political career . . .

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## INTERNATIONAL NOTES

**UNITED NATIONS** – The U.N. General Assembly's Human Rights Council has rejected an effort to block its earlier decision to create an "independent expert" position to challenge violence and discrimination directed at gay people and people of differing gender identities. Several African countries, led by Botswana, sought to block the work of Viti Muntarhorn, who was designated to fill this position effective Nov. 1. The position was created by the Council at a meeting last June. Botswana proposed to delay the appointment until next September to give member states more time to decide whether there is any basis in international law for creating such a position, noting that a large number of member states still penalize gay sex and relatively few outlaw anti-LGBT discrimination. *AllAfrica.com*, Nov. 22.

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**AUSTRALIA** – Southern Australia Premier Jay Weatherill has proclaimed a public apology on behalf of the government to all gay, bisexual and transgender South Australians who have been discriminated against in the past by state laws, according to a December 2 article published online. *Advertiser*, 2016 WLN 36731198. The state's Parliament recently concluded work on several changes in state legislation to

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make the law more inclusive of the LGBT community, including allowing same-sex couples to access IVF, establishing a register that acknowledges same-sex marriages contracted overseas, and easing the requirements for changing gender-designations on birth certificates. According to *Advertiser's* report, the changes were prompted in part by "the death in Adelaide of a British man, David Bulmer-Rizzi," who was honeymooning there with his husband, Marco, when he died, and local officials insisted on identifying him on his death certificate as "unmarried."

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**CANADA** – Score one for Trinity Western University in its ongoing struggle to establish a law school that will be approved by the law societies in each province so that its graduates will be able to practice law. On Nov. 1, The Court of Appeal for British Columbia affirmed a trial judge's decision that set aside the Law Society of British Columbia's refusal to approve the law school, on the ground that the University requires all of its students to sign a Community Covenant that includes refraining from any sexual expression outside of marriage and reserving married to different-sex couples. (This in a county that has allowed same-sex marriage for more than a decade and does not criminalize gay sex.) According to a summary prepared by the court in *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423, the Law Society's governing body initially approved the law school, but this led to an uproar among the membership and a decision to hold a referendum. A majority of lawyers voted against approval, and the Society then reversed its decision and denied approval. The court said that this violated the legislature's delegation to the Law Society of discretion to decide whether to approve law schools. A referendum vote is not an exercise of discretion, held the court. Simply adopting the decision

of a majority of members evaded the requirement that the Society "assess concretely, based on evidence and not perception" the impact on Charter rights. In this case, conflicting rights of free exercise of religion by the University and freedom from discrimination by the students must be weighed. The court considered that there were plenty of other law schools that students could attend if they were deterred by the University's requirements, and that, "In a diverse and pluralistic society, government regulatory approval of entities with differing beliefs is a reflection of state neutrality. It is not an endorsement of a group's beliefs."

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**CANADA** – The Ontario legislature on Nov. 29 passed the All Families Are Equal Act, which revised Ontario's family law statutes to take account of same-sex couples as parents. Under the new law, both members of a same-sex couple who have used assisted reproductive technology to conceive a child will be deemed parents of the child, among other reforms introduced by the law, which has the overall goal of extending equal legal status and treatment to families that include same-sex couples. *Legal Monitor Worldwide*, 2016 WLNR 36711805 (Dec. 1, 2016). It was reported that the law will now accommodate "unconventional families," such as those made up of two lesbians and two gay men (sperm donors) who seek to form a large family unit with their children.

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**CANADA** – On November 18 the House of Commons passed Bill C-16, which would amend the Canadian Human Rights Act to add gender identity and expression to the list of prohibited grounds of discrimination and amends the Criminal Code to add gender identity or expression to the definition of "identifiable group" for the purpose of hate propaganda offences and hate

crimes. The bill now goes to the Senate. Earlier a bill was proposed to repeal a provision of the penal code, Section 159, which places restrictions on anal sex, Bill C-32. The bill would establish an age of consent of 16, above which people could not be prosecuted for engaging in consensual anal intercourse. Section 159 as it now standards allows anal intercourse only for those over 18, and it is only legal if the number of participants does not exceed 2 and it is done in a private place where no other person can observe. Although appeals courts in five provinces have held enforcement of Section 159 illegal, Egale Canada Human Rights Trust reported in June that police officers continue to charge people under it. The bill is expected to receive bipartisan support. *Canadian Press*, Nov. 15.

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**CANADA** – Prime Minister Justin Trudeau has designated Edmonton MP Randy Boissonnault to hold fact-finding hearings around the country to advise the government how to respond to those who were convicted, imprisoned, denied employment, etc., because of their sexual orientation or gender identity. The government created this one-person "task force" in response to a series of article published by the nation's leading daily newspaper, the *Globe and Mail*, documenting past injustices to members of sexual minorities in Canada, according to an article in the newspaper published on November 15.

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**IRELAND** – The European Court of Justice dismissed a claim by Dr. David Parris, a retired lecturer from Trinity College Dublin, that he suffered unfair sex and age discrimination when the College denied a claim of pension entitlement for his same-sex partner of 30 years. The November 24 ruling found no violation of European non-discrimination law. Dr. Parris's claim had been rejected by the university and the Higher Education

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Authority. He brought his claim to the Irish Labour Court, which referred the matter to the European court in Luxembourg, according to a Nov. 25 article in *Irish Times*. The university insisted on enforcing its rule that only employees who married prior to age 60 could pass on pension entitlements to their spouses. Parris and his partner had entered a civil partnership in the U.K. in 2009, and married there in 2015. Neither of those steps were possible under Irish law before Parris reached age 60, and Ireland would not recognize the British Civil Partnership until 2011, after Parris had turned 60. Parris, who is now 70, has dual Irish and British nationality. The Labour Court found that he and his partner would have formed a legal union prior to Parris's 60th birthday had such been possible in Ireland. The European Court, in a burst of formalism, rejected the claim because the challenged rule was neutral as between same-sex and different-sex couples, requiring in either case that a legal relationship be formed with the employee before age 60 to gain the pension entitlement. The Court said that because European Union law did not require Ireland to provide a legal status for same-sex couples prior to 2011 or to retrospective effect the civil partnership act, a claim of disparate impact could not be maintained. The Court also found that rules on age discrimination allow for occupational pension schemes to fix the age for admission or entitlement to benefits, so there was no unlawful age discrimination against Parris. Thus, although it would clear to any reasonable observer that this is a case of de facto discrimination, it is not, in the view of the European Court, a case of de jure discrimination, and thus not actionable. If Parris wishes to pursue the matter further, he might seek a legislative solution to the problem from the Irish government.

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**IRELAND** – The Court of Appeal in Belfast has upheld a judgment by the

Belfast Recorders Court that Ashers Bakery unlawfully discriminated against a customer on grounds of sexual orientation by declining an order to make a cake bearing the message “Support Gay Marriage” based on the baker’s religiously-based objections. The cake had been ordered by a local gay rights activist. The judges rejected the baker’s argument that requiring them to bake the cake would be a form of compelled endorsement of gay marriage. Wrote the court, according to a press report, “The fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either. The supplier may provide the particular service to all or to none but not to a selection of customers based on prohibited grounds. In the present case the appellants might elect not to provide a service that involves any religious or political message. What they may not do is provide a service that only reflects their own political or religious message in relation to sexual orientation.” The bakery’s action was found to have violated the Equality Act (Sexual Orientation) Regulations 2006. *JDSupra*, Dec. 1.

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**KENYA / UGANDA** – The Australian Broadcast Corporation posted an article on-line on Nov. 29 reporting that there is a substantial community of LGBTQI refugees from Uganda now living in Kenya where they are waiting to be relocated to a county that will protect them. Anti-LGBT harassment is rife in Uganda, where newspapers have taken to publishing names and photographs of LGBT people, inciting individuals to attack them. While Kenya is not the most welcoming place for these refugees, they see it as preferable to Uganda. The article reported: “Diana Gichengo, a lawyer from the Kenyan Human Rights Commission, said most of the LGBTQI refugees fleeing Uganda are men. ‘By persecuting them, you are going against the right to human dignity,’ she said. ‘It is

very undignified, for instance, to try and strip them, cleanse them though rape. It’s just wrong in every respect.’” Most of the refugees have applied for resettlement in a third country, reported ABC News, which quoted Ms. Gichengo: “Very many countries were open to accepting people who have been persecuted on the basis of their sexual orientation, however recently this is no longer happening.”

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**MALAWI** – *Agence France Presse English Wire* (Nov. 25) reports that Malawi will hold “public consultations” about whether to reform their colonial-era sodomy laws. President Peter Mutharika’s government will hold “public enquiries” on the issue, according to Solicitor General and Secretary for Justice Janet Banda. Malawi relies heavily on international aid, and has been receiving pressure from donor countries to reform its sex crimes laws to be in conformity with contemporary human rights standards. According to the article, “The country’s small gay community keeps a low profile due to fears over anti-gay public sentiment and the law. The government has in the past urged homosexuals to come out to help the fight against AIDS, with nine percent of the adult population infected with HIV – one of the highest rates in the world.” \* \* \* *AllAfrica.com* (Nov. 23) reported that Eric Aniva, who is living with HIV infection, was sentenced to two years in prison on accusations that he slept with 100 girls and women in a series of “ritual cleansing” acts. It seems that there is a local tradition in Malawi of initiating women into sex by hiring somebody to sleep with them, and Aniva was happy to earn pocket money this way. He faced charges including “grievous bodily harm” and was denied bail repeatedly. The typical fee paid to him by families of the women for these services ranged from the equivalent of \$4 to \$7. The parents normally hire the man to perform this “service.” Aniva pled not guilty, and told the media “I am



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disappointed because I thought I would be given a suspended sentence.”

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**NETHERLANDS** – In a first for the country, King Willem-Alexander visited the country’s main gay rights association to attend its 70th anniversary celebrations, the first such visit by a Dutch head of state, according to local news reports. The organization, known as COC Netherlands, has been advocating for gay rights since 1946, according to *Agence France-Presse English Wire*, Nov. 22. According to the article, “The Netherlands was the first country in the world to legalize gay marriage, and Amsterdam, which hosts a huge annual gay pride event, is known for its tolerance of same-sex couples.” But COC Netherlands still has goals to achieve, including a proposal to put a ban on anti-LGBT discrimination into the Dutch Constitution.

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**NORTHERN IRELAND** – The High Court ruled that a Northern Ireland man who wed his long-term female partner after transitioning suffered a breach of his right to privacy when local officials insisted that their marriage certificate, a publicly accessible document, had to indicate that the parties had previously been in a registered civil partnership. Anybody looking at the certificate could then conclude that the husband had previously been a woman. The man was identified as female at birth, formed the civil union with a female partner, then transitioned and obtained a gender recognition certificate as a man, then entered into a marriage with his partner, after they had dissolved their civil partnership. The court ruled that they had a right to be labeled as “single” when they married. Referring to the respect for private life under Article 8 of the European Convention on Human Rights, Mr. Justice Treacy said, “There’s no justification for the breach of the applicant’s Article 8 rights. I conclude

that I will grant the declaration in the terms set out. I have an open mind about whether any further relief is required.” *Belfast Telegraph*, Nov. 22.

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**ROMANIA** – The Constitutional Court stated on November 24 that it would consult with the European Court of Justice on whether Romania is obligated to recognize a same-sex marriage contracted abroad by a Romanian citizen. Adrian Coman, described by *Canadian Press* (Nov. 29) as a Romanian “gay rights activist,” is seeking formal recognition of his 2010 marriage in Belgium to a U.S. citizen, Claibourn Robert Hamilton. Although the couple lives in New York, Coman wants to ensure that Hamilton would benefit from the legal protection for spouses in case they visit or settle in Romania. Court President Valer Dorneanu said that the court sought to find out how other European countries that do not recognize same-sex marriages under local law have dealt with such marriages by their citizens outside the country. Free movement among European Union countries is considered a “fundamental right,” but opposition to same-sex marriages in Romania is described as “fierce.” The country did not repeal criminal penalties for consensual gay sex until 2002.

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**THAILAND** – More than 500 delegates from around the world convened in Bangkok beginning on November 30 for a conference of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (commonly known as ILGA). Most of the attendants are official delegates from non-governmental organizations affiliated with the ILGA. The organization is discussing ways of addressing the 76 countries that still maintain criminal penalties for LGBT sex or maintain official discrimination against LGBT people. As a sign of progress, it is

reported that at least 100 countries now have laws prohibiting sexual orientation discrimination and/or have repealed their anti-gay criminal laws. *EFE Ingles News Services*, Nov. 30.

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**UNITED KINGDOM** – Final assent was given on November 29 by Queen Elizabeth to a new law, the Investigatory Powers Bill, that will go into effect during 2017. It will require communications service providers to “harvest and retain logs of the digital services accessed by all their users for a full year,” making those logs accessible to “a wide range of government agencies, not just law and intelligence agencies,” and that there is no formal warrant requirement for access to this information. This was described by the on-line journal *Tech Crunch* on November 29 as “the most extreme surveillance legislation ever passed in a democracy” that was quietly processed through the legislative process without any substantial opposition or public debate. It was promoted as a method to improve attempts by law enforcement and intelligence agencies to identify and thwart possible terrorists.

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## PROFESSIONAL NOTES

The Boston office of global law firm **ROPES & GRAY LLP**, together with **GLBTQ LEGAL ADVOCATES & DEFENDERS (GLAD)** and the **MASSACHUSETTS TRANSGENDER POLITICAL COALITION**, have launched a collective effort call the Transgender ID Project, which will enlist volunteer attorneys to provide assistance to transgender people living in the six New England states as they seek legal name changes and updating of documentation such as Social Security cards, passports, driver’s licenses or state ID cards, and birth certificates. The project was announced in a November 21 press release by GLAD.

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6. Brown, Alexander, The "Who?" Question in the Hate Speech Debate: Part 1: Consistency, Practical, and Formal Approaches, 29 Can. J.L. & Juris. 275 (Aug. 2016).
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8. Buzuvis, Erin E., Hormone Check: Critique of Olympic Rules on Sex and Gender, 31 Wis. J.L. Gender & Soc'y 29 (Summer 2016).
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*"Mass. Appeals" cont. from pg. 507*

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While the prosecution conceded that the trial judge erred in failing to instruct the jury on simple assault and battery as a lesser-included offense, the court ultimately held that the trial judge's error "did not result in a substantial risk of miscarriage of justice to the defendant."

In so holding, the Massachusetts Appeals Court concluded that the prosecution's evidence of indecent assault and battery was strong enough and rejected the defense's justification for the touching. While the jury should have been instructed on the possibility of conviction of the lesser crime, the court here was convinced that the defendant's guilt had been fairly adjudicated. – *Michael Leone Lynch*

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**SPECIALY NOTED**

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The University of Pennsylvania Press has published "Antigay Bias in Role-Model Occupations" by Prof. E. Gary Spitko of Santa Clara University Law School. Professor Spitko examines the social and legal effects of systemic anti-gay discrimination in professions that are important as role models for society at large. ISBN 978-0-8122-4870-8, publication date November 21, 2016.

West Academic Publishing has published "Sexual Orientation, Gender Identity, and the Law in a Nutshell," by Prof. Ruth Colker of Ohio State University Law School, an important and overdue addition to West's popular Nutshell series of law study guides providing a concise summary of the field. ISBN 978-1-6346-0899-2. Law students can obtain digital access through the West Academic Study Aids Subscription program.

# LGBT Law Notes Podcast

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

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**EDITOR'S NOTES**

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