

L G B T
LAW NOTES

December 2017

G'DAY

*Results of Australian Postal Survey Are
Overwhelming and Parliament Moves Quickly
to Enact Marriage Equality*

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510 Citations

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Editor-In-Chief

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

Contributors

*David Buchanan, S.C.
Matthew Goodwin, Esq.
Bryan Johnson-Xenitelis, Esq.
Chan Tov McNamara, Cornell '19
Ryan H. Nelson, Esq.
Timothy Ramos, NYLS '19
William J. Rold, Esq.
Matthew Skinner, Esq.*

Production Manager

Leah Harper

Circulation Rate Inquiries

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

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The LeGaL Foundation

of the LGBT Bar Association
of Greater New York
<http://le-gal.org>

ISSN

8755-9021

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Australia Achieves Marriage Equality

After a campaign lasting 7 weeks, on November 15, a voluntary postal survey of registered voters in Australia, as to whether they approved a change of the law to allow for marriage of same sex couples, returned a significant ‘Yes’ result – 61.6% – validated by an unexpectedly high participation rate of 79.5%. By the end of November, the Senate had approved a marriage equality bill, with consideration to begin in the House of Representatives on December 4. The bill passed in that chamber on December 7.

BACKGROUND

In 2004, a previous conservative Liberal/National Party federal government, with the support of the opposition social democrat Labor Party,

Australians approving of same-sex marriage, the present Liberal/National Party Commonwealth government is ideologically split between moderates and the hard right. Although a moderate, the Prime Minister, Malcolm Turnbull, is dependent on support from the hard right faction and has lost the leadership of his party previously over ideological issues (climate change). In the last two years, the momentum for marriage equality has been steadily building both in the community and among politicians, including amongst moderate conservatives. In 2016, the opposition Labor Party, while allowing a conscience vote at present, decided that from the next election it would be binding policy to legislate for marriage equality. Pressure increased inside the Liberal/National Party for

attacking programs developed in some Australian states to sensitize schoolchildren to sexuality and gender issues, causing the programs to be generally wound back. They feared that the campaign would be psychologically damaging for many LGBTIQ children and adults, especially those in the closet. In addition, the plebiscite was proposed by right-wing politicians who had a track record of succeeding in changing popular opinion during a referendum campaign by changing the issue (as in 1999, when a referendum to change Australia from a monarchy to a republic failed). Finally, as a medium for expression of opinion, a postal ballot might limit the vote of the largest cohort of marriage equality supporters, the young, who tend to communicate almost exclusively through electronics,

After the passage of the bill by both houses, same-sex couples will be able to marry as early as January.

changed the Marriage Act to ensure marriage could only be between a man and a woman and to prevent recognition of same-sex marriages entered into overseas.

Under the Australian Constitution, marriage is a topic on which the national (Commonwealth) parliament can legislate. In 2013, the High Court of Australia (Australia’s apex court) struck down an attempt by a territory to legislate for same-sex marriage because it was inconsistent with the federal law (see *LGLN*, January 2014, pp. 23-24). In so doing, however, the High Court confirmed that a Commonwealth law in respect of same-sex marriage was a valid exercise of the marriage power.

MARRIAGE EQUALITY AS A MAINSTREAM POLITICAL ISSUE

While opinion polls have for many recent years shown a majority of

change. To head this off, marriage equality opponents prevailed on the Liberal/National Party to prevent a bill being introduced unless first there was a plebiscite in which a majority of Australians favored the change. In late 2016, the government introduced a bill for a plebiscite to be conducted of registered voters on the issue.

PLEBISCITE

The LGBTIQ communities opposed a plebiscite. They thought that it would be invidious for the majority of Australians to decide on the human rights of a minority. Looking at campaigns which had occurred in other countries when marriage equality had been the subject of a popular vote, they feared in particular that conservatives would denigrate LGBTIQ children and the children of same-sex couples. Conservatives have been viciously

and to boost the vote of the cohort most likely to vote ‘No’, the elderly and registered voters who generally still use surface mail.

The Labor Party and a number of cross-bench Senators accepted these concerns and, the bill for a plebiscite was defeated in the Senate. Labor’s policy was to introduce legislation for marriage equality as soon as it is returned to government. Even though the next federal election is not due until 2019, the present government is behind in the polls and, by and large, the LGBTIQ communities were happy to wait for legislation.

In February 2017, an all-party parliamentary committee published a draft bill to change the law. In July-August, a group of, mainly, openly gay moderate government MPs and Senators proposed to introduce the bill as a private members bill, and there appeared to be a groundswell of

support in the government to allow the bill to be introduced. To head this off, and to remove same-sex marriage as an issue at the next election, marriage equality opponents came up with a form of plebiscite which would not require legislative approval – a postal plebiscite in the form of a survey of opinion conducted by the Australian Bureau of Statistics (ABS). As it has on numerous ideological issues, the government caved in, saying it would not allow a bill for same-sex marriage to be introduced without a plebiscite of opinion (*see LGLN*, Sept. 2017, pp. 325-326). An urgent challenge to the constitutionality of the postal survey in the High Court was dismissed (*see LGLN*, Oct. 2017, pp. 403-404). The postal survey went ahead (the Chief Statistician said the ABS had a ‘swear jar’ into which staff who called it a ‘plebiscite’ had to pay).

feature of the ‘Yes’ campaign was the number of large corporations which very publicly supported it and which donated to the campaign.

The ‘No’ campaign was led by the large and well-funded Australian Christian Lobby, by the more conservative Anglican dioceses and Orthodox and Catholic bishops and by the more right-wing politicians. It is suspected the ACL received significant funding from U.S. organizations. The Sydney diocese of the Anglican Church was notable for donating \$AIM to the ‘No’ campaign. The ‘No’ campaign focused on generating fear around sexuality and gender issues education in schools and the fate of children of same-sex couples. The other issues the ‘No’ campaign raised coalesced around religious freedom, freedom of expression and freedom from ‘political

of the distress the campaigning caused was the large increase in the level of calls to centers providing emotional and psychological support to lesbians and gay men and questioning youth. Opinion polls showed support for marriage equality falling but never below 60%.

THE RESULT

By contrast with the U.S. Presidential election and the Brexit vote in the U.K., this time the opinion polls were right: 7,817,247 people – or 61.6% – voted ‘Yes’. 4,873,987 people – or 38.4% – voted ‘No’. The main reason the opinion polls were right was that the participation rate was high – 79.5% of registered voters. Plebiscites are rare in Australia. This voluntary postal “plebiscite” was unique. But, despite voting being voluntary, and even though it required people to go to the effort of posting their ballot paper in a mailbox, the participation rate was extraordinarily high. This is being attributed in part to Australians being used to having to vote because in Australia voting for politicians and in referendums for constitutional change is compulsory, enforceable by fines against registered voters who do not participate.

The ABS reported that 130 of the 150 federal electorates (“districts” in the U.S.) recorded a majority ‘Yes’ response while 17 electorates recorded a majority ‘No’ response. Apart from the turnout, there were other surprises. One was that almost all of the remote and regional electorates voted ‘Yes’, although this might have been heralded in past years when the principal rural women’s association and the youth wing of the rural-based National Party passed resolutions in support of marriage equality.

The other surprise was that by far the biggest concentration of electorates voting ‘No’ was in an arc of suburbs in the west of Sydney, Australia’s largest city and the home of the Gay and Lesbian Mardi Gras. Sydney’s western suburbs have large non-

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After a short period to allow people to get onto the voting register and to update their details, a ballot was posted to each registered voter at their registered address.

THE CAMPAIGN

The campaign was not enjoyable. The ‘Yes’ campaign was heavily influenced by the campaign for marriage equality in Ireland in 2015. Australians for Equality hired the leader of the Irish campaign as its director. Resources were devoted to mobilizing the vote – getting the young onto the voting rolls and then getting already committed or likely to commit ‘Yes’ voters to actually complete their survey form and, the critical part, to find a mailbox and post the envelope. Video ads depicted diverse happy individuals and celebrities walking together to a mailbox and posting their vote. An interesting

correctness’. Recognizing the strength of public opinion in favor of marriage equality, their main tag was “It’s OK to say No” and, claiming the role of the underdog, equality opponents claimed Australians were being “bullied” into voting ‘Yes’ by the “fascist” LGBTIQ movement. Also, tellingly in the result, adherents of a number of religions, and particularly conservative congregations, were mobilized to vote ‘No’.

There was vandalism on both sides and some minor violence when an anarchist wearing a “Yes” badge head-butted a former Prime Minister who was a leading force against same-sex marriage and had made the plebiscite policy in the Liberal/National parties – though the offender told the court he did it because he hated the man, nothing to do with marriage equality. The LGBTIQ communities had to put up with the homophobia licensed by the fact of the campaign. A measure

Anglo populations: Arab, Iranian, African (Sudanese), Indian, Chinese, Cambodian, and Vietnamese, to name just a few. A leading election analyst said that gay marriage doesn't fit into the Australian political structure very well, because it is not a class-based issue. "It cuts across party lines, which is why the parties themselves have struggled to deal with the issue in recent years." He also said that there had been "some quite specific campaigning within the Muslim community, the Chinese community, in parts of western Sydney – and that's something that goes under the radar."

Other analysts contend that opposition to same sex marriage in Sydney's west was more a factor of religion. Taking the country's population as a whole, large numbers of Australians were born overseas or are second-generation migrants. Analysis of the voting figures in electorates where more than 40% of the population was born overseas shows that, outside the Western Sydney ring, non-Anglo voters in Australia overwhelmingly backed same-sex marriage. A local MP in Melbourne with a majority non-Anglo population attributed the much higher 'No' vote in Sydney to religious institutional funding for the 'No' campaign there. He said there was nowhere the near the level of church involvement in the campaign in Australia's second-largest city.

All but one of the federal seats in Sydney's west which voted 'No' are held by Labor politicians – most of whom are left-wing or moderates, and most of them in favor of marriage equality. Those who went on the record said that the outcome in their electorates would not stop them supporting marriage equality when the time came to vote in Parliament. One said of his 'No' voting, largely non-Anglo constituents: "I think they will think about their gay neighbors' life as much as they would have before the vote – not much at all."

THE BILL

The Prime Minister promised same-sex marriage would be the law by

Christmas. The pressure to pass the bill before Christmas was immense. Apart from anything else, the Australian population was sick of the issue, bubbling away as it has been for years. The bill recommended by the all party committee and sponsored by, mainly, gay and lesbian MPs and Senators, was introduced into the Senate the day the postal survey result was announced and, on November 29, it passed the Senate by an overwhelming margin. The bill passed the House of Representatives on December 7, with just four MPs voting against it.

Although the bill's passage was secured, ideological conservatives in the government, supported by the ACL, some of the churches, and the Murdoch-controlled media mounted a fierce campaign for it to be amended to provide "protections" for freedom of religion, freedom of speech and

the Commonwealth should implement the whole of the treaty. (Australia has no bill of rights and has only a weak human rights law and tradition. The Constitution contains narrowly worded religious protections which constrain only the exercise of Commonwealth legislative power.) Equality supporters also argued that the amendments proposed were designed to entrench anti-equality ideas which were rejected by the electorate in the postal survey.

The Australian Human Rights Commission opposed the insertion of "protections". More telling, perhaps, were statements by the two national associations of civil celebrants. In 2016, 74% of weddings in Australia were performed by civil celebrants. By creating a category of "religious civil celebrant", the bill already contained a "protection" for civil celebrants who didn't want to preside

The bill passed the House of Representatives on December 7, with just four MPs voting against it.

"freedom of conscience" – so that the religious florist and the baker were not compelled to provide services for a same-sex wedding, and so that churches, mosques and religious schools could teach that only opposite-sex marriage is valid. Other amendments proposed were to prevent sexuality and gender issues education in schools. The 'No' campaigners fought a dogged rearguard action, without appreciating the irony of calling for the opinions and rights of the religious minority in the population to be respected. Some on the right invoked article 18 of the International Covenant on Civil and Political Rights as to the right to freedom of thought, conscience, and religion. Other right-wing ideologues warned that to carve out such "protections" could lead to sharia law in Australia. Progressive elements argued that if we were to start legislating to implement the ICCPR,

over same-sex weddings. The civil celebrants associations denounced the clause as unnecessary and invidious, saying "Don't bring in a law to get rid of discrimination and build in more discrimination."

In any event, the Senate rejected every amendment proposed by conservatives before passing the bill in the form it was introduced, upon a representation by political leaders that the possible religious accommodations might be taken up separately in 2018. The bill's fate in the House hung in the balance as this issue of *Law Notes* went to press, with passage anticipated, although conservatives planned to reintroduce their amendments. – *David Buchanan*

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

Second Federal Judge Blocks Implementation of Trump Transgender Military Ban

A second federal district court judge has issued a preliminary injunction against implementation of President Donald Trump's August 25 Memorandum, which expanded upon his July 26 tweet announcing a ban on all military service by transgender individuals. *Stone v. Trump*, 2017 U.S. Dist. LEXIS 192183, 2017 WL 5589122 (D. Md.). The November 21 action by District Judge Marvin J. Garbis of the District of Maryland came just three weeks after a federal district court judge in the District of Columbia, Colleen Kollar-Kotelly, had issued a preliminary injunction against two directives in Trump's three-directive memo. (See *Doe v. Trump*, 2017 U.S. Dist. LEXIS 178892, 2017 WL 4873042 (D.D.C. Oct. 30, 2017)). Judge Garbis took the next step, enjoining implementation of all three directives, finding that the plaintiff group represented by the American Civil Liberties Union (ACLU) in this case includes at least two individuals who had standing to challenge the directive against the military providing sex reassignment procedures for military personnel. On the same day that Judge Garbis issued his preliminary injunction, the Justice Department filed an appeal with the D.C. Circuit of Judge Kollar-Kotelly's order in *Doe v. Trump*. About a week later, on November 27, responding to a request from the government for "clarification" of the scope of her Order, Judge Kollar-Kotelly issued a statement making clear that her Order required DOJ to end its ban on "accession" of transgender personnel as of January 1, 2018. Of course, Judge Garbis's Order would have the same effect.

In his August 25 Memorandum, Trump directed that all transgender service members be discharged, beginning no later than March 23, 2018, and that the existing ban on accession of transgender members, scheduled to end on January 1, 2018, be extended indefinitely. His third directive provided that after March 23, the Defense Department cease providing sex

reassignment surgery for transgender personnel, with a possible individual exception in cases where procedures were already under way and failure to complete them would endanger the health of the individual. (Of course, those individuals, being identified as transgender, would be subject to discharge under the first directive in any event.)

On September 24, Secretary of Defense James Mattis issued a memorandum establishing an "interim policy," announcing that he would meet the President's deadline of submitting a "plan to implement the policy and directives in the Presidential Memorandum" by February 21, but until then, there would be no immediate effect on individual service members.

The ACLU filed this lawsuit in the U.S. District Court in Maryland on August 8. Three other lawsuits challenging the transgender ban are pending. One filed on August 9 in the District of Columbia District Court has already resulted in the preliminary injunction issued by Judge Kollar-Kotelly. The others are pending in the District Courts in Seattle and Los Angeles, where the plaintiffs are also seeking preliminary injunctions.

Judge Garbis leaned heavily on Judge Kollar-Kotelly's October 30 ruling for much of his analysis, agreeing with her that heightened scrutiny applies to the plaintiffs' equal protection claim and that the usual judicial deference to military policy decisions by the Executive Branch was not appropriate in this case. The judge took particular note of an amicus brief filed by retired military officers and former national security officials, who had written that "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes."

Continued Garbis, "President Trump's tweets did not emerge

from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President's announcement and the departure from normal procedure, the Court agrees with the D.C. Court that there is sufficient support for Plaintiffs' claims that 'the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.'"

Indeed, Garbis concluded that heightened scrutiny was not even necessary to rule for the Plaintiffs on this motion. "The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest," he wrote, so it would fail the minimally demanding rationality test applied to all government policies.

Garbis closely followed the D.C. Court's analysis of the grounds for jurisdiction in this case, rejecting the government's argument that nobody had been harmed yet so nobody had standing to bring the case, and that it was not yet ripe for judicial resolution when Mattis had not yet made his implementation recommendations to the President. The adoption of a policy that violates equal protection is deemed a harm even before it is implemented, and the stigmatic harm of the government officially deeming all transgender people as unfit to serve the country is immediate. The court found that Trump's directive that Mattis study how to implement the president's orders was not, in effect, a mandate to recommend exceptions or abandonment of the ban, thus undercutting the government's argument that it is merely hypothetical or speculative that the ban would go into effect unless enjoined by the courts.

Garbis went further than Kollar-Kotelly to enjoin the sex reassignment directive because the ACLU's plaintiff group included at least two individuals whose transition procedures have already been disrupted and will be further disrupted if the ban goes into effect. The D.C. Court had accepted the government's argument that appropriate adjustments had vitiated any negative effect on the plaintiffs in that case who were seeking transition procedures, but Garbis found that the timing of the transition procedures for the plaintiffs before him would be disrupted if the ban goes into effect, so the harm was not merely hypothetical.

The court based the preliminary injunction on its finding that plaintiffs were likely to prevail in their equal protection argument, and did not address the due process argument in that context. However, in rejecting the government's motion to dismiss the due process claim, Garbis accepted the plaintiffs' argument that "it is egregiously offensive to actively encourage transgender service members to reveal their status and serve openly, only to use the revelation to destroy those service members' careers."

In perhaps the strongest statement in his opinion, Garbis wrote: "An unexpected announcement by the President and Commander in Chief of the United States via Twitter that 'the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military' can be considered shocking under the circumstances. According to news reports provided by Plaintiffs, the Secretary of Defense and other military officials were surprised by the announcement. The announcement also drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes."

The only setback suffered by the plaintiffs was dismissal, without prejudice, of their claim that the policy

violates 10 U.S.C. sec. 1074(a)(1), a statute that entitles active duty and reserve military members to medical care in military treatment facilities. The plaintiffs claimed that the sex reassignment directive exceeded the President's authority by attempting to override a statute by "denying necessary medical care to a group of service member he happens to disfavor," and that doing so through a unilateral White House memorandum rather than a regulation adopted pursuant to the Administrative Procedure Act was unlawful. Garbis characterized the plaintiffs' factual allegations in support of this claim as "conclusory" and thus not sufficient to meet the civil pleading requirement. However, he wrote, "Perhaps Plaintiffs could assert an adequate and plausible statutory claim," so he dismissed without prejudice, allowing the plaintiffs to seek permission to file an amendment that "adequately asserts such a claim if they can do so." This dismissal does not really affect the substance of the relief granted by the preliminary injunction or sought in the ongoing case, because Judge Garbis granted the preliminary injunction on constitutional grounds against implementation of Trump's sex reassignment surgery, exactly the part of the Trump memorandum targeted by the statutory claim.

The Justice Department will likely seek to appeal this ruling to the 4th Circuit Court of Appeals, just as it appealed Judge Kollar-Kotelly's ruling to the D.C. Circuit Court of Appeals on the day Garbis's order was released. By the time an appeal is actually considered by an appeals court, however, it is likely that preliminary injunctions will also have been issued by the district courts in Seattle and Los Angeles. In the Seattle case, *Karnoski v. Trump*, Lambda Legal and cooperating attorneys argued their motion for a preliminary injunction late in November, after District Judge Marsha J. Pechman had released a ruling granting a motion by the state of Washington to intervene as a co-plaintiff. *See* 2017 U.S. Dist. LEXIS 194406, 2017 WL 5668071 (W.D. Wash., Nov. 27, 2017). At the end of the hearing, Judge Pechman announced

her intention to rule on the motion by December 8. Perhaps she was eager to get out in front on this before her colleague of the U.S. District Court for the Central District of California, Jesus G. Bernal, who granted a motion by the state of California to intervene as a co-plaintiff in *Stockman v. Trump*, Case No. EDCV 17-1799 (JGB) (KKx) on November 16, and set a revised hearing date for the preliminary injunction motion of December 11. Judge Bernal also ordered the parties to file a "concurrent supplemental brief" addressing the question of whether particular plaintiffs had shown an "injury-in-fact" sufficient to challenge the portion of the Trump memo dealing with sex reassignment surgery, raising the question whether any preliminary injunction he might issue might be nearer in scope to Judge Kollar-Kotelly's than to Judge Garbis's.

Maybe a united front of judicial rejections of the transgender ban will eventually convince Trump and Attorney General Jeff Sessions, whose department is defending the ban, that it is time to withdraw the August 25 Memorandum and disavow the July 26 tweet rather than fight it out in court to an inevitable conclusion. But perhaps a ruling from one of the circuit courts will be necessary to achieve this goal.

Since the Administration takes the position that Presidential tweets are official policy statements of the President, a disavowal of the tweets would be necessary to render the policy fully withdrawn, one presumes, although this is unexplored territory. Interestingly, Judge Garbis followed Judge Kollar-Kotelly's example by including a cut and paste version of the original Trump tweet sequence in the background section of his opinion, and specifically identified policy announcement by tweet as a departure from normal procedure that contributes to the constitutional analysis.

Judge Garbis, a Senior U.S. District Judge, was appointed by President George H.W. Bush. Senior Judge Pechman in Seattle was appointed by President Bill Clinton. Judge Bernal in Los Angeles was appointed by President Barack Obama. ■

Potential Supreme Court Blockbuster Term Leads Off with *Masterpiece Cakeshop* Argument

As December began, media interest peaked with the anticipated argument in the Supreme Court on December 5 in *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, No. 16-111. The case presents the question of whether a bakery whose proprietor has religious objections to same-sex marriage enjoys a constitutional privilege to refuse the business of a same-sex couple, who sought to buy a wedding cake for their reception, in a state that bans sexual orientation discrimination in public accommodations under its Civil Rights statute. More than one hundred

religious freedom memorandum – the government’s brief disclaimed reliance on the Free Exercise Clause, focusing entirely on the argument that requiring a baker to make a wedding cake for a same-sex couple violated the baker’s right to refrain from publicly expressing approval of same-sex marriages, a compelled speech argument under the Free Speech Clause. It was reported that there was a sharp divide within the Justice Department over participation on behalf of the petitioner, with career staff resistant to arguing in favor of an exemption from state public accommodation laws. It is worth noting that, at present,

Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch would likely side with the petitioner. Because Justice Kennedy has a strong track record in support of freedom of speech and religion as well as of opposition to anti-gay discrimination, predicting where he would end up was difficult. For those seeking portents from last Term, the Court’s *per curiam* decision in *Pavan v. Smith* to give a broad reading to *Obergefell* as requiring equality of treatment for same-sex married couples by the government provided some comfort, although the dissent by Justice Gorsuch (signed also by Justices Alito and Thomas) seemed to foreshadow three votes for the petitioner in *Masterpiece*. To the *Law Notes* editor, it seems likely that if Kennedy sees this case as another attempt by opponents of marriage equality to chip away at what Kennedy identified as a fundamental constitutional right, he would be likely to support respondents, but prediction in advance of oral argument is difficult. In the January 2018 issue of *Law Notes*, we will provide an account of the argument. In the LGBT rights cases mentioned above, comments and questions by the justices during oral argument provided strong clues to the Court’s rulings in all four cases.

The Court allocated time for oral argument as follows: Twenty minutes for Kristen Kellie Waggoner of Alliance Defending Freedom in support of the petitioner (including any time reserved for rebuttal), ten minutes for Solicitor General Noel Francisco representing the Trump Administration in support of the petitioner, fifteen minutes for Colorado Solicitor General Frederick R. Yarger, representing the respondent Colorado Civil Rights Commission, and fifteen minutes for David Cole of the American Civil Liberties Union, representing complainants Charlie Craig and David Mullins. The Court posts a transcript of the oral argument

Most commentators writing in advance of the argument predicted that the decision would come down to the views of Justice Anthony M. Kennedy, the author of the Court’s quartet of extraordinary pro-gay opinions.

amicus briefs have been filed in the case. Numerous print and electronic publications editorialized about the case in the weeks leading up to the argument, overwhelmingly siding with the complainants Charlie Craig and David Mullins and the respondent, Colorado Civil Rights Commission, who maintained that baker Jack Phillips and his business do not enjoy such a constitutional privilege to violate the state law.

The already-high profile of the case was elevated in public attention when the Trump Administration decided to weigh in with an *amicus* brief and successfully sought to participate in the oral argument on behalf of the petitioner, although – curiously, given Trump’s religious freedom executive order and Attorney General Sessions’

federal public accommodations laws do not expressly address the issue of discrimination because of sex, sexual orientation, or gender identity; passage of the Equality Act, which would add those categories to federal law, would elevate the issue to the level of federal law enforcement.

Most commentators writing in advance of the argument predicted that the decision would come down to the views of Justice Anthony M. Kennedy, the author of the Court’s quartet of extraordinary pro-gay opinions in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*. Commentators opined that Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan would side with the respondents, and that

on its website during the afternoon of the argument day, and posts a link to an audio recording of the argument by the end of the week.

If *Masterpiece Cakeshop* is the only LGBT-related decision by the Court this term, it will be a momentous term. But the number of petitions for certiorari that were pending before the court in LGBT-related cases by the end of November suggested that *Masterpiece* is not likely to be the only such case decided by the Court this term. At least four of the pending petitions were scheduled for consideration by the Court during its conferences in December or January. The pending petitions were: *Arlene's Flowers v. Washington* (No. 17-108), another ADF case presenting the same issues as *Masterpiece Cakeshop* with respect to floral arrangements for same-sex weddings; *Kenosha Unified School District v. Whitaker* (No. 17-301), in which the school district seeks review of a 7th Circuit ruling that a school district's policy prohibiting transgender students from using restrooms consistent with their gender identity violates Title IX and the Equal Protection Clause; *Evans v. Georgia Regional Hospital* (No. 17-370), in which Lambda Legal appeals the 11th Circuit's ruling that sexual orientation discrimination, as such, is not prohibited by Title VII's ban on sex discrimination in employment; *Turner v. Pidgeon* (No. 17-424), in which the City of Houston appeals the Texas Supreme Court's conclusion that *Obergefell* leaves open the question of whether a public employer is required to treat same-sex and different-sex marriages equality under its employee benefits plans [Editor's Late Note: The Court denied certiorari in this case on December 4, as we were finishing work on this issue of *Law Notes*]; *Barber v. Bryant* (No. 17-547), Lambda Legal's appeal from the 5th Circuit's ruling that plaintiffs did not have standing to challenge the constitutionality of Mississippi's anti-LGBT H.B. 1523, which was challenged as a violation of the 1st Amendment Establishment Clause; and *Campaign for Southern*

Equality v. Bryant (No. 17-642), another appeal from the same 5th Circuit standing ruling regarding a challenge to H.B. 1523. The 5th Circuit had combined two separate challenges against H.B. 1523 to be heard together, but the two plaintiff groups have separately petitioned the Supreme Court for review. Lead counsel for CSE is Robbie Kaplan, who successfully argued for Edith Windsor in the Supreme Court challenge to DOMA and represented CSE in litigation striking down Mississippi's ban on same-sex marriage.

The Supreme Court publishes the list of cases it will potentially discuss at its conferences, but listing does not necessarily mean that a decision on certiorari will be made at that conference. *Masterpiece Cakeshop* was listed numerous times during the October 2016 Term, but the Court did not reach a decision on certiorari until Justice Gorsuch took the bench. As of the beginning of December, *Turner* and *Arlene's Flowers* were listed for the December 1 conference, and an announcement as to those cases might be made by the time this issue of *Law Notes* is published. *Evans* was listed for the December 8 conference. *Barber* was listed for the January 5 conference. *Kenosha* and *Campaign for Southern Equality* will not be listed until all filings in response to the certiorari petitions have been made. Going by the Court's published rules, which suggest the factors considered in granting a petition, all of these cases present plausible grounds, but perhaps the most compelling are the *Kenosha* and *Evans* cases in light of the differing views of lower federal courts on how to interpret laws banning discrimination because of sex in the context of sexual orientation and gender identity. If the 2nd Circuit was to issue its pending *en banc* ruling in *Zarda v. Altitude Express* on the Title VII issue before December 8, and, as widely expected, lines up with the 7th Circuit in finding sexual orientation claims actionable under that statute, the case for granting the petition in *Evans* would be even more compelling. ■

Update: Eleventh Circuit Court of Appeals Issues New Opinion on Criteria for LGBT-Specific Voir Dire of Jurors in a Civil Case

In October, the Atlanta-based 11th Circuit Court of Appeals ordered a new trial in a Key West man's excessive force lawsuit against that city's police department and certain police officers in an unofficially published opinion. *Berthiaume v. Smith*, 2017 U.S. App. LEXIS 19403, 2017 WL 4422465 (Oct. 5, 2017). Defendant's Lieutenant Smith of the Key West Police Department and the City of Key West moved for panel rehearing of the earlier decision as well as official publication of an opinion. The court denied the request for rehearing, but granted the motion for publication and substituted a new *per curiam* opinion for the old one on November 22. *Berthiaume v. Smith*, 2017 U.S. App. LEXIS 23630, 2017 WL 5616872. Much of the new opinion remained the same, but the court appreciably clarified what is required of trial judges during *voir dire* in cases where the district court has notice that "... issues of sexual orientation will potentially be a central part of the evidence at trial."

The court directed that "... the district court's *voir dire* must at least 'provide reasonable assurance that prejudice will be discovered if present.'" The court continued, "To determine whether specific questioning is necessary in a given case [a court must ask] whether under all the circumstances presented, there is a reasonable possibility that a particular type of prejudice might have influenced the jury"

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Louisiana Court of Appeal Grants Custody to Lesbian Mother's Former Same-Sex Partner, Despite No Legal or Biological Ties to Child

On November 2, 2017, the Court of Appeal of Louisiana, Fourth Circuit, ruled in favor of a lesbian woman, Victoria Adjmi, who sued her former long-term partner, Dr. Lisa Colon, for joint custody of their child, Charlie, despite the fact that Adjmi is a legal and biological stranger to the child and in the face of adverse earlier Louisiana precedents. In a 4-1 decision, the court held in *In re C.A.C.*, 2017 La. App. LEXIS 2012, 2017 WL 4988661, that denying Ms. Adjmi parenting time and custody would result in substantial harm to Charlie

in part because the donor was Jewish, Adjmi's faith. In October of that year, the baby was born and named Charlie as a tribute to Adjmi's father.

In April of 2008, the parties entered into a domestic partnership agreement (the "Agreement") which was dated as of Charlie's birth. In it, the women stipulated to share joint custody and reasonable visitation rights of Charlie in the event of the dissolution of their relationship. The parties also stipulated to waive any constitutional or statutory challenges to the Agreement, Colon executed a limited power of

be with Adjmi and was comfortable in Adjmi's home.

Adjmi filed suit in 2014. Colon filed exceptions to the custody petition, arguing that there was no cause of action, that Adjmi had no right of action, and that her legal argument was vague. The trial court denied these exceptions and, after the Court of Appeal of Louisiana denied a writ application by Colon for interlocutory review, the parties participated in a custody evaluation with the court-appointed custody evaluator ("Evaluator"). The Evaluator found both parties to be capable parents. The Evaluator recommended to the trial court that the two women should be awarded joint custody with Colon as the primary custodial parent and time divided between them 60/40. At Adjmi's request, the court required the Evaluator to apply the "substantial harm to the child" legal standard under Louisiana state law. In this respect, the evaluator found "a failure to award joint custody of Charlie would result in substantial emotional harm to the child." The Evaluator opined that if Colon were granted sole custody, she would be able to, and likely would, cut Adjmi out of Charlie's life, despite the fact that Charlie enjoyed a parent-child relationship with each party.

Colon retained her own expert who did not conduct a custody evaluation but, instead, testified that Charlie was not in danger of "substantial harm" if sole custody were awarded to Colon because substantial harm as defined by psychological literature is consistent with child abuse statutes of brutality, neglect, severe neglect, physical abuse, and emotional abuse.

The trial court awarded custody in conformity with the Evaluator's recommendation.

On appeal, Colon asserted that the trial court violated her constitutional

On appeal, Colon asserted that the trial court violated her constitutional right as a natural parent by awarding joint custody to a non-parent, as well as by finding substantial harm to the child if Adjmi's petition for joint custody was denied.

and, as such, was not in Charlie's best interest, which is generally the standard for adjudicating custody disputes throughout the United States.

The court summarized the pertinent facts of the case as follows: Adjmi and Colon began a romantic relationship in 1996 and, at the time of their break up, had lived together in a committed relationship for over eighteen years. The couple never married. Their relationship ended before court rulings required Louisiana to allow same-sex couples to marry. As an intact couple, Adjmi and Colon shared finances, bank accounts, and built a home together. In 2007, Colon underwent an insemination procedure using the sperm of a donor jointly selected by the women at least

attorney in favor of Adjmi in order to facilitate care for Charlie, and she appointed Adjmi Charlie's guardian in her 2009 will.

In 2014, Colon became involved with another woman, Adjmi's sister-in-law. At that juncture Colon took steps to "limit [Adjmi's] participation in Charlie's life" such as restricting [Adjmi's] ability to communicate with Charlie's school, refusing to allow Charlie to travel with Adjmi, and refusing to provide Adjmi with any information related to Charlie's extracurricular activities or doctor's appointments. Nevertheless, at trial Colon testified to a "love bond" between Charlie and Adjmi, and that Charlie thinks of Adjmi as a mother, loves to

right as a natural parent by awarding joint custody to a non-parent, as well as by finding substantial harm to the child if Adjmi's petition for joint custody was denied. Colon also argued it was error to deny her exception of no cause of action, and in admitting into evidence the Agreement, power of attorney, and last will and testament.

The Court of Appeal, in an opinion by Judge Marion F. Edwards, held that Adjmi had a right of action under Louisiana Civil Code Article 133 which reads "[i]f an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living . . . or otherwise to any other person able to provide an adequate and stable environment." Likewise, the court rejected Colon's argument that the Agreement, power of attorney, and last will and testament were improperly admitted into evidence because all of these documents showed that Adjmi was a good parent to Charlie and that Charlie viewed Adjmi as a parent.

Strikingly, the court situated its custody analysis in the context of *Obergefell v. Hodges*, 135 S. Ct. 2584 despite the fact Colon and Adjmi were never married. The court acknowledged the potent force of Colon's parental rights under the Fourteenth Amendment's Due Process clause that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the care, custody, and control of their children." Yet the Court pointed once more to Article 133 as providing non-parents a path to custody. In this connection, the court recognized that a parent's "right under the constitution is neither absolute nor perpetual . . . [a]s with all constitutional rights, a parent's right must be balanced with the child's right to a custodial arrangement which promotes his or her best interests."

The court's analysis then turned to the dual prong test a Louisiana court must employ to determine whether

a non-parent has met their very high burden of proof in a custody contest: (1) "the trial court must determine that an award of custody to the parent would cause substantial harm to the child . . ." and, if so (2) "then the courts look at the best interest of the child factors to determine if an award of custody to the non-parent is required to serve the best interest of the child."

The court rejected Colon's expert's opinion as to what constituted substantial harm, writing "a showing of substantial harm is more inclusive and . . . is broad enough to include . . . prolonged separation of the child from its parents that would cause the child to suffer substantial harm." Here the court relied on a custody case from the Louisiana Supreme Court in which "substantial harm" was used interchangeably with "detrimental" and in which a tripartite custody arrangement was ruled to be in that child's best interests. *McCormic v. Rider*, 27 So.3d 277, 279. The court reasoned that the trial judge properly applied the substantial harm concept of Louisiana law in the post-*Obergefell* era and reasonably found Adjmi met her high burden of demonstrating the potential substantial harm to Charlie were sole custody awarded to Colon. They found the trial court properly considered the relevant factors under Louisiana law to determine that the award of joint custody and parenting time was in Charlie's best interests.

Two judges on the Court, Joy Cossich Lobrano and Terri F. Love, wrote separate concurrences. Judge Love simply wrote "I respectfully concur in the results," while Judge Lobrano's concurrence simply stated that the judgment of the trier of fact in custody cases is entitled to great weight.

One judge, Terrel Broussard, concurred with the majority's finding that the trial court properly exercised discretion by denying the exception of no cause as well as Colon's motion *in limine* to exclude certain evidence at trial. Judge Broussard, however, wrote a lengthy dissent as to the majority's award of joint custody of Charlie to the parents.

In short, Judge Broussard argued that the trial court misapplied the standard of substantial harm under Louisiana law as well as violated the "preference given in Louisiana Jurisprudence to the natural mother." Judge Broussard wrote that "[s]ole custody of the natural parent should not be abrogated, unless, there is substantial harm to the child." Judge Broussard pointed to evidence in the record that Charlie was thriving to support his conclusion that no substantial harm had yet befallen the child as he believed required for there to have been any award of custody to Adjmi. Here Judge Broussard argued the testimony of the Evaluator was entirely speculative and focused only on "speculative emotional harm" to Charlie in the absence of a joint-custody arrangement, not what had happened to Charlie.

Finally, Broussard faulted the majority for what he saw as erroneous application of concepts such as *in loco parentis*, *de facto parent*, *co-parent*, and *psychological parent* despite the fact the same are not codified in Louisiana law. Judge Broussard pointed to the Louisiana case of *Black v. Simms*, 12 So.3d 1140 (La. App., 3rd Cir., 2009), in which the court ruled that Ms. Black could not "be considered a functional, or *de facto* parent to [the child] born to her same-sex partner, [Ms. Simms]." The *Black* court relied heavily on the United States Supreme Court's pronouncements in *Troxel v. Granville*, 530 U.S. 57 (2000), in which that court struck down a Washington state law that allowed any third party to petition state courts for child visitation rights over parental objections. The majority distinguished *Black* by noting the child at issue in that case, unlike Charlie, had not seen the partner's family for over a year and, unlike the instant case, there was conflicting expert testimony in *Black* as to the harm that might befall that child absent an award of joint-custody. – *Matthew Goodwin*

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

Texas District Court Finds Controlling Circuit Precedent Requires Dismissal of Sexual Orientation and Sex Stereotyping Claims Under Title VII

Judge Sam A. Lindsay of the U.S. District Court for the Northern District of Texas recently addressed two issues that the U.S. Supreme Court hopefully will address later this term if it grants review in *Evans v. Georgia Regional Hospital*. (As of this writing, the petition for certiorari in *Evans* remains pending.) Specifically, in *Berghorn v. Texas Workforce Commission & Xerox Corporation*, 2017 U.S. Dist. LEXIS 188702, 2017 WL 5479592 (N.D. Tex. Nov. 15, 2017), Judge Lindsay evaluated: 1) whether employment discrimination based on sexual orientation is a *per se* violation of

remanded Berghorn's claims against the Commission for administrative consideration, reserving the bulk of its opinion to analyzing Berghorn's Title VII claims against Xerox.

First, with respect to his claim that sexual orientation discrimination is *per se* sex discrimination under Title VII, Berghorn cited the Seventh Circuit's groundbreaking decision in *Hively v. Ivy Tech Community College* for the proposition that existing Fifth Circuit precedent allegedly placing sexual orientation discrimination beyond the purview of Title VII was outdated and should be overturned. In response,

pleaded sufficient facts to support his discrimination claim based on gender stereotyping, noting instead that Berghorn's allegations focus only on his homosexuality. As such, the court dismissed Berghorn's claim but without prejudice, thereby allowing Berghorn "to amend his pleadings as to this claim because it is unclear at this juncture whether amendment as to this claim would be futile." Apparently, the court would require factual allegations as to sex stereotypes that are not linked by definition to homosexuality in order to sustain a Title VII claim.

The court's unfortunate dismissal of Berghorn's sex stereotyping claim propounds an already-incorrect body of law that attempts with futility to draw a distinction between because of sexual orientation and sex stereotyping. Multiple courts — including the U.S. Court of Appeals for the Second Circuit (*Christiansen v. Omnicom Grp., Inc.*) and the U.S. District Courts for the Western District of Pennsylvania (*EEOC v. Scott Medical Health Center*) and the Southern District of New York (*Philpott v. New York*), as well as the 7th Circuit in *Hively* — have flatly rejected the arguments raised by Xerox and embraced by the court here. Put most plainly by District Judge Cathy Bissoon in the *Scott Medical Health Center* case: "the Court finds discrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two."

This case highlights the dire need for the Supreme Court to grant Jameka Evans's petition for certiorari in *Evans v. Georgia Regional Hospital* and rule in her favor to clarify once and for all that Title VII unequivocally prohibits employment discrimination based on sexual orientation. — Ryan Nelson

Ryan Nelson is corporate counsel for employment law at MetLife.

The court ruled that the Fifth Circuit precedent remained good law, binding on the district court "regardless of the age of the case" unless and until it was overturned by the Supreme Court or the Fifth Circuit itself.

Title VII of the Civil Rights Act of 1964, and 2) if not, whether plaintiff's claim for sexual orientation discrimination constitutes a claim for sex stereotyping in violation of Title VII under the precedent set by the Supreme Court in *Price Waterhouse v. Hopkins*.

Kyle Berghorn (represented by Kalandra N. Wheeler and Rob J. Wiley of Rob Wiley, P.C.) filed suit against Xerox Corp. (represented by Samuel Zurik III of The Kullman Firm) and the Texas Workforce Commission, seeking judicial review of the Commission's decision to deny him unemployment benefits and alleging that Xerox terminated him in violation of Title VII because he is gay and failed to conform to Xerox's gender stereotypes. On motion, the court severed and

the court ruled that the Fifth Circuit precedent remained good law, binding on the district court "regardless of the age of the case" unless and until it was overturned by the Supreme Court or the Fifth Circuit itself. Thus, the court dismissed Berghorn's claim of *per se* sex discrimination with prejudice.

Second, with respect to Berghorn's claim that Xerox's alleged discrimination based on his being gay constituted sex stereotyping in violation of Title VII, Berghorn argued in his brief that Xerox "held biases that Berghorn was sleeping with other males, that he had grown too close to other males, and that he could not have children"—all stereotypes that necessarily rest on Berghorn's being male. Nevertheless, the court found that Berghorn had not

Gender Stereotyping Claim Survives Dismissal of Title VII Sexual Orientation Claim

A November 14, 2017 preliminary decision from the U.S. District Court for the Western District of Kentucky marks the tepid beginning to a case considering the intertwined and enigmatic nature of discrimination on the basis of gender stereotyping, and discrimination on the basis of sexual orientation. District Court Judge Thomas B. Russell granted in part and denied in part the defendant's pretrial dismissal motions in *Hudson v. Park Cmty. Credit Union, Inc.*, 2017 U.S. Dist. LEXIS 187620.

Plaintiff Penelope Hudson worked at Park Community Credit Union, Inc. for more than fifteen years until her termination on September 29, 2016. In May 2017, Hudson brought suit in Kentucky state court, alleging that during her employment she "was continually subject to harassment, disparate treatment and a hostile work environment due to her status as a gay woman." Hudson detailed that she was "told to change her appearance as she was 'too butch' to deal with customers," that fellow employees discussed her perceived sexual orientation within earshot of customers, that her supervisor refused to promote her due because of "animus toward lesbians," and "that another supervisor . . . made a comment more than one time that the Plaintiff doesn't believe in God since she is gay." On the basis of these and additional allegations, Hudson claimed violations of Louisville-Metro Government Ordinance § 92.06, the Kentucky Civil Rights Act (KCRA), KRS § 344 et. seq., and Title VII of the Civil Rights Act of 1964. In response, on June 6, 2017 Park Community removed the suit to federal court and filed a motion to dismiss or, in the alternative, for a more definite statement.

Judge Russell noted that the court could only grant a motion to dismiss "if, after drawing all reasonable inferences from the allegations in the complaint

in favor of the plaintiff, the complaint still fails to allege a plausible theory of relief." *Garceau v. City of Flint*, 572 F. App'x. 369, 371 (6th Cir. 2014).

In its motion to dismiss, Park Community alleged Hudson's claims failed for three reasons: (1) "Louisville Metro Government Ordinance § 92.06 does not allow for a private right of action;" (2) "none of the causes of action Hudson asserts allow relief for discrimination on the basis of sexual orientation;" (3) and "to the extent Hudson's claims are based on a sex stereotyping theory, Hudson has failed to plead sufficient facts to state a claim." Judge Russell addressed each allegation in turn.

that no private right of action exists, absent review and "receipt of the right of election" from the Human Relations Commission. He also recalled multiple precedential cases determining that § 92.06 does not create a private right of action, including *Mickens v. Gen. Elec. Co.*, 2016 U.S. Dist. LEXIS 163961, 2016 WL 7015665, at *2 (W.D. Ky. Nov. 29, 2016) and *Roberson v. Brightpoint Servs. LLC*, 2008 U.S. Dist. LEXIS 23020, 2008 WL 793636 at *2-3 (W.D. Ky. Nov. 29, 2016).

In response, Hudson asserted that the present case was different from the precedents, since she intended to file a complaint with the EEOC before her time runs out. Additionally,

Finding Hudson could not state a claim for relief under Ordinance § 92.06 absent receipt of the right of election, her claims under § 92.06 were dismissed for failure to state a claim.

Beginning with the claim that Section 92.06 of the Louisville-Metro Government Ordinance does not allow for a private right of action, Judge Russell first cited the code in full. Notably the code covers a range of protected classifications including "sex, gender identity, [and] sexual orientation." See Louisville-Metro Government Code of Ordinances § 92.06(A)(1), entitled "Unlawful Practices in Connection with Employment." Further reading shows that the Louisville/Jefferson County Human Relations Commission has "full operating responsibility" for carrying out Section 92.06. The section also outlines the complaint procedure for persons who allege that their employer violated § 92.06. Having closely read the statute, Judge Russell concluded

she took issue with the procedural requirement—arguing that she was planning to litigate the fact that the Sixth Circuit is one of the only circuits requiring plaintiffs to file a complaint with the EEOC. To Judge Russell, neither argument changed the fact that Ordinance § 92.06 does not create a private right of action. Accordingly, finding Hudson could not state a claim for relief under Ordinance § 92.06 absent receipt of the right of election, her claims under § 92.06 were dismissed for failure to state a claim upon which relief can be granted.

Addressing the defendant's second point, Judge Russell explained that because the Kentucky Civil Rights Act parallels Title VII, the Court uses the federal standards to evaluate sex-discrimination claims. Since

sexual orientation discrimination is not expressly prohibited under either the KCRA or Title VII, Park Community contended that Hudson's sexual orientation discrimination claims must be dismissed. Judge Russell agreed, writing "[u]nder Title VII, 'sexual orientation is not a prohibited basis for discriminatory acts,'" therefore "[a] claim premised on sexual-orientation discrimination thus does not state a claim upon which relief may be granted." *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011) (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006)).

In response, Hudson claimed that she had not argued that her KCRA and Title VII claims were related to her being gay, but to gender stereotyping. However, turning to the complaint Judge Russell found that statement inaccurate. On its face, the complaint alleged that the defendant violated the KCRA "by subjecting the Plaintiff to discrimination and depriving employment based on sexual orientation and her perceived divergence from sexual stereotyping." It also stated that the defendant had violated Title VII by "[s]ubjecting the Plaintiff to discrimination and depriving employment solely due to her sexual orientation and her perceived divergence from sexual orientation." Moreover, several of the factual allegations in the complaint focus solely on the allegations that she was mistreated due to animus towards lesbians.

As a result, Judge Russell found that Hudson equally alleged sex stereotyping and sexual orientation discrimination in her complaint. Therefore, he held that to the extent that Hudson's Title VII and KCRA claims are based on allegations of sexual orientation discrimination, they were also dismissed for failure to state a claim upon which relief can be granted.

Turning to the defendant's final claim, Judge Russell first invoked the seminal case on gender stereotyping—

Price Waterhouse v. Hopkins. There, the Supreme Court held that claims of employer sex discrimination included instances of "evaluat[ing] employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251. But Judge Russell noted the Sixth Circuit's warning against allowing Title VII plaintiffs to "bootstrap protection for sexual orientation into Title VII' under the guise of a sex-stereotyping claim." *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011). Specifically, the Sixth Circuit requires that a claim of gender stereotyping include an "argument that the plaintiff's appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for harassment." *Vickers*, 453 F.3d at 763. In contrast, if the plaintiff complains of harassment, "more properly viewed as harassment based on perceived homosexuality, rather than based on gender non-conformity," the claim is not legally cognizable. *Gilbert*, 432 F. App'x at 520.

In the instant case, the Judge found the allegation that Hudson was asked to change her appearance because she was "too butch" qualified as the type of gender-nonconforming allegation recognized in *Price Waterhouse*. Further, the allegations that supervisors discussed Hudson's "appearance and attire" in a way that caused her to believe she had to change her appearance to keep her job and be promoted, satisfied the requirement that Hudson allege adverse job consequences due to her perceived non-feminine appearance or mannerisms. Any other ambiguities in Hudson's complaint with respect to whether it alleges discrimination on the basis of gender or sexual orientation, would be resolved in Hudson's favor. *Wimsatt v. Froher Co.*, 2015 U.S. Dist. LEXIS 74134, WL 3622336 at *4 (W.D. Ky. June 9, 2015).

Park Community's responses were twofold: (1) by itself, the claim

that Hudson was told she was "too butch," is insufficient to state a gender stereotyping claim; and (2) even if true, Hudson failed to meet the requirements to make out a prima facie case of sex discrimination by "alleging that she was subject to any adverse employment action due to her supposed gender non-conformity or that she was treated differently than a similarly situated female employee who did conform to stereotypical gender norms." Judge Russell rejected both counterarguments.

Relying on Supreme Court precedent, Russell made clear that employment discrimination plaintiffs do not need to plead a prima facie case of discrimination, but instead must simply plead sufficient facts to give the defendant "fair notice" of the grounds for the claim. To the judge, Hudson had alleged sufficient facts to state a cognizable claim for gender stereotyping sex discrimination.

Notably, Judge Russell took care to underscore the interconnected nature of discrimination on the basis of sexual orientation and discrimination on the basis of gender stereotyping, writing: "frankly . . . whether Hudson's claims are based on gender stereotyping or sexual orientation is a very fine line with the possibility of overlap."

Finally, Judge Russell rejected the defendant's alternative motion for a more definite statement of the factual allegations supporting Hudson's gender stereotyping claim. While he agreed that Hudson's allegations were "scant," the judge found that they were not so unintelligible that Park Community could not possibly formulate a response. Reasoning that a "motion for a more definite statement is designed to strike at unintelligibility rather than simple want of detail," Judge Russell denied Park Community's 12(e) motion.

Thus, Judge Russell ordered the Defendant's motion to dismiss, or in the alternative, for a more definite statement granted in part and denied in part. — *Chan Tov McNamara* (*Cornell Law School class of 2019*)

Georgia Appeals Court Reverses HIV-Positive Man's Conviction for Exposing Sexual Partner to HIV

On October 27, a panel of the Georgia Court of Appeals reversed the conviction of Onofre Rodriguez, Jr. for reckless conduct by an HIV-infected person in *Rodriguez v. State*, 2017 Ga. App. LEXIS 524, 2017 WL 4900563. The panel of three judges found that the state had failed to produce any evidence to support the crime's most essential element – that Rodriguez was an “HIV-infected person” with a “confirmed positive HIV test,” as defined by the statute, OCGA §31-22-9.1(a)(5), (11).

Appellant, 29-year-old Onofre Rodriguez, met 43-year-old S.F. when he went to her home to visit her grandson. After several encounters, the two engaged in consensual sexual intercourse. S.F. insisted that Rodriguez use a condom, but during intercourse she noticed that he was no longer wearing the condom. S.F. ended intercourse and confronted Rodriguez about removing the condom. Rodriguez then apologized and told her, “I am HIV positive. I just carry the virus.”

S.F. sought immediate medical advice, and the next day reported the incident to the police. Two days later, S.F. and Rodriguez went to the health department to get S.F. tested, and to confirm Rodriguez's HIV-positive status. The testing revealed that S.F. did not contract HIV from Rodriguez. When S.F. asked Rodriguez to prove his status to her, he initially resisted. Ultimately however, he handed her a “single-page document from Quest Diagnostics purporting to show that he had tested positive for the presence of HIV infection.”

Following S.F.'s report, the police contacted Rodriguez, who agreed to speak with them without counsel present. During the interview, Rodriguez admitted to being “HIV positive,” and to having had intercourse with S.F. without informing her of his status. Rodriguez was subsequently charged with “reckless conduct by engaging in sexual intercourse without

first disclosing that he is an HIV-infected person.” At trial, a jury found Rodriguez guilty and sentenced him to ten years imprisonment.

On appeal, Rodriguez contended that there was insufficient evidence to support a guilty verdict because the state had failed to prove that he was an “HIV infected person” as defined by statute.

Writing for the panel, Chief Justice Sara L. Doyle reaffirmed the State's burden to prove every essential element of an offense. The essential elements of a crime are prescribed by the applicable statutory provisions, and “where the statutory language is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms.” *Weaver v. State*, 299 Ga. App. 718, 721–722 (2), 683 SE2d 361 (2009).

In the case before the court the elements of the crime are set forth in OCGA §16-5-60 (c), the “HIV Reckless Conduct Statute.” Judge Doyle noted that subsection (a) of the same code instructed that terms used in OCGA §16-5-60 were to be given the “meanings provided in OCGA §31-22-9.1.” Consulting that subsection, Judge Doyle found that the term “HIV infected person” was defined as “someone who has been determined to be infected by HIV.” The latter phrase was defined as “having a confirmed positive HIV test.” And the phrase “confirmed positive HIV test,” “means the results of at least two separate types of HIV tests, both of which indicate the presence of HIV in the substance tested thereby.” Further review of the subsection defined “HIV test” as “any antibody, antigen, viral particle, viral culture, or other test to indicate the presence of HIV in the human body, *which test has been approved for such purposes by the regulations of the department.*” (emphasis in original). The court then

interpreted “department” to refer to the Department of Community Health (“DCH”).

In his appeal, Rodriguez argued that because the DCH failed to issue any regulations approving specific tests “to indicate the presence of HIV in the human body,” there was no evidence that he was an “HIV infected person” as defined by the statute. In response, the state did not directly counter Rodriguez's contention, instead arguing that it was not required to prove the “mysterious new fifth element.” Judge Doyle rejected the State's contention that Rodriguez raised a “new element.” Instead, she found that OCGA §§ 16-5-60(a) and 31-22-9.1(a)12 “explicitly included” DCH regulations in the method for proving a person is an “HIV infected person” under the HIV Reckless Conduct Statute. On further examination, the court found no existing DCH regulations “specifically purporting to approve testing for purposes of indicating the presence of HIV.”

Instead, the state's only evidence of Rodriguez's HIV status were his admissions to S.F. and the police, as well as the one-page Quest Diagnostic testing report that he had given to S.F. The court found that neither satisfied the state's burden to prove HIV status as defined under OCGA §31-22-91. With regards to the Quest Diagnostic testing report, Judge Doyle explained that the document did not purport to satisfy, or comply with, any DCH regulations. Moreover, the state had not called any witnesses to explain how the report satisfied the statutory requirements to demonstrate a person is an “HIV infected person.”

Judge Doyle concluded that in the court's view there was no evidence to support a finding that Rodriguez was an “HIV infected persons” with a “confirmed positive HIV test.” Thus, finding that the State had failed to meet its burden to prove Rodriguez's status under OCGA §16-5-60, the court reversed Rodriguez's conviction. – *Chan Tov McNamarah*

Federal District Court Allows Some of Catholic Wedding Venue's Constitutional Claims Against Michigan City Ordinance to Proceed

A Michigan federal district court granted in part and denied in part the City of East Lansing's motion to dismiss a Catholic farmer's lawsuit, rooted in his publicly-declared refusal to host same-sex weddings on his farm. *Country Mill Farms, LLC v. City of East Lansing*, 2017 WL 5514818 (W.D. Mich. Nov. 16, 2017). After Stephen Tennes posted several announcements on social media about his policy to not host same-sex weddings, the East Lansing Farmer's Market declined his renewal application to be a vendor for another season, after the City stepped in and amended the participation rules to bar vendors that did not comply with its broad nondiscrimination and public accommodations ordinance, even if the business is located outside city limits. The so-called Alliance Defending Freedom (ADF), also representing the baker in *Masterpiece Cakeshop* and several other businesses owned by religious objectors to marriage equality, came to his rescue and filed this action in the local federal court.

Tennes is a devout Catholic who operates a family-owned farm, organized for business purposes as Country Mill Farms, LLC. The farm is located about twenty-two miles outside of East Lansing in Charlotte, Michigan; it both sells crops and serves as a wedding venue available for the public to rent. The farm had sold its crops at the East Lansing Farmer's Market since 2010. But in 2016, a series of Facebook posts by Tennes, announcing he would not rent his farm out for same-sex weddings, set in motion increased scrutiny by the City of the market vendor application policies, and eventually led to the rejection of Country Mill Farm's application for 2017.

The City's nondiscrimination ordinance covers public accommodations and explicitly prohibits discrimination based on sexual orientation (as well as gender identity and expression). After the 2016 season, the City amended the Farmers' Market vendor guidelines and required vendors to check a box

on application forms indicating that they comply with the City ordinance, not only at the market, but in their general business practices, too. The City later cited the ordinance when Tennes requested clarification about why his application was denied. ADF stepped in and filed a federal action in May, alleging its familiar smorgasbord of constitutional violations in these kinds of cases. The court granted the farm a preliminary injunction in September, which allowed it to return to the market for the rest of the season.

For purposes of a motion to dismiss, U.S. District Court Judge Paul L. Maloney, appointed to the bench by President George W. Bush, has to accept all plausible pleadings. As he noted in the first paragraph of the opinion, previewing his thinking on many of the claims, "the sequence of events permits the inference that the city targeted Tennes's speech and religious beliefs and, therefore, most of Plaintiffs' claims are plausible."

With that in mind, the court allowed the plaintiffs' facial free speech claim to proceed, because the ordinance arguably regulates speech based on content. The court also allowed the overbreadth challenge to the general business practice language in the vendor guidelines and harassment portion of the ordinance, both of which encompass communication; a First Amendment retaliation claim; a Free Exercise claim, based on the City using a generally applicable and neutral policy to target their religiously-motivated conduct; and an Establishment Clause claim, based on allegations that the predominant purpose of the changes to the vendor guidelines was motivated by disapproval of the plaintiffs' religious beliefs. The court also allowed a prospective unconstitutional conditions claim, based on the plaintiffs' argument that they must give up their religiously-motivated conduct in order to obtain a vendor license; their claim that there was a violation of their procedural due process rights; and their claim under

Article 1, Section 4 of the Michigan Constitution, also protecting religious freedoms. Judge Maloney wrote that the East Lansing guidelines used to deny Tennes's application appeared to be motivated by disapproval of Tennes's religious beliefs and again emphasized the timeline of developments in this case as significant. According to him, "[a]n objective observer could plausibly view the context of events and consider any secular purpose of the changes to the Vendor Guidelines a sham."

The court dismissed, however, the plaintiffs' as-applied free speech claim, on the ground that the City's decision was based on their conduct, rather than their speech; their overbreadth challenge to the public accommodations ordinance, because incidental burdens on speech about prohibited conduct are permissible if the government has the power to prohibit such conduct; their Equal Protection Clause claim, for lack of evidence that similarly situated vendors were treated differently; and their Home Rule City Act claim, because the statute does not prohibit the City from considering a vendor's conduct outside the geographic boundaries of East Lansing when determining which vendors will be granted a license.

While this was only a decision on a motion to dismiss and not on the merits, it is still a sobering reminder of where the law in this area may be headed. Of course, the U.S. Supreme Court's resolution of the similar First Amendment issues in the *Masterpiece Cakeshop* case this term will be extremely important as this case plays out and for the many other "religious liberty" cases ADF and its cohorts have brought around the country in response to *Obergefell*, as part of an overall strategy to chip away at the marriage rights of LGBT people. – Matthew Skinner

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

EEOC Wins Its First Fully-Litigated Sexual Orientation Discrimination Claim Under Title VII

In what has been characterized by various news outlets as a landmark case for LGBT employment rights, the U.S. Equal Employment Opportunity Commission (EEOC) won—and won big—in its first case litigated to a ruling on the merits applying the theory that Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination as a form of sex discrimination. *EEOC v. Scott Med. Health Ctr., P.C.*, 2017 U.S. Dist. LEXIS 189577, 2017 WL 5493975 (W.D. Pa. Nov. 16, 2017).

The EEOC represented a gay man who was harassed and constructively discharged by his employer in violation of Title VII. U.S. District Judge Cathy Bissoon adopted the EEOC's interpretation that Title VII's protection against gender bias include bias based on sexual orientation. Thus, she was left to determine how much the plaintiff was entitled to in back pay, prejudgment interest, damages, and/or injunctive relief.

Following a discussion that showcased what an employee may be entitled to if federal courts treated sexual orientation discrimination claims similarly to other Title VII cases involving gender, racial, and religious discrimination, Judge Bissoon awarded the plaintiff: (i) \$5,500.43 in back pay and prejudgment interest; (ii) \$50,000 in compensatory and punitive damages; and (iii) injunctive relief against the defendant. Her opinion repeatedly suggests that she would have awarded much more in compensatory and punitive damages but for the maximum amount imposed by 42 U.S.C. § 1981a(b)(3)(A) for statutory damages related to a Title VII violation by an employer with fewer than 101 employees at all relevant times.

EEOC v. Scott Med. Health Ctr., P.C. is one of two cases filed by the EEOC after it announced its interpretation regarding sexual orientation discrimination under Title VII in *Baldwin v. Foxx*, 2015 WL 4397641

(E.E.O.C. 2015). Since *Baldwin*, the EEOC has primarily acted as amicus curiae in cases concerning whether the various circuits should adopt the federal law enforcement agency's interpretation. See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017); *Zarda v. Altitude Express, Inc.*, 2017 WL 2730281 (2nd Cir. 2017).

Dale Massaro worked as a telemarketer at Scott Medical Health Center (SMHC) between July 24, 2013 and August 16, 2013. During his brief employment, Massaro was repeatedly subjected to *sex-based harassment* by his supervisor, Robert McClendon, who referred to Massaro as a “faggot” and asked him offensive questions concerning his sex life and relationship. Judge Bissoon consistently used the term “sex-based” in place of “anti-gay” in her opinion, rooting the case in the statutory language.

Although Massaro reported McClendon's harassment to Gary T. Hieronimus, the owner and chief executive officer of SMHC, Hieronimus refused to intervene; instead, the CEO merely stated that McClendon “was just doing his job.” Interestingly, this statement would come back to bite the defendant throughout Judge Bissoon's opinion. At all relevant times, SMHC maintained an anti-harassment policy that stated that sexual orientation harassment was unlawful. Hieronimus neither trained nor identified anyone who would have trained McClendon on the policy. Furthermore, Massaro was never trained on, permitted to read, or have a copy of the policy.

McClendon's continued harassment caused Massaro to experience emotional distress that manifested as crying episodes, anti-social behavior, and overeating and weight gain. After Massaro quit his job, he also experienced changes in his sleeping habits and depression. Though he later found employment at PA Mentor on September 15, 2013, his harassment at SMHC led him to seek counseling

through an employee assistance program, as well as prescriptions for anti-depressants and sleep aids.

Judge Bissoon first determined whether the plaintiff was entitled to back pay and prejudgment interest. Under Title VII, a victim of discrimination is entitled to back pay less interim earnings or amounts earnable with reasonable diligence. Furthermore, the court may award prejudgment interest to compensate the victim for the loss of use of money he would have otherwise earned had he not been unjustly discharged. Judge Bissoon quickly adopted the EEOC's calculations for back pay and prejudgment interest, finding that the amount would achieve Title VII's objectives of “eradicating discrimination throughout the economy” and making Massaro whole. Key — but largely left unsaid in Judge Bissoon's determination — is her initial acceptance of Title VII's protection against sexual orientation discrimination as sex discrimination, which drives the rest of her opinion.

Next, Judge Bissoon determined whether the plaintiff was entitled to compensatory damages under Title VII. Such damages available include recovery for emotional pain, mental anguish, and other non-pecuniary losses. 42 U.S.C. § 1981a(b)(3). Ultimately, Judge Bissoon held that the EEOC proved that Massaro was entitled to non-pecuniary compensatory damages in excess of the \$50,000 limit for statutory damages, for the emotional distress and the related physiological symptoms resulting from McClendon's harassment. Because the Third Circuit does not currently recognize Title VII's applicability to sexual orientation discrimination, Judge Bissoon determined the appropriate amount for compensatory damages by referring to other types of discrimination claims in which a plaintiff successfully proved emotional distress caused by an employer's Title VII violation.

Afterwards, Judge Bissoon addressed the plaintiff's request for



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punitive damages. Such damages may be awarded upon a showing that an employer engaged in a discriminatory practice with malice or reckless indifference to the *federally protected rights* of an aggrieved individual. 42 U.S.C. § 1981a(b)(1). The Third Circuit considers the following factors to determine the amount of punitive damages to be awarded: (i) whether the defendant should be punished for the conduct; (ii) whether punitive damages are necessary to deter future similar wrongful conduct by the defendant; (iii) whether punitive damages will deter others from engaging in similar wrongful conduct; (iv) the degree to which a defendant should be punished, or the degree to which a punitive damages award will act as a deterrent; and (v) the defendant's financial resources. Here, Hieronimus admitted that he was aware of the federal prohibitions against *sex-based harassment*, yet dismissed Massaro's complaint as McClendon "just doing his job." As a proxy for the defendant employer, he tolerated and ratified the Title VII violation of allowing a manager to create and perpetuate a *sexually hostile working environment*. Thus, Judge Bissoon found that the defendant met all the factors that warranted an amount of \$75,000 in punitive damages; however, as previously mentioned, the court was constrained by the \$50,000 statutory limitation.

Lastly, Judge Bissoon determined whether the plaintiff was entitled to injunctive relief. Under the U.S. Supreme Court's interpretation of § 706(g)(1) of Title VII, a district court has a duty to render an injunction which will "so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). A defendant may avoid injunctive relief if it proves that the type of violation at issue is unlikely to recur under the circumstances. See *EEOC v. Goodyear Aerospace Corporation*, 813 F.2d 1539, 1544–1545 (9th Cir. 1987). Applied to the case at hand, Judge Bissoon found that the EEOC proved that an injunction

is warranted because the defendant committed an intentional violation of Title VII by subjecting Massaro to a hostile work environment *because of his sex*, and constructively discharging him. Furthermore, Judge Bissoon held that the defendant's past conduct may infer the likelihood of future violations, as SMHC had submitted no evidence that it subsequently undertook any training, policies, or programs specifically designed to prevent what happened to Massaro.

Once again, it is important to note how Judge Bissoon's award of back pay, prejudgment interest, compensatory and punitive damages, and injunctive relief rests on her acceptance of the EEOC's interpretation of Title VII. Unlike the U.S. District Court for the Western District of Pennsylvania, the Eastern District recently held that Title VII does not protect against sexual orientation discrimination. *Ellingsworth v. Hartford Fire Insurance*, U.S. Dist. LEXIS 42061 (E.D. Pa. Mar. 23, 2017). Furthermore, the Third Circuit has not addressed the issue since before *Baldwin. Bibby v. Philadelphia Coca Cola Bottling*, 260 F.3d 257 (3d Cir. 2001). – *Timothy Ramos (NYLS class of 2019)*

[Editor: Some media have reported that the EEOC is backing off from pursuing sexual orientation discrimination claims under Title VII as a result of Trump's appointments to fill vacancies on the Commission, so this litigation win may stand as an isolated instance for a while. However, under Title VII, a complainant can sue in federal district court, having received a "right to sue" letter from the EEOC, which the Commission is required to issue regardless of whether it concludes that there is merit to a discrimination charge, so a change of position by the EEOC does not mean that gay discrimination victims will be unable to file suit under Title VII. The agency's flip-flop on the Title VII coverage issue will likely adversely affect the weight of its opinion in the federal courts – except, possibly, in cases assigned to federal judges newly appointed by Trump.]

British Appeals Court Affirms Residential Child Custody for Gay Male Couple in Contest with Gestational Surrogate

A unanimous three-judge panel of the England and Wales Court of Appeal issued a decision on November 17 affirming a ruling by Justice Lucy Theis of the High Court Family Division that a gay male couple should have residential custody of a child born as a result of an unenforceable gestational surrogacy agreement they had entered with a married woman who sought to keep the child. *Between: H (A Child); Re H (Surrogacy Breakdown)*, [2017] EWCA Civ 1798 (Case No: B4/2-17-0064/FAFMF (Nov. 17, 2017)). Although the appeal had been presented as “involving novel issues about the interface between the Human Fertilisation and Embryology Act 2008 and the Child Act 1989,” wrote Lord Justice Andrew McFarlane for the Court of Appeal, “on examination these issues fell away and the argument ultimately boiled down to the question of whether the Judge erred on her evaluation of the evidence.”

A and B, the gay couple, entered into a surrogacy agreement with C and D, a “heterosexual married couple” who had five children. C, the wife, had been a gestational surrogate twice before. The parties had met on-line in April 2015, and signed the surrogacy agreement in August of that year. C and A traveled to a clinic in Cyprus, where A’s sperm was used to fertilize a donated egg, which was then implanted in C. Thus, C would have no genetic relationship to the child.

The relationship between the parties deteriorated during the pregnancy, to the point where communication between them had ceased in March 2016. According to the opinion by Family Court Justice Theis, “At some point in late March 2016, C and D sought legal advice and decided that they were not going to hand over the child to A and B, as had been agreed between the parties as recorded in the agreement they signed in August 2015. At this time, A and B were seeking to establish contact with C, but with no response.” C gave birth to H in

late April. Due to difficulties with the birth and aftermath, she and the child remained in the hospital until May 6.

The day before the birth, C and D’s then-lawyer wrote to A and B, telling them that C and D were not prepared to follow the surrogacy agreement and would not be giving their consent to a parental order on behalf of A, the child’s biological father. Although correspondence between the attorneys occurred for ten days following H’s birth, A and C were not informed of the birth until May 10, by which time C and D had already registered the birth with the name they had chosen rather than that chosen by A and B. A and B then filed suit, which resulted in arrangements being made for them to have contact with the child, which ultimately became a “shared care arrangement” up to the time of the hearing in Family Court.

Justice Theis appointed a Guardian for the child in the context of the hearings and hear testimony from all parties. Because C and D were not willing to cooperate with a parental order, they are considered the legal parents of H, as birth mother and her spouse at the time of the birth. Surrogacy agreements are not enforceable under English law. The intended father cannot obtain a parental order designating him as the legal parent in such a case without the cooperation of the birth mother and her spouse, if any. The main question for the court was whether the child should reside with C and D, or with A and B, in light of the history of the child’s conception and the subsequent bonding through the shared care arrangement, and A’s claims as a biological parent.

C and D’s lawyer argued that “as a matter of law, C and D had a right ‘to change their minds and keep H.’” wrote Lord Justice McFarlane. “It is undoubtedly correct that a surrogate mother has the right to change her mind,” he wrote, but noted that the lawyer “wisely withdrew from the submission that such a mother also had the right to have her own way about

where the child should live. She was also forced to concede that, while the six week ‘cooling off’ period protects a mother in relation to the important issue of consent to a parental order, it tells one nothing about what the best welfare arrangements for the child will be after birth. That will depend on the circumstances, which will include, in addition to the factors in the [Child Act] 1989, sec. 1(3) checklist, the child’s gestational and legal parentage, his or her genetic relationships and the manner in which the intended surrogacy came about.”

The Guardian appointed for the child testified that A and B were better placed to meet “the more complex emotional needs of a child born in these circumstances” than were C and D. On this issue, it appeared that A and B were open to allowing H to have a relationship with C and D, but C and D were not disposed to encourage a relationship with A and B. Both couples were seen as capable of meeting the child’s “ordinary physical, emotional and educational needs.” The Guardian recommended that H should live with A and B and have visiting contact with C and D, ultimately recommending that such contact should take place six times a year until the child’s 2nd birthday, subject to being increased at that time depending how the relationship developed.

Judge Theis accepted this recommendation, finding that it was best for H to live with A and B, with the recommended visiting schedule for C and D. As described by Lord Justice McFarlane, “The Judge therefore concluded that it would be best for H to live with A and B because (1) H’s identity needs as a child of gay intended parents would be best met by living with a genetic parent, (2) A and B could meet H’s day-to-day needs in an attuned way, (3) A and B were best able to promote the relationship with C and D, having remained positive about their significance despite the difficulties, and (4) C and D were

unlikely to significantly change their views about A and B.”

The Court of Appeal rejected C and D’s argument that placing the child with A and B was “equivalent to the making of a parental order,” pointing out that such an order “leaves the surrogate with no rights, and no right to apply to court. It would not provide for ongoing contact.” Justice McFarlane observed that Justice Theis had explicitly recognized the ongoing role of C and D as legal parents of H. He also rejected the argument that the Family Court was “obliged to strive to provide H with two homes and four functioning parents,” since it was “obvious that it was not likely to be in H’s interests to have more than one secure home base, and one couple who could be clearly identified as parents.” The court rejected any argument that the Family Court’s decision was “punitive to C and D” for having abrogated the surrogacy agreement and behaved poorly towards A and B, finding that the judge’s concern was “relating less to what had happened in the past and more to the respective couples’ ability to respond,” and that she had repeatedly “acknowledged the love that all four adults felt for the child, but she was clear that one of the couples was better placed than the other to negotiate the challenges of the future.”

The Court of Appeal concluded its opinion with observations on two matters. “Firstly, we note that surrogacy is a complex area, ethically and legally, and that there are no internationally agreed norms,” wrote Justice McFarlane, endorsing Justice Theis’s observation that it would be desirable for the government to enact “a properly supported and regulated framework to underpin arrangements of this kind.” The lack of any legal status for surrogacy agreements is a continuing source of difficulties, since the legal template for dealing with custody disputes between divorcing parents does not easily fit the situation when surrogacy arrangements break down during pregnancy.

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Pennsylvania District Judge Refuses to Dismiss Transgender Student’s Title IX and Equal Protection Claims

U.S. District Judge Robert D. Mariani denied a school district’s motion to dismiss Title IX and Equal Protection claims by a transgender elementary school student in *A.H. v. Minersville Area School District*, 2017 U.S. Dist. LEXIS 193622, 2017 WL 5632662 (M.D. Pa., Nov. 22, 2017). The court rejected the school district’s argument that in light of the Trump Administration’s “withdrawal” of a Guidance issued by the Obama Administration on protection for transgender students under Title IX, the complaint failed to state a valid claim.

mother, supportive of her daughter’s needs, asked that she be allowed to use the girls’ bathroom in school, the School Superintendent, Carl McBreen, said they would not allow it in order to protect the privacy of other students.

This was not a problem during kindergarten, since the kindergarten classroom has a single-use bathroom used by all the students, and the only adverse problem during A.H.’s kindergarten year came during a field trip, when teachers required A.H. to wait until all the boys had used a male-designated bathroom and then allowed

The court rejected the school district’s argument that in light of the Trump Administration’s “withdrawal” of a Guidance issued by the Obama Administration on protection for transgender students under Title IX, the complaint failed to state a valid claim.

A.H., the eight-year-old plaintiff (whose suit was brought by “her next best friend and mother, Tracey Handling”), classified male at birth, “was diagnosed with gender dysphoria while in kindergarten,” wrote Judge Mariani, explaining, “Under the care of a pediatric psychologist, Plaintiff and her family have been exploring ways for Plaintiff to express her gender identity at home, in school, and in the community . . . Since beginning kindergarten in 2014, Plaintiff has continuously presented herself both in and out of school as a female. Plaintiff uses a female name, dresses in clothing traditionally associated with females, is addressed using female pronouns, and is known to her classmates as a female student.” Even though A.H.’s

A.H. to use that bathroom. “The incident upset Plaintiff and resulted in some of her classmates asking her why she, as a girl, was using the boys’ bathroom.” A.H.’s mother questioned the principal about this. His response was that it was “school policy that a child must use the bathroom that corresponds with the sex listed on the child’s birth certificate,” and talked about “protecting” the other students from A.H. However, despite repeated requests, the school never showed A.H.’s mother an actual written policy. Her request to allow A.H. to use girls’ bathrooms during A.H.’s first grade year was turned down, with Superintendent McBreen stating that “Minersville isn’t ready for this.” While giving a school tour to Mrs. Handling, the principal referred to

A.H. using male pronouns, even after she corrected him.

After the Obama Administration Guidance was distributed to all public school districts, Superintendent Breen informed Mrs. Handling that her daughter could use the girls' restrooms at school, but the school "has not created any policy on bathroom access for transgender students." A.H. filed suit seeking a court order to comply with Title IX and Equal Protection requirements.

In its motion to dismiss the Title IX claim, the school first argued that the Trump Administration's withdrawal of the Obama Administration Guidance left "no legal basis to support a Title IX claim against the school district for transgender discrimination." After concisely relating the sequence of events surrounding the Obama Administration Guidance and the Trump Administration withdrawal, Judge Mariani, quoting from *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267 (W.D. Pa. 2017), noted that "The 2017 [Trump Administration] Guidance 'did not propound any 'new' or different interpretation of Title IX or [DOE's restroom regulation], nor did the 2017 Guidance affirmatively contradict the 2015 and 2016 Guidance documents.' Indeed, the *Evancho* court had observed, the 2017 Guidance 'appears to have generated an interpretive vacuum pending further consideration by those federal agencies of the legal issues involved in such matters.'"

"Thus," wrote Judge Mariani, "the fact that the Department of Justice and the Department of Education withdrew their interpretation of Title IX does not necessarily mean that a school, consistent with Title IX, may prohibit transgender students from accessing the bathrooms that are consistent with their gender identity. Instead, it simply means that the 2016 Guidance cannot form the basis of a Title IX claim." Lacking a binding precedent on this issue from the U.S. Supreme Court or the 3rd Circuit Court of Appeals (which has jurisdiction over federal courts in Pennsylvania), Judge Mariani looked to the 7th Circuit's decision in

Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017), as well as the earlier decision from the Western District of Pennsylvania court in *Evancho*. He observed that Title IX courts have looked to precedents under Title VII of the Civil Rights Act for guidance in determining the scope of protection under law banning discrimination because of sex, and that both the 7th Circuit and the *Evancho* court, following such precedents, had concluded, in the words of the 7th Circuit, that "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." The 7th Circuit specifically rejected the argument that providing access to a gender-neutral single user restroom is "sufficient to relieve the School District from liability, as it is the policy itself which violates the Act." Similarly, the *Evancho* court, while noting that the law on this issue was currently "clouded with uncertainty," determined that the transgender student plaintiffs in that case had "made a more than sufficient 'showing' in their Complaint of a right to relief under" Title IX.

Mariani pointed out that the Minersville school district had not attempted in its motion to distinguish these precedents or "present any arguments as to why this Court should not follow their holdings. The Court, further, sees no reason why the analysis and holdings of either *Evancho* or *Whitaker* are unsound when applied to the facts of this case." Mariani concluded, "Contrary to Defendant's argument, a specific practice need not be identified as unlawful by the government before a plaintiff may bring a claim under Title IX . . . Further, while the Court recognizes that the Amended Complaint seems to indicate that Plaintiff now has access to the girl's bathroom at school and thus may not have alleged any continuing violation of Title IX, that does not undercut the fact that Plaintiff has adequately pleaded that a violation of Title IX occurred as some point in time." The judge also rejected the school's argument that it

did not, as a matter of law, have any "discriminatory intent" when it acted. First, he pointed out, discriminatory intent was not a prerequisite to getting injunctive relief, just damages. And, in any case, statements attributed to school officials could provide a basis for finding discriminatory intent.

Turning to the Equal Protection claim under the 14th Amendment, Judge Mariani found agreement of the parties that heightened scrutiny would apply to judicial review of the school's alleged policy and its actions. As to that standard, which requires the defendant to show that the challenged policy serve an important government objective, Judge Mariani found an absence of proof by the school district. "Here," he wrote, "Defendant does not advance any important objective that its bathroom policy served. Instead, Defendant reiterates its argument that, in the absence of guidance from the government, Defendant made all reasonable efforts to accommodate Plaintiff," but this argument fails. "Plaintiff has adequately alleged the existence of a school policy that treated her differently on the basis of her transgender status or nonconformity to gender stereotypes. As such, she has sufficiently stated a claim for relief under the Equal Protection Clause." As constitutional discrimination claims require a showing of discriminatory intent, the judge pointed to statements by school officials that adequately serve at this stage of the case as evidence of discriminatory intent. Judge Mariani noted the similar rulings in *Whitaker* and *Evancho*, while also noting a contrary ruling from several years ago by a different district judge in the Western District of Pennsylvania, *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015), which for some reason the school district never even cited in support of its motion – perhaps because that opinion is somewhat of an embarrassment.

Judge Mariani was appointed by President Barack Obama in 2011.

A.H. and her mother are represented by David L. Deratzian of Hahalis & Kounoupis PC in Bethlehem, Pennsylvania. ■

CIVIL LITIGATION

U.S. SUPREME COURT – On November 27, the Court denied a petition for certiorari in *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017), c.d., 2017 WL 4180868, in which the Court of Appeals rejected a constitutional challenge to a Nebraska law restricting picketing in close proximity to funerals in progress. This is one of numerous controversies sparked by the Westboro Baptist Church, founded by the late Rev. Fred Phelps and carried on by his progeny, whose gospel centers on hatred of gay people. Groups from WBC picket funerals of American service members, flourishing signs proclaiming that the death of service members is God's punishment of the U.S.A. for tolerating homosexuality. Their actions prompted many states to enact time-place-and-manner restrictions on picketing of funerals, most of which have been upheld against constitutional challenge.

ALABAMA – A lesbian executive at the YMCA of Birmingham who was discharged several months after filing employment discrimination charges with the EEOC suffered summary judgment on some of the state law counts of her 15-count complaint, which alleged, among other things, sexual orientation discrimination under Title VII. *Oliver v. YMCA of Birmingham*, 2017 U.S. Dist. LEXIS 194641, 2017 WL 5714291 (N.D. Ala., Nov. 28, 2017). The focus of this motion was on Counts 10-15, asserting tort claims of defamation, negligence, interference with contractual or business relations, and invasion of privacy. District Judge Virginia Emerson Hopkins found that the pleadings fell short of the specificity required to assert these claims, being rather general in nature. For example, Cynthia Oliver alleged that after she married her same-sex partner in June 2015, subsequent to the *Obergefell* decision, the attitudes of her supervisors changed and they “made derogatory comments

about Oliver’s sexual orientation and made the terms and conditions of her employment even more adverse.” But she did not allege specific statements, or show how they were defamatory under Alabama law, and the judge also noted that the complaint provided no basis for imputing individual comments by particular supervisors to the defendant organization. Notably, this opinion does not address any argument concerning whether Title VII would encompass the plaintiff’s discrimination claims. A significant part of the factual allegations goes to Oliver’s contention that she, a Caucasian woman, was dealt with adversely by her African-American supervisor. Oliver is represented by Alicia Kay Haynes of Haynes & Haynes PC, Birmingham.

ARIZONA – Judge Karen A. Mullins of the Maricopa County Superior Court issued a ruling on October 24 granting a motion for summary judgment by the City of Phoenix and denying contrary motions filed by Alliance Defending Freedom on behalf of Brush & Nib Studio LC, a business that sought a declaratory judgment that their business selling custom wedding invitations and related products was privileged under Arizona law to refuse to deal with same-sex couples. *Brush & Nib Studio LC v. City of Phoenix*, CV 2016-052251. Seeking to avoid the growing body of federal case law rejecting such claims, ADF filed in state court and asserted claims solely under the Arizona Constitution and the Arizona Religious Freedom Act, arguing that these sources provided broader protection than federal sources in the raft of cases that have been decided. But to no avail, because Judge Mullins rejected all of their claims in an unpublished decision released filed by the clerk on October 25. Judge Mullins rejected the argument that applying the City of Phoenix’s public accommodations law would violate constitutional or statutory rights of the

plaintiffs, in a decision that borrowed from the New Mexico Supreme Court’s ruling in *Elane Photography LLC v. Willock*, 309 P.3d 53 (2013), which similarly dealt with state constitutional and statutory claims under comparable provisions. ADF filed a notice of appeal on November 21.

ARKANSAS – The U.S. Supreme Court ruled in *Pavan v. Smith*, 137 S. Ct. 2075 (June 26, 2017) (per curiam), that Arkansas must accord equal treatment to same-sex couples in the matter of recording parental names on birth certificates, consistent with the Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), reversing the Arkansas Supreme Court and remanding the case for a decision consistent with the Court’s mandate. The Arkansas Supreme Court bucked the case back down to Pulaski County Circuit Judge Tim Fox while the state stalled on correcting its statutes, regulations and forms. See *Smith v. Pavan*, 2017 Ark. 284 (Oct. 19, 2017). The Arkansas Supreme Court was divided on what to do, but unanimous in believing that any change to legislative language must be undertaken by the legislature, not the court, and that the matter required remand to the trial level. Justice Wynne’s opinion for the court ordered a remand for the trial judge to issue declaratory and injunctive relief as required to comply with the U.S. Supreme Court’s opinion, but without “rewriting” the statute, which was declared to be beyond the court’s authority. Concurring, Justice Womack said that in order to comply with the U.S. Supreme Court’s ruling, the trial court would have to hold a hearing to determine whether and how the existing statute violated the equal protection rights of same-sex couples. This drew a dissent from three members of the court, joining an opinion by Justice Karen R. Baker, who opposed a remand, opining that the court, taking account of the state’s

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concession that the statute as written is unconstitutional, should declare the statute unconstitutional and strike it from the books. Judge Fox, apparently sympathetic with Baker's dissent, gave the parties until November 5 to submit briefs in response to the remand. On November 27, Judge Fox threatened to block the state from issuing any new birth certificates if they did not quickly "fix" the birth certificate law to comply with the U.S. Supreme Court's ruling, according to a November 28 report. *Canadian Press* (Nov. 28); *Arkansas Democrat Gazette* (Nov. 28). Fox gave the state and the three plaintiff couples until January 5 to "find language that should be stricken from the state's birth certificate law" in order to comply. The press report continues: "Fox wrote that if the attorneys in the case can't come up with a solution by then 'this court will have no alternative but to enjoin the issuance of any birth certificates by the (state) until such time as the General Assembly can convene, in either special or regular session, to remove the equal protection violation.'" The next scheduled meeting of the General Assembly is its budget session in February, so it appears that a special session may be needed. The judge ordered that Arkansas Attorney General Leslie Rutledge personally participate in mediation hearings with attorneys for the plaintiff couples unless the parties submit proposed changes to the law to the court, thus denying a request by Rutledge that she not be required to attend mediation sessions personally. Trying to read the tea leaves from the confusing set of opinions issued by the Arkansas Supreme Court on October 19, Fox apparently concludes that his mandate is to declare the existing law unconstitutional and void, to be stricken from the statute books. If a replacement is not approved by the General Assembly, then, there will be no statutory authority for the state to issue marriage licenses. At an early hearing, Fox expressed his view

that the Arkansas Supreme Court had erred in concluding that the court did not have authority to order the relief sought by the plaintiffs without legislative intervention. The October 19 opinion from the state supreme court seems consistent with that court's timid approach to LGBT issues over the past few years, stalling on making rulings, seizing upon technicalities to avoid making rulings, and general doing everything they can to avoid being pinned down on the rights of LGBT people. This is an elected court in a very conservative state, which may help explain the timidity.

CALIFORNIA – U.S. District Judge Yvonne Gonzalez Rogers (N.D. Calif.) ruled in *Seneca Insurance Co. v. Cybernet Entertainment, LLC, v. State Compensation Insurance Fund*, 2017 WL 5665665, 2017 U.S. Dist. LEXIS 194441 (Nov. 27, 2017), that State Insurance Compensation Fund was entitled to summary judgment on its claim that it was not obligated to defend Cybernet, a producer of BDSM pornography under the trade name Kink.com, against state law personal injury claims asserted by three men who acted in Kink.com productions and claim to have contracted HIV due to the negligence and/or intentional acts of the producer. The three men had filed claims with the Workers Compensation Board, some of which were granted and some denied. In those claims, of course, they alleged they were employees. But in the separate lawsuit they filed against Cybernet, which it removed to federal court, they claimed to be independent contractors, presumably to escape the preemptive effect of the Workers Compensation Law. They alleged that the film's producer, in violation of its own policies, failed to assure that performers used condoms for scenes involving penile insertion while the performers were bound (and in some cases, presumably, blindfolded

or hooded) and thus unable to protect themselves. The court engaged in a complex analysis of the interaction of Workers Compensation and personal injury tort claims in light of the employer's liability insurance policy sold to Cybernet by Insurance Fund. The dispute on this cross-motion between third party plaintiff Cybernet and third party defendant State Compensation Insurance Fund was concerned with Insurance Fund's contractual obligation to defend Cybernet against the tort claims. The court ruled that insurance Fund did not have an obligation to defend against claims that were preempted under the Workers Compensation Law, which preempts negligence claims against an employer, and in construing the policy that they also had no obligation to defend against intentional tort claims, since such claims were expressly excluded from coverage under the insurance policy. The question whether the three plaintiffs were employees is unresolved for purposes of the state law claims, which seems odd since the Workers Compensation Board did authorize compensation to two of the men for injuries not inflicted intentionally by the employer. The opinion is probably of interest mainly to insurance law specialists, but is included here because Some of our readers may be interested to know that actors in Kink.com videos are, allegedly, being subjected to unsafe sex during the production of the videos.

DISTRICT OF COLUMBIA – U.S. District Judge Rosemary M. Collyer refused to dismiss a Title VII claim against the District of Columbia Department of Corrections by Darnelle Creese, a man who claims he was fired because "he was not 'manly' enough to satisfy the leader of his training class." *Creese v. District of Columbia*, 2017 WL 5592667, 2017 U.S. Dist. LEXIS 191109 (D.D.C., Nov. 20, 2017). Collyer pointed out that "it has long been the

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law that gender stereotyping can violate Title VII.” Furthermore, Judge Collyer refused to dismiss an Equal Protection claim brought personally against the supervisor, Dr. Willie Barr. However, she found that the factual allegations were insufficient to support an intentional infliction of emotional distress claim against the municipality and the supervisor, and, in addition, Creese had failed to satisfy statutory requirements for asserting tort claims against the municipality – providing advance notice of the suit to the Mayor as required by the D.C. Code. The factual allegations suggest that Dr. Barr took an immediate dislike to Creese, apparently perceiving him as gay, a perception reinforced when Creese mistakenly left a personal flash drive in a training computer and Barr discovered that the drive’s contents included a nude photograph of Creese and photographs of other men. He had been riding Creese about his dress, appearance, grooming, etc., and Creese was discharged for violating the D.C. policy against employee’s using personal flash drives with office computers. Creese alleged that the D.C. policy was to give a demerit for such a violation, not a discharge. As quoted by the judge, the Complaint specifically alleges that “Dr. Barr and other managers at DOC viewed Creese’s status or perceived status as a homosexual male, including his appearance, mannerisms, or conduct as insufficiently masculine, or not in conformity with gender stereotypes of how men should act and/or generally comport themselves.” This was sufficient, in the court’s view, to state a Title VII claim. The factual allegations were also sufficient to support a claim against Dr. Barr of intentional discrimination, intent being a required element for a constitutional discrimination claim. However, the allegations were deemed insufficient to meet the test under the common law of the District for intentional infliction of emotional distress: “outrageousness or conduct beyond all possible bounds of decency

that might be regarded as atrocious and utterly intolerable in a civilized society.” A supervisor’s relentless homophobia towards a specific employee evidently can be tolerated in a civilized society. We have a distance to go . . . Creese is represented by Jeanett P. Henry of Silver Spring, MD.

MARYLAND – A 15-year-old student who filed a federal lawsuit on August 11 challenging her school’s policy allowing transgender students to use facilities consistent with their gender identity filed a motion on November 2 for voluntary dismissal without prejudice. *Smith v. Board of Education of Frederick County, Maryland*, Case No. 1:17-cv-02302-ELH (D. Md., Northern Div.). According to the motion, the student seeks dismissal of her suit because she “is exposed to tremendous stress and potential humiliation for bringing and prosecuting this case in defense of her right to privacy.” Her decision to withdraw seems to have been precipitated by the filing of a motion to intervene by a transgender student, James von Kuilenberg, represented by the ACLU of Maryland and Free State Justice, with appropriate fanfare in the press, seeking to defend his right to access the boys’ restroom facilities at the school. This, of course, led to much comment about the litigation at school. According to Smith’s motion, “Plaintiff minor came home from school in tears the day intervenor’s motion to intervene was in the newspaper because intervenor’s attorneys allegedly said intervenor was trying to ‘stop members of the community,’ meaning minor Plaintiff, ‘from attempting to disrupt his and other trans students’ education by taking away their right to be treated with dignity” The motion insists that “Plaintiff minor treats all people with dignity, and has never been and is in fact not discriminatory, and has instead sought to defend and protect her own privacy and speech rights. However, she

does not believe that she can continue to prosecute her case without an increase in anxiety and fear of loss of her privacy.” Perhaps she should have considered these issues before filing suit in the first place. According to a *Washington Post* article about the lawsuit, “The family’s attorney, Dan Cox, an unsuccessful Republican candidate for Congress last year, declined to comment on the suit, which at points invokes totalitarian regimes and Nazi death camps.” Mary Smith is, of course, a pseudonym, and the case was brought with the participation of the plaintiff’s mother, identified in pleadings as “Jane Doe.”

NEW YORK – U.S. District Judge Gregory Woods ruled on November 30 that Hoai Ngo, a gay former analyst at Oppenheimer & Co., was bound by an employee handbook arbitration provision and thus his lawsuit against the company was stayed pending the outcome of arbitration of his retaliation and FMLA claims against the company. Ngo had argued that because the handbook had a disclaimer stating that it was “not a contract of employment,” his electronic acknowledgement that he agreed to the terms of the arbitration provision in the handbook when he returned to work after taking a family leave for the birth of his daughter and then medical leave for a brain aneurysm was not binding. Ngo claims that he was discharged in retaliation for taking the leaves. *Ngo v. Oppenheimer & Co., Inc.* (S.D.N.Y.).

NEW YORK – In a *per curiam* opinion that frustratingly avoids relating the details of any of the underlying factual allegations in the case, a unanimous panel of the N.Y. Appellate Division, 2nd Department, affirmed a ruling by Westchester County Supreme Court Justice Charles D. Wood granting summary judgment to the employer on claims of sexual

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orientation discrimination/hostile work environment and retaliation in *Keceli v. Yonkers Racing Corporation*, 2017 N.Y. App. Div. LEXIS 8435, 2017 WL 5762297, 2017 N.Y. Slip Op 08359 (2nd Dept., Nov. 29, 2017). One wonders at first why the court system decided to publish such an unenlightening decision, which falls back on reciting legal formulas and stating conclusions without exposing any application of doctrine to facts. According to the opinion, “The plaintiff alleged that she is an openly gay woman who was employed as a peace officer at the Empire City Casino and was subjected to persistent and severe discriminatory comments and conduct by other employees and her supervisors. She further alleged that after she complained about these comments and conduct, she was subjected to incidences of retaliation. She commenced this action against her employer and individual supervisors, alleging, *inter alia*, employment discrimination/hostile work environment on the basis of sexual orientation and unlawful retaliation in violation of Executive Law sec. 296(1) and (7).” The court then recites the requirements for a prima facie case, rebuttal, and ultimate burdens of proof, and states in conclusory fashion that the defendants met their burden “by offering legitimate, nondiscriminatory reasons for the challenged actions and demonstrating the absence of material issues of fact as to whether their explanations were pretextual. In opposition, the plaintiff failed to raise a triable issue of fact.” The court does not say what these reasons are, or what the plaintiff alleged in terms of specifics. Similarly, as to the retaliation claim, Keceli apparently relied on temporal proximity to tie particular employer actions to the complaints she raised, but the court said that was insufficient, without setting out any of the factual details or the dates in question. As such, the reader can draw little guidance from the opinion other than its statements of doctrinal law, based on prior decisions

that are cited without any discussion of the reasoning for their holdings. This may be marginally useful to the extent that the summaries of New York statutory law are accurate and differ in some ways from the requirements of federal law under Title VII. Plaintiff Suzanne Keceli is represented by Phillips & Associates (New York City), with Casey Wolnowski and Nicole Welch of counsel.

NORTH CAROLINA – Chief U.S. District Judge Frank D. Whitney of the U.S. District Court for the Western District of North Carolina denied an employer’s motion to dismiss a Title VII sex discrimination claim by Charly Barber, a *pro se* transgender plaintiff, in *Barber v. PACTIV/Reynolds*, 2017 U.S. Dist. LEIS 179830 (Oct. 31, 2017), finding that under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), “the United States Supreme Court has recognized that Title VII protects persons from sex discrimination for failing to act in accordance with their gender stereotype.” Noting that in responding to a motion to dismiss the plaintiff is entitled to “favorable review” as the nonmoving party, wrote the judge, “the Court finds the *pro se* complaint sets forth minimally sufficient allegations, when construed in her favor, could suggest discrimination based on her failure to conform to gender stereotypes. Accordingly, the Court finds it would be inappropriate to resolve the issue at this early stage.” Judge Whitney wrote that the dismissal was without prejudice, and defendants could raise the Title VII coverage argument following discovery in a motion for summary judgment. The court also ordered that plaintiff be permitted to participate in the Pro Se Settlement Assistance Program for the Western District of North Carolina, which “provides civil *pro se* litigants with limited advice and representation at mediated settlement conferences,” and that “the parties in this case should

be given the opportunity to participate in the program.” One infers that the judge’s review of the complaint gave rise to a view that the plaintiff’s case may have merit. The opinion does not provide any detail about the plaintiff’s factual allegations.

OKLAHOMA – We previously reported on refusals by U.S. District Judge Robin J. Cauthron (W.D. Oklahoma) to dismiss a Title VII discrimination case by Rachel Tudor, a transgender woman, against her former employer, Southeastern Oklahoma State University. In our last report, we suggested that the strongly-worded opinion by Judge Cauthron might lead a prudent employer to seek a settlement rather than face a trial. But the University decided to brave the trial process and got squashed! On November 20, the jury returned a plaintiff’s verdict in *Tudor v. Southeastern Oklahoma State University*, Case No. CIV-15-324-C (W.D. Okla.), finding that Tudor had been denied tenure because of her sex in 2009-10, and was denied a chance to apply for tenure in the following annual cycle for the same reason. The jury also found that the denial of a chance to reapply for tenure in 2010-11 was in retaliation for the complaints she had made about workplace discrimination. However, the jury concluded that the facts adduced at trial were not sufficient to support a verdict on hostile environment. The jury determined to award damages in the amount of \$1,165,000.00 on those claims subject to jury determination. This will likely be reduced university moves to reduce the award, although an initial account in the BloombergBNA Daily Labor Report indicated that the university stated that it “respected” the jury’s verdict, whatever that means. Still to be determined by Judge Cauthron are Tudor’s claims for equitable relief, including reinstatement or front pay in lieu of that. Interestingly, the judge had charged the jury that Title

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VII does *not* directly cover gender-identity discrimination, as 10th Circuit precedent has not gotten that far. The judge allowed the case to proceed entirely on a sex-stereotyping theory. According to Tudor’s attorney, Ezra I. Young of New York, this is the first time a jury has ruled on a transgender plaintiff’s sex discrimination claim under Title VII, all prior such decisions having been made in bench trials by the judge or settled after surviving dismissal motions. That a federal trial jury in Oklahoma would issue this verdict with a substantial damage award suggests that public opinion on the rights of transgender people has definitely progressed in recent years as the media has been reporting ongoing disputes concerning gender identity discrimination. Joining Mr. Young in representing Tudor at trial were Brittany M. Novotny (local counsel, Oklahoma City) and Marie E. Galindo of Lubbock, Texas.

OKLAHOMA – U.S. Magistrate Judge Kimberly E. West denied the employer’s motion for summary judgment in a same-sex harassment case under Title VII and the Oklahoma Anti-Discrimination Act. *Kyser v. D.J.F. Services, Inc.*, 2017 U.S. Dist. LEXIS 194283, 2017 WL 5690889 (E.D. Okla., Nov. 27, 2017). Edwon Kyser said his employment on an oilfield crew was going fine until Earl Poole became his supervisor. Then, according to his deposition testimony, “Poole began to sexually harass him about three weeks after Poole became his supervisor. Plaintiff testified in his deposition that daily ‘filthy comments’ were made by Poole directed to him. The comments Plaintiff recalled consisted of Poole (1) telling Plaintiff to ‘suck on Poole’s penis’; (2) identifying Plaintiff as gay; (3) asking Plaintiff to hold his penis every time Poole went to the bathroom; (4) walking up behind Plaintiff and putting his hand between the back side of his legs, ‘pretty much [his] butt crack’, and squeezed and said ‘Oh, baby’; (5)

pulling down his pants to his underwear, talking to Plaintiff and looking at him; (6) grabbing Plaintiff’s derrick belt and pulling him to Poole; and (7) texting Plaintiff on his cell phone and asking Plaintiff if he was playing with himself and if he stayed home and masturbated on a day Plaintiff had stayed home sick. Plaintiff stated that he repeatedly told Poole to stop or quit making the comments which he found offensive. Plaintiff recognized in his testimony that ‘it’s the oilfield. They talk dirty out there, but I mean, in a joking way.’ But that ‘it was never like that towards me. It was more aggressive towards me, like being the butt of it and – you know, every time I turned around, I was getting touched, and then him dropping his pants’” Kyser complained to the company’s owner, but got no assistance; indeed, the owner, Donald Flint, told him that “Poole was thinking about getting rid of Plaintiff, anyway.” Ultimately, Kyser quit the job because he couldn’t take the harassment any longer. Flint testified in his deposition that “his company did not have a formal handbook or a policy to address sexual harassment of an employee.” The summary judgment motion argued that this case did not meet the requirements for a same-sex harassment case established by the Supreme Court in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), but Judge West said, “Defendant reads the Supreme Court’s statements too narrowly . . . Under the facts presented by this case in a light most favorable to Plaintiff, Poole created an objectively offensive atmosphere in the workplace which was so severe, as evidenced by sexual touching, and so pervasive, as it occurred every day repeatedly, so as to constitute actionable sexual harassment under Title VII. Defendant is unable to avail itself of the *Faragher* and *Ellerth* defense because it did not have a policy for addressing sexual harassment. Moreover, no reasonably objective person could find Poole’s conduct to represent ‘ordinary socializing’ or

‘male-on-male horseplay.’ Instead, Poole appears to have employed sexual intimidation against Plaintiff which created an arguable intolerable workplace. Defendant also contends the allegations in this case are not as severe as in other case authority to which it cites. This Court would be remiss to fail to recognize a flexible societal standard on the acceptability of sexual harassment of employees by persons of power – whether they be of the same or different gender of the victim – and the level of tolerance for such conduct. The viewpoint of the ‘reasonable person’ is not static with time and Poole’s conduct in this case is certainly sufficiently severe to warrant consideration by a jury. Even in an arguably more rough environment such as the oilfield, conduct can become so offensive so as to be considered objectively unreasonable – especially when the conduct includes sexual touching such as alleged in this case.” However, the judge did grant the summary judgment as to the retaliation claim, finding that “plaintiff never informed Flint of the specific or even general allegations of sexual harassment by Poole. As a result, the required causal link between Plaintiff’s activity and his constructive discharge has not been established” Kyser is represented by Terry A. Hall of Hall Nalley & Holloway PLLC, Shawnee, OK.

PENNSYLVANIA – Last month, we reported on a Pennsylvania Superior Court decision, *In re A.S.D.*, 2017 Pa. Super. Unpub. LEXIS 3951, 2017 WL 4801515 (Oct. 24, 2017), concerning a transgender person’s application for a name change that had been denied by the Court of Common Pleas. At the time, the opinion had been designated as unpublished. On November 20, the court reissued the opinion, this time as a published opinion. The new citation is *In re A.S.D. aka A.S.*, 2017 PA Super 369, 2017 Pa. Super. LEXIS 952, 2017 WL 5575083 (Nov. 20, 2017). The opinion

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does not seem to have been materially modified from the earlier, unpublished opinion. The bottom line is that the Court of Common Pleas should hold a hearing and grant the name change unless the petitioner has failed to comply with the statutory requirements. The Common Pleas court had denied the application without holding a hearing, based on the court's discomfort with the fact that the petitioner had a past felony conviction. The petitioner had noted that more than two years had elapsed since the completion of her prison sentence and she was no longer subject to probation or parole jurisdiction, and that she had, as required by statute, submitted her fingerprints to the State Police. Presumably this requirement exists so that she can be properly identified if fingerprint evidence is submitted to the State Police for identification purposes. A majority of the court remanded for a hearing, with a concurring judge making a stronger statement about the obligation of the trial judge to grant the name change if "upon holding a hearing, the court finds no indication that the name change is being sought for fraudulent purposes." As before, there is no indication on the opinion whether the petitioner was proceeding *pro se*, and there is no indication whether the decision to make this a published decision was in response to a motion or made *sua sponte*. It is certainly more useful for it to be an officially published opinion.

TEXAS – U.S. District Judge Vanessa D. Gilmore has granted a motion to dismiss for lack of subject matter jurisdiction in *Freeman v. Turner*, Civ. Action No. 4:17-CV-2448, an action brought by Lambda Legal with pro bono assistance from attorneys at Morgan Lewis & Bockius seeking to vindicate the equal benefits rights of Houston city employees with same-sex partners in the wake of the Texas Supreme Court's ruling in *Pidgeon v. Turner*, 2017 WL 2829350 (June 30,

2017), which sent pending state court lawsuits on this issue back to the trial court for reconsideration. (On December 4, the U.S. Supreme Court rejected a petition by the City of Houston to take up the question whether the Texas Supreme Court decision had correctly construed *Obergefell v. Hodges* to have left open this issue.) Judge Gilmore accepted the argument by the taxpayers who had initially brought suit in state court challenging the City's decision to award such benefits that at present the plaintiffs in this case – municipal employees whose spouses are receiving benefits – do not present a justiciable case or controversy, because there is no final state court ruling requiring the City to rescind the benefits. Judge Gilmore found that in light of the Supreme Court's June 26, 2017, ruling in *Pavan v. Smith*, "which the Texas trial court is required to follow, it seems constitutionally impermissible for the City to deny benefits to same-sex spouses of its employees," a position that the City had recently taken in its petition to the U.S. Supreme Court. In light of these developments, Judge Gilmore found that the plaintiffs' claims are not ripe for review. "Plaintiffs have also failed to show that they have yet suffered an 'injury in fact' to confer Article III standing," wrote Gilmore, noting that plaintiffs are receiving the benefits and the possibility that the Texas trial court will rule against the City is at best speculative. "Moreover," she wrote, "the City has stated that it is committed to ensuring that Plaintiffs' benefits remain intact and has various legal mechanisms at its disposal to protect those benefits. Thus, although there is a possibility that future injury could occur, it is still 'too remote' to be 'certainly impending' and there is not a 'substantial risk that the harm will occur.'" Judge Gilmore was appointed to the district court by President Bill Clinton.

WASHINGTON – Lambda Legal reported on November 14 that the federal

district court in Seattle has granted a motion by the State of Washington to intervene as a co-plaintiff in *Karnoski v. Trump*, a lawsuit challenging the Trump Administration's ban on military service by transgender people. The motion was granted on November 14, just days after the court had rejected a motion by defendants to stay the case in light of the preliminary injunction granted last month by the federal district court in the District of Columbia in *Doe v. Trump*, 2017 U.S. Dist. LEXIS 178892, 2017 WL 4873042. Denial of the motion for stay made total sense, since the D.C. ruling granted the government's motion to dismiss two of the plaintiff's counts on standing grounds, and it is possible that among the Karnoski co-plaintiffs are individuals who would have standing to make an estoppel argument or to assert a claim regarding the August 25 Trump Memorandum provision on sex-reassignment surgery.

WASHINGTON – The perils of filing suit *pro se* are shown by the November 27 opinion in *Peden v. Catholic Community Services of Western Washington*, 2017 U.S. Dist. LEXIS 195227 (Nov. 27, 2017). The plaintiff, Craig Peden, who identifies himself in a first-amended complaint filed pursuant to the court's request as a "divorced, single, bisexual male with AIDS," filed an initial complaint which apparently puzzled Chief U.S. District Judge Ricardo S. Martinez, who wrote: "Plaintiff alleged in his initial Complaint that Catholic Charities agreed to pay his rent for October through the end of his lease in December 2017. He also appeared to allege some type of retaliation and discrimination, although he did not allege that he is a member of any protected class, nor did he provide the details of such allegations. Plaintiff apparently received a Notice of Belief of Abandonment related to an apartment in Everett, which also noted that his lease would be terminated on October 31,

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2017, unless he informed the manager of his intent not to abandon his property, an address at which he could be served with certified mail, and his current rent due. The circumstances surrounding Plaintiff's allegations and request were not apparent from the initial Complaint or the motion itself," the latter referring to an "Emergency Motion for Injunction" that the court construed to be a request for a TRO, which was denied. Peden's amended complaint named five new defendants, "appears to abandon his prior legal claims," and "now raises allegations of federal Due Process and Civil Rights violations," wrote Judge Martinez. "He also appears to raise allegations of federal housing violations. Plaintiff makes general averments of harassment, defamation, stigmatization, and discrimination on the basis that he is a divorced, single, bisexual male with AIDS, but no specifics are provided. His allegations appear to cover a time period between 2013 and 2017." Emphasizing that the court can't proceed without a complaint that establishes federal court jurisdiction, he wrote, "In this case, Mr. Peden fails to explain how each of the Defendants has violated any federal law. Indeed, he provides only general averments, but does not specify what actions, if any, each Defendant took that would have violated his federal rights. In addition, Plaintiff fails to explain why some of his actions are not barred by the applicable statutes of limitations. Accordingly, Plaintiffs' Complaint suffers from deficiencies that, if not corrected in an Amendment Complaint, require dismissal." But in a display of patience with a *pro se* plaintiff who may have valid claims, the judge ordered that Peden file a Second Amended Complaint "no later than 21 days from the date of this Order" and briefly summarized what the Complaint must include. Of course, Peden should quickly repair to a legal aid office and obtain some assistance in quickly composing an amended complaint that satisfies the court's requirements, assuming that such

services exist in the Seattle area and that a competent attorney determines that there are plausible federal claims he can assert that are not time-barred and/or subject to a rock-solid 1st Amendment defense by Catholic Charities. The judge directed that "the clerk shall send a copy of this Order to Mr. Peden at 1425 Broadway, #232, Seattle WA 989122."

WISCONSIN – You can't sue an employee benefits plan established under ERISA for a violation of Title VII of the Civil Rights Act of 1964, for the simple reason that Title VII addresses only the relationship between employees and their employers or their labor unions. So ruled U.S. District Judge William M. Conley in *Boyden v. Conlin*, 2017 WL 5592688, 2017 U.S. Dist. LEXIS 191306 (W.D. Wis., Nov. 20, 2017). Plaintiff Alina Boyden, a transgender woman who has been diagnosed with gender dysphoria, is an employee of the University of Wisconsin, one of the defendants in this case, Co-defendant Dean Health Plan, Inc., is a health insurance administrator that provides insurance to University employees through the Wisconsin Department of Employees Trust Funds, an ERISA plan. Boyden alleged in this suit that various defendants, including Dean, discriminated against her in violation of Title VII because of her sex, relying on recent case law holding that discrimination against transsexuals is covered under Title VII. All well and good, but it seems that when Dean turned down her request to approve coverage for Gender Confirmation Surgery, it was merely performing its administrative function under the relevant employee benefit plan, which unambiguously excludes such coverage. Dean is not responsible for the content of the plan, merely its administration. Responsibility lies with the plan sponsor, Boyden's employer. "Because Dean is only responsible for administering its health plans according to these dictated

terms," wrote Conley, "Dean is not an agent of plaintiff's employer with respect to employment practices, but rather a provider or vendor of services. The most relevant defendants here are the Wisconsin Department of Employee Trust Funds and the State of Wisconsin Group Insurance Board, the entities that have decision-making authority over the coverage policies of the plan. Thus, Conley granted Dean's motion to be dismissed as a defendant. "In the end," wrote Conley, "Title VII is not a proper vehicle for plaintiff to bring a claim against Dean," because "to hold otherwise would necessarily mean that Dean and all other health providers would be deemed at least an agent for every employer who contracted to provide healthcare plans to its employees, even though they have *no* discretion as to the scope of health benefits covered. It is doubtful that Congress intended to impose such wide-ranging liability on insurance companies under Title VII, and absent clear statutory language to the contrary, this court is disinclined to reach a different conclusion that it did more than a decade ago" in a case presenting the same issue.

CRIMINAL LITIGATION NOTES

CALIFORNIA – The 4th District Court of Appeal affirmed the voluntary manslaughter conviction of Dantijer Domenick Powell, who killed a transgender woman with whom he had a sexual relationship extending over several years. The court rejected Powell's argument that the trial judge should have instructed the jury on the lesser offense of involuntary manslaughter. *People v. Powell*, 2017 Cal. App. Unpub. LEXIS 8090, 2017 WL 5662393 (Nov. 22, 2017). According to the opinion by Judge Carol D. Codrington, Powell and the victim, Domonique Newburn, began their sexual relationship when Powell

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was 14 and Newburn was 24. “When defendant was 14 years old, he met Newburn, who performed oral sex on him in her car,” wrote Codrington. “It was defendant’s first sexual encounter. He did not know for a month or two that defendant was a transsexual female. Their sexual relationship continued for several years. Defendant lived with his father intermittently but often stayed with Newburn, who bought him games, food, haircuts, shoes, and clothes in exchange for sex.” Powell turned 18 in June 2013, and began dating Jamie C., a cisgender woman. In August, he was entering his senior year of high school. On August 19, Newburn texted Powell requesting he come to her apartment for sex, but he did not respond because he was with Jamie. Codrington relates the facts that could be found by the jury: “When defendant arrived (at Newburn’s home) after school the next day, Newburn was out buying food. When Newburn returned home, she became angry because defendant said he did not want to eat and she accused defendant of wasting her money. They argued and defendant went into the bedroom to play a video game alone. Jamie called defendant’s cell phone and defendant told her he loved her and he would see her later. Newburn came into the bedroom and confronted defendant about the phone conversation. Defendant initially lied about who he was speaking to but Newburn said she knew he had a girlfriend. They continued to argue and defendant asked to be taken home. Newburn refused and insisted defendant choose between her and Jamie. Defendant told Newburn he loved her but Jamie could be pregnant and he wanted to be responsible. Newburn ‘got madder’ and again refused to drive defendant home. As defendant began to gather up his belongings, Newburn returned to the bedroom wielding a knife.” A fight ensued, in which Powell wrested the knife from Newburn and stabbed her to death. “Defendant was so scared he did not remember how many

times he actually stabbed Newburn who continued to threaten him. He finally stopped when he felt safe and Newburn appeared to be dead.” At trial, defense counsel argued for an involuntary manslaughter charge. San Bernardino County Superior Court Judge Shahla Sabet responded by reading aloud the elements of voluntary manslaughter and stating, “Let’s assume somebody pulled a knife on you. And you pick up the knife and you wave it around stabbing ten times. Four of those are fatal and one is to the jugular. I don’t think so.” Wrote Codrington, “In declining to give the involuntary manslaughter instruction, the trial court focused on there being 10 stab wounds, four of which were fatal. We agree with the trial court that the circumstances in this case did not warrant the requested instruction.” In a detailed justification of this conclusion, the judge wrote, “The chaotic crime scene and the ‘ransacked’ apartment seem to corroborate defendant’s testimony that he panicked. Defendant contends that substantial evidence supported the involuntary manslaughter instruction. Ultimately, however, the sustained violence of the attack would not have allowed the jury to find that defendant acted without implied malice and conscious disregard of the risk to human life. Defendant’s level of force was not objectively reasonable. When Newburn attacked defendant in the bedroom and a struggle ensued, defendant gained possession of the knife and stabbed Newburn repeatedly as she screamed for help. The 10 stab wounds penetrated bone and liver and severed the jugular vein and carotid artery. Defendant claimed he could not remember many of the specific details of the stabbing because he was scared, panicked, and not thinking clearly. It is scarcely credible that defendant could have been unaware of the risk of death or serious injury from multiple extreme strikes. Nevertheless, even if defendant may not have intended to kill Newburn, he surely intended

to cause her harm. The number and nature of the knife wounds permit virtually no other conclusion.” The court also noted Powell’s failure to seek medical assistance for Newburn, as he proceeded to pack his things, load them in her car, and drive away, disposing of her wallet as he fled the scene and leaving the state in an attempt to elude arrest. Codrington opined that there was “no reasonable probability” that the requested charge would have benefited him at trial. The sentence upheld by the court was 12 years in prison: “the aggravated term of 11 years for voluntary manslaughter plus one consecutive year for the use of a knife.” Powell was represented by appointed counsel, Erica Gambale. Prosecuting attorneys included Julie L. Garland, Lynne G. McGinnis, and Eric Swenson, under the direction of Chief Assistant Attorney General Gerald A. Engler.

CALIFORNIA – A Los Angeles Superior Court jury has convicted Isauro Aguirre of first degree murder in the death of Gabriel Fernandez, the 8-year-old son of his girlfriend, whom Aguirre tortured and brutalized because he suspected the boy was gay. The case had ramifications beyond the conviction of Aguirre, whose bifurcated trial will now turn to the penalty phase, in which prosecutors are seeking the death penalty. The penalty phase was to begin on November 27. Young Fernandez was found unconscious with a cracked skull, three broken ribs and BB pellets embedded in his lung and groin. Criminal charges have been filed against Los Angeles County social workers to had allowed the boy to remain in his mother’s home “despite six investigations of the mother and numerous reports of the boy’s injuries.” Some sheriff’s deputies who visited the home multiple times but failed to remove the child have been disciplined as well, according to a report on the verdict in the *Los Angeles Times* on November 15.

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INDIANA – The Court of Appeals of Indiana affirmed the conviction of Stanley Williams for “failing to warn persons at risk that he is a dangerous communicable disease carrier,” a Level 6 felony. Despite documentary evidence that Williams had repeatedly been counseled after testing HIV-positive that he had such a statutory duty, and his defense attorney’s stipulation at trial to admit the documentation, Williams, who was also convicted on a charge of aggravated battery for transmitting HIV to his girlfriend through unprotected sexual intercourse, argued on appeal that the state had failed to prove that he was the same Stanley Williams whose counseling was proven through the documentation, or that he knew that that he had a legal duty to warn his girlfriend about his HIV-status. The court found that the evidence admitted at trial was sufficient to convict Williams beyond a reasonable doubt of knowingly failing to warn. *Williams v. State*, 2017 Ind. App. LEXIS 565, 2017 WL 4873046 (Oct. 30, 2017). The evidence at trial showed that Williams never affirmatively told his girlfriend that he was HIV-positive and they had unprotected sex numerous times. It was only after Williams developed Kaposi sarcoma lesions on his back (which he told her were skin cancer) that he suggested they use prophylactics, “but despite this gesture,” wrote Judge Robb, “never began using prophylactics. Even then, it was not until some time later that the girlfriend discovered the medical discharge papers from William’s KS diagnosis and discovered his HIV-status. She immediately went to a hospital emergency room for testing, and was found to be HIV-positive.”

IOWA – A Keokuk, Iowa, jury convicted Jorge Sanders-Galvez of first degree murder on November 3 in the death of Kedarie Johnson, a “gender-fluid” teenager who was tortured and shot to death during 2016, leading to a

lengthy investigation that identified two men charged in the case. A trial of the second defendant, Jaron Purham, has yet to occur. The two men killed Sander-Galvez, who was dressing as a woman at the time, when they discovered male genitals during sexual activity. The case would likely qualify for prosecution as a hate crime, but Iowa’s legislature has refused to add gender identity to the state’s hate crimes law, failing to pass a bill that would have done so last year. Attorney General Jeff Sessions, taking note of the case, assigned a Justice Department hate crimes specialist to assist the prosecution, and the Justice Department may yet file hate crime charges, depending how the sentencing turns out. Sanders-Galvez is eligible for a life sentence under state law. *New York Times*, Nov. 3.

MINNESOTA – The Minnesota Court of Appeals upheld the conviction of Christopher Lee Holloway for criminal sexual conduct with a 14-year-old boy who had represented to Holloway that he was 18. *State v. Holloway*, 2017 Minn. App. LEXIS 227 (Nov. 20, 2017). The court affirmed the trial court’s rejection of Holloway’s claim that the state criminal statutes in question violated his right to due process and equal protection. Judge Kevin Ross wrote for the unanimous panel. Holloway met J.D. “on a social-media application designed to facilitate meetings between homosexual men,” wrote Ross. They exchanged messages, with J.D. representing himself as 18 years old. At the time Holloway was 44. “Holloway went to J.D.’s house in the middle of the night in December 2014” and they had sex in J.D.’s basement bedroom. Holloway returned the next night for a second round, but “J.D.’s mother heard noises and walked in,” catching them *in flagrante delicto*. Of course, had J.D. actually been 18, as Holloway purported to believe, no law would have been broken. But Minnesota’s

criminal statute allows a mistake-of-age defense only if the defendant is no more than 120 months older than the victim when the victim is under 16. The court rejected Holloway’s argument that there is a fundamental constitutional right to present a mistake-of-age defense, asserting, “The mistake-of-age defense has no roots in age-based sexual assault trials because knowledge of age has never been an element” of the offense. Statutory rape is a strict liability crime. Thus, the court evaluated Holloway’s due process claim using the deferential rationality test, and observed that the Minnesota Supreme Court “long ago foreshadowed our result today” in *State v. Morse*, 281 Minn. 378 (1968). Judge Ross did note that his court had recently allowed a mistake-of-age defense in a sexual solicitation of a minor case where the solicitation occurred on-line, the victim claimed she was sixteen or older, and the parties had never met face-to-face before the defendant was arrested. But this case was distinguishable, since it involved actual sex, not solicitation, and, of course, Holloway met J.D. twice . . . As to the equal protection claim, which was specifically aimed at the 120-month rule, Judge Ross found that the legislature’s intent to “afford the most protection to the youngest victims” was rationally served by this rule. “The younger the potential victim,” wrote Ross, “the smaller the segment of that class of offenders who can avoid conviction using the mistake-of-age affirmative defense. Reducing the number of potential offenders who can avoid conviction in this manner necessarily affords greater protection to the youngest potential victims.” Thus, he concluded, the 120-month distinction was “neither arbitrary nor fanciful,” but rather it is “manifestly rational.” Furthermore, as Holloway’s counsel acknowledged at trial, “providing greater protection to younger potential victims is a legitimate legislative objective,” and the court concluded that the challenged statutory provision

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“furtheres the statutory objective.” Thus, the district court “did not abuse its discretion by failing to instruct the jury that the defendant’s knowledge of the victim’s age is an element of criminal sexual conduct,” and the challenged statutes “do not violate due process or equal protection by limiting the use of the mistake-of-age defense.” Holloway’s counsel on appeal are Max A. Keller and Lexie D. Stein, of Keller Law Offices, Minneapolis.

NEW JERSEY – The *Courier News (Bridgewater, NJ)* reported December 1 that Morris James May pled guilty to assault charges in a pepper-spray attack against a transgender person, Allison Kolarik, who was attempting to engage May in conversation prior to an anti-hate rally in Bridgewater. May received a 90-day suspended sentence, a \$250 fine, a requirement to serve 100 hours of community service, and an order to undergo a mental health evaluation, pursuant to a plea agreement approved by the municipal court. Kolarik alleged that May was harassing volunteers making signs for the rally, stating, “I hate liberals. I hate you people. You’re trying to take away our rights.”

SOUTH DAKOTA – Chief U.S. District Judge Jeffrey L. Viken overruled the federal prosecutor’s objection to proffered expert testimony by Dr. Ilan H. Meyer, the Williams Distinguished Senior Scholar of Public Policy at The Williams Institute at UCLA Law School, in support of the defense of Andries Snyman, a man who was caught in a U.S. government internet sting operation apparently targeted at gay men who use dating apps to meet other men. *United States v. Snyman*, 2017 U.S. Dist. LEXIS 196963 (D.S.D., Nov. 30, 2017). This case is typical of such operations. A federal agent posing as a person interested in making contact for sexual purposes through such an

app establishes an on-line relationship, seeking to lure somebody into making a date to meet a minor in person, and then makes an arrest. As described by Judge Viken, “The government charged an ‘attempt’ offense. It is consequently the government’s burden to prove beyond a reasonable doubt defendant intended to engage in sexual activity with the fictional youth with whom he was communicating and he knowingly and willfully took some action that was a substantial step toward bringing about or engaging in sexual activity. The court draws this language from the court’s jury instructions settled by the parties at the pretrial conference and the Model Jury Instructions for the District Courts of the Eighth Circuit.” In this case, defendant’s theory is “he did not form the requisite intent because, rather than intending to engage in sexual activity, he intended to meet with the 14-year-old boy to educate him on the dangers of encountering older men on gay dating applications and help him cope with the stress shared amongst the marginalized gay community.” This was what Snyman said upon his arrest to law enforcement officers. “Defendant’s intent is a crucial element of the charge the government brought,” wrote Judge Viken. “Dr. Meyer’s proposed testimony provides a framework for understanding the defense theory and may assist the jury in evaluating the defendant’s intent.” The judge found that the proposed evidence “is relevant and will not prejudice a party or confuse the jury.” Mr. Meyer’s credentials, gleaned from his biographical page on the Williams Institution website, includes graduate degrees from the New School for Social Research in New York (M.A.) and Columbia University (Ph.D.). Prior to joining UCLA in 2011, Dr. Meyer was Professor of Clinical Sociomedical Sciences and Deputy Chair for MPH Programs at Columbia’s Mailman School of Public Health, and has published extensively in peer reviewed journals and books. His background

is in social psychology, psychiatric epidemiology, and sociomedical sciences in public health, with areas of research including stress and illness in minority populations and, in particular, the relationship of minority status, minority identity, prejudice and discrimination and mental health outcomes in sexual minorities and the intersection of minority stress related to sexual orientation, race/ethnicity and gender. Unfortunately, Judge Viken’s opinion does not go into any detail about the testimony that the defense proposed to elicit from Dr. Meyer, but in light of his sterling credentials, it should not be surprising that the court found that the *Daubert* standards for admission of expert testimony had been satisfied in this case. Snyman’s defense counsel is Thomas M. Diggins of the Federal Public Defender’s Office in Rapid City, S.D.

TEXAS – A Travis County jury has convicted JonCasey Rowell of murdering Monica Loera, a transgender woman. Rowell claimed he had acted in self-defense, having arranged an assignation with Loera on-line and then claiming she had threatened him with a baseball bat, but the jury was not persuaded, deliberating for four hours to reach its unanimous verdict on a first-degree felony charge that carries a possible term of 5-99 years, according to a November 6 report in the *Austin American-Statesman*. * * * On November 28, a grand jury in San Antonio returned a manslaughter indictment against Mark Daniel Lewis for the murder of Kenneth “Kenne” McFadden, a transgender woman “whose body was found April 9 floating in the San Antonio River” along the River Walk in downtown San Antonio. A news report in the *San Antonio Express-News* (Nov. 29) identified McFadden as “a black transgender woman who was in the process of transitioning.” Lewis is charged with recklessly causing

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McFadden's death by "pushing" or "causing the complainant to enter into a body of water, or by knowing that the complainant was impaired by alcohol, failing to assist the complainant from the body of water, which acts and omissions caused the complainant's death." Manslaughter is a second-degree felony in Texas, with a potential sentence of up to 20 years.

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ARKANSAS – A *pro se* inmate, Eddie Scott, alleged that he was denied early release from a parole violation because of race (African-American) and because he is gay and HIV+. Although this is not mentioned in the decision, his complaint found in PACER also alleges parole discrimination because he "cross-dresses." In *Scott v. Anthony*, 2017 U.S. Dist. LEXIS 178869 (E.D. Ark., October 30, 2017), U.S. District Judge Billy Roy Wilson dismissed Scott's claim under 42 U.S.C. § 1983 because, under *Heck v. Humphrey*, 512 U.S. 477, 486-7 (1994), his suit was a challenge to his continued confinement and thus had to be brought as a *habeas corpus* action. The rules of *habeas* cannot be circumvented by styling an action under § 1983. *Preiser v. Rodriguez*, 411 U.S. 475, 484, 499 (1973). Judge Wilson counted a strike under the Prison Litigation Reform Act and certified that an appeal would be frivolous, but he dismissed the case without prejudice. *William J. Rold*

ILLINOIS – Transgender inmate Anthony Johnson has filed over 60 grievances during her incarceration in federal prison in Illinois. She has at least two federal lawsuits pending. In *Johnson v. Kruse*, 2017 U.S. LEXIS 143138 (S.D. Ill. September 5, 2017), U.S. District Judge J. Phil Gilbert allowed her to proceed on numerous theories about denial of her civil rights.

It is reported and "recommended to anyone seeking a better understanding of the day-to-day life of transgender people in custody" in *Law Notes* (October 2017 at page 424). The instant case, *Johnson v. Robinson*, 2017 WL 5288190, 2017 U.S. Dist. LEXIS 187118 (S.D. Ill., November 13, 2017), also before Judge Gilbert, deals with events over 4½ months in 2013-4. Magistrate Judge Reona J. Daley recommended dismissal of all claims on various grounds, and Judge Gilbert adopted the report after reviewing *do novo* those parts to which Johnson objected. After affirming the recommendation that certain claims be denied for failure to exhaust administrative remedies under the Prison Litigation Reform Act (which are not reviewed here), Judge Gilbert turns to whether defendants were deliberately indifferent to Johnson's safety by her cell assignments during the period at issue and whether they denied her Equal Protection of the laws. During much of this time, Johnson was housed alone in a multiple inmate cell. When she did have cellmates, she was not assaulted, but she alleged she was threatened and that officials knew her cellmates belonged to gangs that believed in assaulting transgender inmates. Judge Gilbert found no jury question on these arguments. There was no evidence to show that the named defendants knew of the gang membership or its propensities. After Johnson was threatened, she was moved to isolation for her own protection, then to a different unit. No jury could find this behavior over these months to meet the subjective standard of deliberate indifference to Johnson's safety, because there was "no evidence that the defendants were subjectively aware of any specific risk posed by the inmates proposed to share a cell with Johnson," citing *Babcock v. White*, 102 F.3d 267, 270 (7th Cir. 1996). Johnson relied on "class of one" Equal Protection theory for her transgender discrimination claims, but Judge Gilbert affirmed the

recommendation that the defendants be granted qualified immunity, because the law on "class of one" theory as applied to single-celling transgender inmates was unsettled in 2013-4 and remains so. Judge Gilbert questions its applicability to cell assignments on these facts, citing *Thayer v. Chiczewski*, 705 F.3d 237, 254 (7th Cir. 2012); and *Del Marcelle v. Brown Cty. Corp.*, 680 F.3d 887 (7th Cir. 2012) (en banc). An appeal has been noticed to the Seventh Circuit. Johnson is represented by Rynearson Suess, et al., St. Louis. *William J. Rold*

MONTANA – Pro se inmate Michael Henry Anderson was beaten up on several occasions and his shoulder dislocated when other inmates were told by officers that he was gay and a child molester. On screening, U.S. Magistrate Judge John Johnston allows Anderson to proceed on a protection from harm claim, with leave to amend on other issues, in *Anderson v. Delten*, 2017 U.S. Dist. LEXIS 185300 (D. Mont., November 8, 2017). Anderson has a "reasonable opportunity" of prevailing on the merits of his protection from harm case [note: this is not the standard for screening under 28 U.S.C. § 1915 – which refers to dismissing actions that are frivolous, malicious, fail to state a claim, or seek solely monetary relief from a defendant who is immune – nevertheless, Judge Johnston finds that Anderson meets the higher standard of "reasonable opportunity" to prevail applicable to ordering defendants to reply to this claim under 42 U.S.C. § 1997e(g).] Judge Johnston does not cite *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (usually cited in protection from harm cases involving deliberate indifference to safety) or *Hudson v. McMillan*, 503 U.S. 1, 6-7 (1992) (if staff deliberately set Anderson up for assault). Instead, he relies oddly on *Helling v. McKinney*, 509 U.S. 25, 33 (1992), which involved protecting inmates from danger from secondary

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environmental tobacco smoke. The issue here is far more individualized. Judge Johnston also relied on *Valandingham v. Bojorquez*, 866 F.2d 1135, 113839 (9th Cir. 1989) (claim that prison officials labeled prisoner-plaintiff a snitch for the purpose of subjecting him to life-threatening retaliation by other inmates actionable under section 1983). Judge Johnston found that Anderson's claims about medical treatment were too generalized to proceed and that his claims of violation of due process for punishing him for fighting did not violate the Fourteenth Amendment, citing *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Anderson was given the choice of proceeding on the protection from harm case alone or repleading the entire complaint. In either case, eventually the officer defendants will have to respond to the allegations. *William J. Rold*

NEW MEXICO – This case illustrates how a federal judge inclined to assist a *pro se* plaintiff can do rather remarkable things. *McNary v. Corr. Corp. of Am.*, 2017 U.S. Dist. LEXIS 195671 (D.N.M., November 28, 2017), was originally filed in New Mexico state court, but it was removed on federal question jurisdiction by defendant Corrections Corporation of America. District Judge M. Christina Armijo accepted without further inquiry the *in forma pauperis* status granted *pro se* plaintiff Dominique McNary by the state court. McNary claimed her rights under HIPAA, the United States Constitution, and New Mexico law were violated when her HIV status was disclosed to hundreds of inmates against her wishes, subjecting her to harassment and threats, and eventually leading to physical confrontation and “torture.” She sued the Corrections Corporation of America [“CCA”] and Corizon Medical [“Corizon”], who provided medical services at the institution. Screening the complaint under 28 U.S.C. § 1915, Judge Armijo dismissed the HIPAA

claim (as nearly all federal courts have done), as not providing a private cause of action, citing *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010). Nevertheless, Judge Armoji found that McNary had a constitutional right to privacy in her HIV information, citing *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994); and *Perkins v. Kansas Dep’t of Corr.*, 165 F.3d 803, 810-11 (10th Cir. 1999); as well as out of circuit cases: *Doe v. Delie*, 257 F.3d 309, 311 (3rd Cir. 2001); and *Powell v. Schriver*, 175 F.3d 107, 110 (2d Cir. 1999). Since CCA and Corizon are private entities acting under color of state law, they cannot be held liable unless a pattern or practice or some policy violation is alleged, citing *Monell v. New York City Dep’t of Soc. Serv.*, 436 U.S. 658, 691 (1978). McNary, however alleged that the disclosures were a violation of the defendants’ policies, and Judge Armijo dismissed the § 1983 claims against CCA and Corizon on this basis. Many judges would stop there and send the state law claims back to state court. However, the disclosures were made by people, at least two of whom were identified in the complaint but not named as defendants. Judge Armijo deems the complaint amended to include them as defendants: “[I]n a *pro se* case when the plaintiff names the wrong defendant in the caption or when the identity of the defendants is unclear from the caption, courts may look to the body of the complaint to determine who the intended and proper defendants are,” she wrote, citing *Trackwell v. United States Gov’t*, 472 F.3d 1242, 1243-44 (10th Cir. 2007). Thus, McNary’s unit manager and a corrections officer responsible for some of the disclosures are added as defendants, *by the court* [emphasis by this writer]. Judge Armijo also allows McNary to keep her New Mexico tort claims in the federal case. Since under some of the claims, unlike under § 1983, *respondeat superior* may apply (Judge Armijo does not

elaborate), Corizon is also to be served as a defendant on the state tort claims. *Saludos! William J. Rold*

NEW YORK – This is the kind of decision that makes a reviewer’s blood boil. *Pro se* inmate Moise Blandon was bitten in the face by another inmate while they were both housed in a prison psychiatric unit. Blandon pleaded that the biter was well-known to be HIV-positive and had Hepatitis-C and that he was placed under “keeplock” restrictions because of assaultive tendencies. Blandon sustained series injuries from the bite, leaving a scar and requiring regular testing for the diseases. He sued the superintendent, the officers on duty at the time the biter’s cell was left unlocked (and who allegedly falsified records and tried to “cover-up” the event); and he listed three “John Does” who participated but whose identity was unknown at filing. In *Blandon v. Capra*, 2017 WL 5624276 (S.D.N.Y. November 20, 2017), U.S. District Judge Kenneth M. Karas allowed Blandon to proceed *in forma pauperis* and directed service of the complaint. He also issued an Order in February of 2017 that Corrections assist Blandon with identifying the “John Does,” under the authority of *Valentin v. Dinkins*, 121 F.3d 72, 76 (2d Cir. 1997). In April, Blandon wrote to Judge Karas that Corrections officials were not helping him find the “Does” and that the refusal of help “inexcusably hampers Plaintiff’s ability to . . . fil[e] a timely Amended Complaint.” There was no response, and defendants moved to dismiss under F.R.C.P. 12(b) (6) for failure to exhaust administrative remedies and failure to state a claim under the Eighth Amendment. Judge Karas wrote a 9000+-word opinion with 19 footnotes that challenged this reader to follow. Karas presented extensive discussion of exhaustion under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) [“PLRA”], and whether the

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Supreme Court's three exceptions to exhaustion in *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016), were the only exceptions under the Second Circuit's subsequent decision in *Williams v. Priatno*, 829 F.3d 118, 122-3 (2d Cir. 2016), interpreting *Ross*. Specifically, he noted that the Circuit (and the Supreme Court) appear to have left open whether the inmate's mental state could be so impaired that grievance remedies were not in fact "available" (a situation Blandon tried to argue when he said the process was "flawed" and "too complicated" for him to follow). Judge Karas cited *Galberth v. Washington*, 2017 WL 3278921, at *8 (S.D.N.Y. July 31, 2017) ("The *Ross* Court did not opine on . . . whether an inmate's mental health condition can cause administrative-remedy unavailability. Nor is this [c]ourt aware of any court that has considered this precise question in light of *Ross*'s clarification of PLRA availability.") Judge Karas ultimately denied dismissal on exhaustion grounds, finding nothing in the face of the complaint to justify the affirmative defense (since Blandon had filed a grievance), and defendants' assertions about appellate exhaustion were appropriate for consideration on summary judgment, not on a motion to dismiss. Judge Karas then turned to the "personal involvement" of the superintendent and found insufficient allegations of involvement in the incident to sustain a cause of action under either direct or supervisory liability. As to the two officers named, Judge Karas found insufficient pleading of the second arm of *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (subjective deliberate indifference to serious danger). The complaint (and grievance, which Judge Karas considered, reading allegations in Blandon's favor), fails to show that these officers knew the biter was ill or that they were more than negligent in leaving his cell unlocked on the night of the incident. Judge Karas refuses to accept that the risk was "obvious" under *Farmer*, 511 U.S. at 842; and

Walker v. Schult, 717 F.3d 119, 125 (2d Cir. 2013), writing that the mix of mental health and security employees in the unit did not necessarily mean that the risk was "well-known" to these officers or that they were familiar with the biter's keeplock orders. Judge Karas also declined to accept the officers' attempts to cover-up the incident as circumstantial evidence of state of mind, writing that the officers' lying to mislead the investigation, while "questionable," could have been motivated by a desire to hide negligence, not deliberate indifference. [How about a jury question here?] Judge Karas suggests that Blandon plead with allegations about training and supervision and additional details about conditions and responsibilities on the unit. Judge Karas dismisses without prejudice, gives the Attorney General 14 days to comply with the *Valentin* Order to identify the "Does," and orders Blandon, still *pro se*, to file an amended complaint 30 days later. It is doubtful an experienced civil rights lawyer could pull that off. Judge Karas denied appointment of counsel. It is truly ironic that Judge Karas could find that mentally impaired Blandon's ability to navigate the prison grievance system is an open question, but his ability to navigate the federal courts (and this prolix opinion) is not. *William J. Rold*

PENNSYLVANIA – Ruling on a motion to dismiss under F.R.C.P. 12(b) (6), Senior U.S. District Judge Harvey Bartle III held that a transgender man identified as "I.Z.", representing himself *pro se*, had stated claims against the City of Philadelphia, the warden, and other executive and health administrators in civil rights claims in *I.Z. v. City of Philadelphia*, 2017 WL 4883156 (E.D. Pa., October 30, 2017). Upon arrival at the Riverside Correctional Facility for Women, I.Z. informed officials that he is male. After two nude searches by security personnel, who concluded that I.Z. was female, he was taken to a nurse,

who conducted a penetrative genital examination and concluded that I.Z. was female because he did not have a scrotum. He was told he was female "until he grows a dick" and subjected to other slurs. He was denied shoes, subjected to disciplinary action, and ultimately pepper-sprayed while shackled and handcuffed. Defendants claimed there were insufficient allegations to sustain liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). After surveying Third Circuit law on *Monell* liability, Judge Bartle concluded: "Plaintiff has alleged not the single action of a rogue prison staff member, but rather a coordinated effort which included prison staff at the supervisory level. These allegations are sufficient to state a claim of a municipal policy or practice under *Monell*." Defendants also plead lack of personal involvement, but Judge Bartle found that their argument "misses the mark." Noting that a municipality can act only through its employees, Judge Bartle found that I.Z.'s allegations were sufficient to state a claim of official policy or practice regarding search and classification of transgender inmates, citing *Hill v. Borough of Kutztown*, 455 F.3d 225, 245 (3d Cir. 2006); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990). Since I.Z. alleged that improper searches were occurring as a matter of course, Judge Bartle also allowed a claim of lack of training to go forward under *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). In summary, I. Z. will be permitted discovery on all of his federal claims. Kudos to I.Z. for getting this far on his own; now is the time for assistance of counsel. *William J. Rold*

PENNSYLVANIA – This opinion primarily concerns under what circumstances an inmate can obtain an extension of time to obtain discovery when facing a motion for summary judgment. Jeremy V. Pinson, *pro se*, a transgender woman, successfully

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obtained an extension of time to acquire opposing affidavits under F.R.C.P. 56(d) in *Pinson v. United States*, 2017 U.S. Dist. LEXIS 184078 (M.D. Pa., November 7, 2017). U.S. District Judge Sylvia H. Rambo found that Pinson (who is suing for an injunction seeking sex reassignment surgery and for damages for failure to protect her from self-harm from a razor blade purposely left in her cell) needed more time to obtain the statement of her former cellmate (now in another prison) because officials were not cooperating with her efforts to correspond with the former cellmate. The cellmate's information allegedly contradicted official accounts about the blade. Judge Rambo found that leave should be granted liberally, particularly when the missing information is wholly in control of the party seeking summary judgment, citing *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984) and *Malouf v. Turner*, 814 F. Supp. 2d 454, 459-60 (D.N.J. 2011). An expert affidavit (psychologist Richard Samuels) was proffered to contradict the defendants' medical testimony about Pinson's treatment. Judge Rambo granted an additional 30 days for the affidavits and 60 days for opposition papers. She also ordered Corrections to allow Pinson to correspond with her former cellmate on the limited computer linkage available to federal inmates. She also denied preliminary injunctive relief on various claims, because the relief sought was premature, did not allege irreparable injury, or had nothing to do with the underlying claims in this lawsuit. Appointment of counsel was denied without prejudice. *William J. Rold*

SOUTH DAKOTA – Last Summer, U.S. District Judge Karen E. Schreier dismissed with leave to amend *pro se* transgender inmate Cody Ray Caskey's civil rights complaint about medical treatment in *Caskey v. Leave*, 2017 U.S. Dist. LEXIS 117815 (D.S.D., July 27, 2017), reported in *Law Notes*

(September 2017 at page 370). Now, in *Caskey v. South Dakota State Penitentiary*, 2017 WL 5198191 (D.S.D., November 9, 2017), Judge Schreier screens Caskey's new complaint and allows her to proceed. Caskey had been taking "street" hormones since her teens prior to her incarceration five years ago, since when she has been denied hormones. She complains of "severe suicidal tendencies and severe headaches," which she has repeatedly reported. She alleges that prison officials have made no attempt to treat her gender dysphoria. After her first lawsuit, the prison physician recommended that Caskey see an endocrinologist, but she is told that the request was either "denied" or continuously "under review." Caskey also alleges that the warden has participated in the denials of medical referrals in retaliation for her prior lawsuit. [Note: While amended complaints are usually considered to supersede prior complaints, here Judge Schreier combines the two complaints, since the second one lacks a "request for relief," citing *Kirr v. N.D. Pub. Health*, 651 F. App'x 567, 568 (8th Cir. 2016) (amendment "intended to supplement, rather than to supplant, the original complaint," should be read together with original complaint as plaintiff's complaint).] Judge Schreier found that Caskey stated a claim for denial of access to medical care, distinguishing *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015), where summary judgment was upheld against a prisoner who claimed to be transgender but who was not so diagnosed, making the dispute merely one of differing opinions. Here, access to specialist diagnosis is at issue for Caskey, who claims a "well documented" history of gender dysphoria and denials of continued medication and the specialist referral. Judge Schreier also found that Caskey's allegations that the warden personally retaliated against her because of her prior litigation survive screening. This is another case of an Eighth Circuit district

judge trying to distinguish unfavorable circuit precedent for transgender prisoners, as described in the *Law Notes* discussion of Caskey's first complaint. *William J. Rold*

WISCONSIN – In *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015), the Seventh Circuit found a cause of action based on what is colloquially known as "verbal abuse plus" – namely, when an inmate is subjected to verbal abuse that is itself so outrageous as to constitute a serious tort or subjects the inmate to risks to his or her safety that amount to deliberate indifference. *Rausch v. Bortz*, 2017 U.S. Dist. LEXIS 185013 (W.D. Wisc., November 8, 2017), tests the limits of this civil rights violation. Jonathan Rausch, *pro se*, was approached by correctional officer Brandon Bortz, who asked about Rausch's green hat and said: "probably used [it] to wipe semen off [your] celly's stomach." Rausch filed a complaint under the Prison Rape Elimination Act, and Officer Bortz was disciplined. Rausch was later transferred to another medium security prison and sued, claiming he was afraid of retaliation for complaining about an officer at the previous prison and risked assault at the new prison for the comments at the old prison that suggested that he was gay. U.S. District Judge William M. Conley dismissed the case on screening because there had been no retaliation and no assaults, and Rausch's fears were not actionable under the circumstances. He found the single instance of "simple verbal harassment" not enough "by itself" to state a cause of action, even in light of *Beal*, citing *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). "However offensive and deserving of discipline, therefore, Bortz's lone comment fails to implicate plaintiff's constitutional rights." The absence of allegations of actual retaliation or assault or their reasonable likelihood was fatal to Rausch's claim. *William J. Rold*

PRISONER / LEGISLATIVE

LEGISLATIVE & ADMINISTRATIVE

CONGRESS – Pending bills include: HR 3222, the Do No Harm Act (lead sponsor, Rep. Joseph P. Kennedy (D-Mass), which would make the Religious Freedom Restoration Act inapplicable to federal laws (or implementation of laws) that protect against discrimination or that promote equal opportunity, including the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family Medical Leave Act, EO 11246 (federal contractors), the Violence Against Women Act, and the Department of Housing & Urban Development’s published rules entitled “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity.” The explicit purpose is to ensure that federal RFRA cannot be used as a defense in a federal civil rights case. HR 3273, the LGBT Data Inclusion Act (leader sponsor, Rep. Grijalva (D-Ariz), intended to address reports that the Trump Administration had removed questions about sexual orientation or gender identity from various federal demographic surveys, including those carried out by the Census Bureau. HR 1515, the Juror Non-Discrimination Act of 2017 (lead sponsor, Rep. Davis (D-Calif.), which would add sexual orientation and gender identity to the current prohibition of discrimination in jury service in the judicial code, which now covers race, color, religion, sex, national origin, or economic status.

UNITED STATES ATTORNEY GENERAL – Attorney General Jeff Sessions issued a memorandum to “all components” of the Justice Department on November 16, seeking to reign in the practice, which became common in prior administrations, to issue “Guidance” documents that, in Sessions’ view, went too far into legislative action. Without his getting into specific

“Guidance” documents that would merit this criticism, from the language he employed it was clear that Obama Administration Guidance documents issued by the Justice Department concerning discrimination because of gender identity or sexual orientation were among those he was targeting, most specifically the “Guidance” concerning the rights of transgender public school students under Title IX, which the Trump Administration “withdrew” last spring, knocking Gavin Grimm’s Title IX case off the Supreme Court’s hearing calendar and undermining a determined effort by the Education and Justice Departments during the Obama Administration to get public school systems to adopt policies respecting the gender identities of students. Wrote Sessions: “Effective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local and tribal governments).” Among other things, he specified that guidance documents “should not be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation,” and guidance documents “should not use mandatory language such as ‘shall,’ ‘must,’ ‘required,’ or ‘requirement’ to direct parties outside the federal government to take or refrain from taking action, except when restating – with citations to statutes, regulations, or binding judicial precedent – clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.”

UNITED STATES SECRETARY OF STATE – *Huffington Post* (Nov. 20) reported that Secretary of State Rex

Tillerson had said in a statement released to mark Transgender Day of Remembrance that: “Transgender persons should not be subjected to violence or discrimination and the human rights they share with all persons should be respected.” This was noted as apparently contradictory to the views of the Justice Department, as Attorney General Sessions has withdrawn the Obama Administration’s position that transgender people are protected against discrimination under federal sex discrimination laws, in a formal written directive issued in October.

DELAWARE – The Delaware Department of Education has published a proposed amendment to Regulation 225, providing guidance to school districts and charter schools to include transgender students among those protected against discrimination. The measure has to go through an administrative adoption process to become a legally binding rule. *Delaware State News*, Nov. 20.

ILLINOIS – The River Forest District 90 school board the River Forest Education Association agreed upon a collective bargaining agreement, which was ratified by the school board on November 20, which adds a non-discrimination policy that covers sexual orientation and gender identity in all of the district’s dealings with teaching staff covered by the CBA. *Forest Leaves*, Nov. 30.

INDIANA – The Shelbyville City Council, meeting on November 20, amended the city’s fair housing ordinance to reflect federal standards, including modifying the definition of “family” to include people “regardless of sexual orientation, gender identity, or marital status.” *Shelbyville News*, Nov. 21.

LEGISLATIVE

KANSAS – City Commissioners in Salina, Kansas, voted 5-0 on November 6 to add sexual orientation and gender identity to the list of forbidden grounds of discrimination in the city personnel manual, which codifies employment policies for city workers. At the same time, a unanimous vote approved a resolution adding those categories to a ban on discrimination in access to city facilities and services. *Salina Journal*, Nov. 7.

MAINE – The Portland School Board unanimously approved a comprehensive policy on the rights of transgender students on November 28, acting on the guidance of the Maine Human Rights Commission. The school superintendent, Xavier Botana, said the district decided to act after the Trump Administration withdrew the Obama Administration’s Title IX guidelines. According to an article previewing the guidelines published on November 24 in the *Portland Press Herald*, “Of the roughly half-dozen school policies that exist in the state, the Portland version most closely follows the guidance of the Maine Human Rights Commission.” It will require schools to provide facilities access consistent with gender identity of students, use student’s preferred name and pronouns, and taking the student’s side if parents disagree with these steps. The guidance is broadly worded to encompass all variants of gender and gender identity, not just transgender. The article reported that the Portland public schools have “transgender students at all school levels, from elementary to high school,” including an 8-year old student who told a school social worker two years ago that he was going to transition to a female identity, and had known his true identity since age 2. (We are using “his” and “he” in this article because the student had not begun to transition.)

NEW YORK – Oswego County has agreed to drop an exclusion of transgender medical and mental health care coverage from its employee health plan, under pressure from the New York State Law Department, whose investigation found that the county was in violation of Title VII of the Civil Rights Act of 1964 and the New York Human Rights Law. Although neither of those statutes expressly forbids gender identity discrimination, federal courts have increasingly found that such discrimination violates the ban on sex discrimination under Title VII, and Governor Andrew Cuomo directed the New York State Division of Human Rights to adopt a similar rule under the state’s sex discrimination ban, which is yet to be tested in the courts. *BloombergBNA Daily Labor Report*, 222 DLR 18 (Nov. 20, 2017).

WISCONSIN – The City Council in De Pere voted November 21 to adopt a non-discrimination ordinance that includes coverage for sexual orientation, gender identity and gender expression, and goes beyond typical municipal ordinances by expressly taking on issues of domestic violence, sexual assault, and stalking as forms of discrimination – one of four municipalities in the state that have done so. All employers in the municipality must comply with the new ordinance as of March 1, 2018. In the past, the Wisconsin legislature has reacted to municipal civil rights activity by attempting to reign in local legislating on such topics. Whether it will take similar action in response to the De Pere ordinance is a matter of some speculation. *Mondaq*, 2017 WLNR 37172678 (Nov. 30).

LAW & SOCIETY NOTES

WORLD AIDS DAY PRESIDENTIAL PROCLAMATION – As has become customary prior to December 1, the President of the United States issued a

proclamation on November 30, titled “President Donald J. Trump Proclaims December 1, 2017, as World AIDS Day.” The proclamation, several hundred words in length, provides a history of the AIDS epidemic without ever mentioning the groups particularly affected and thus, perforce, omitting any mention of gay people. This sounds curiously like the Holocaust Memorial proclamation Trump issued last spring that managed to discuss the Holocaust without mentioning Jews. The model for such proclamations is undoubtedly the infamous Soviet Encyclopedia, which would be revised from one edition to the next to exclude from historical memory individuals and events of which the ruling party disapproved. Par for the course in this administration . . .

HUMAN RIGHTS CAMPAIGN’S 2018 CORPORATE EQUALITY INDEX,

released in November, reported a record number of U.S. major companies and law firms have earned the highest score on an index taking account of formal policies and practices. The top score of 100% went to 609 businesses and firms, a new record, up from 517 last year, a single-year increase of 18 percent. Perhaps the most notable advance in recent years has been the adoption of corporate policies on gender identity, including making provision in employee benefit plans to cover transition costs for employees. 83 percent of Fortune 500 companies now ban gender identity discrimination, up from just 3 percent in 2002, and close to that number have adopted supportive inclusion guidelines for employees who are transitioning, most including coverage for transitional medical care under their employee benefit plans. The CEI Report indicated that 106 major businesses have become official endorsers of the Equality Act, a bill pending in Congress that would add sexual orientation and gender identity to the forbidden grounds of discrimination under federal law.

LEGISLATIVE / INTERNATIONAL

INTERNATIONAL NOTES

AUSTRALIA – The full bench of the Family Court ruled on Nov. 30 that transgender minors will no longer have to go to court to get permission for hormone therapy. The court ruled that “young people who experience gender dysphoria and want to undergo hormone treatment would no longer need the approval of this court,” reported *The Age*; “Until this ruling, Australia was the only country in the world that required court involvement in stage 2 hormone decision making.”

BAHRAIN – The High Civil Appeals Court has rejected a petition from a transgender man to have legal recognition of his gender identity. The man, who has gone through gender transition and appeared at the hearing wearing a beard and male dress, had, according to *Gulf Daily News* (Nov. 26), “spent around BD30,000 on gender reassignment surgery in Europe, and had to give up her job in her quest to be a man.” A further appeal to the nation’s highest court lies ahead.

BERMUDA – Although the nation’s highest court has ruled in favor of marriage equality, determined opponents, led by Minister of Home Affairs Walton Brown, have proposed a Domestic Partnership Bill that would extend legal right of marriage but not the title to same-sex couples and different-sex couples (who sought a legally binding relationship but not marriage as such). Brown stated that under his proposal those same-sex couples who have married after the court’s decision will “not have this designation taken away from them,” but upon enactment of the DP Bill, same-sex couples would not have the option to marry. After a two week “public

consultation” period, the proposal was formally introduced into the legislature.

BOLIVIA – It was reported that the Constitutional Court has struck down part of a 2016 law that was intended to provide equal rights for transgender people. While upholding provisions governing documents, name and appearance changes, the court held that the law could not actually change a person’s gender for purposes of marriage, and declared unconstitutional a provision purporting to extend to transgender people “all fundamental political, labor, civil, economic, and social rights.” A legislator who had filed a challenge to the law claims that as a result of the decision all marriages involving transgender people must be annulled. Awaiting further developments . . . (Based on an on-line report posted by journalist Rex Wockner on Nov. 11.)

BOTSWANA – Human Rights Watch reports that the Lobatse High Court has ruled in *ND v. Attorney General of Botswana* that a transgender person was entitled to have official recognition of his gender identity through a change in his identity papers. Judge Nthomiwa Nthomiwa wrote, “Recognition of the applicant’s gender identity lies at the heart of his fundamental right to dignity. Gender identity constitutes the core of one’s sense of being and is an integral part of a person’s identity. Legal recognition of the applicant’s gender identity is therefore part of the right to dignity and freedom to express himself in a manner he feels . . . comfortable with.” The court noted the distress and discomfort experienced by the applicant when “he is required to explain intimate details of his life to strangers whenever he seeks access to routine services,” wrote Tashwill Esterhuizen, a lawyer with the Southern African Litigation Centre who reported on the opinion in the *Daily Maverick*. The court said that

“arbitrary interference or embarrassment and the intrusion of privacy faced by the applicant may be avoided or minimized by the state by allowing him to change the gender marker on his identity document.” Now the question is whether the government will acquiesce in this decision or seek review from a higher court. Generally, the government in Botswana has been very resistant to gay rights and has sought to appeal or evade pro-gay court opinions.

CANADA – On November 28, Prime Minister Justin Trudeau addressed the House of Commons in an emotional speech in which he apologized on behalf of the Canadian government and people for an anti-gay purge of the military and federal agencies that had taken place decades ago. The PM proposed to put some substance behind the apology by committing a fund of up to \$100 million (Canadian dollars) to compensate individuals for the disruption to their lives and careers as a result of the purge, which took place even after the nation’s sodomy laws had been reformed to legalize consensual adult same-sex activity. While many hailed the government’s action, some critics remarked that there was more work to be done, and Trudeau acknowledged in his speech that there were remaining restrictions on gay men donating blood and HIV criminalization that need to be addressed. * * * The Supreme Court of Canada heard oral argument beginning November 30 in Trinity Western University’s challenge to the refusal of some of the provincial law societies to grant accreditation to what would be Canada’s first private law school, a step that would prevent TWU’s graduates from admission to the bar in those provinces. The refusals were predicated on TWU’s requirement that students certify their agreement to a conservative Christian creed that condemns all sexual conduct outside of heterosexual marriage, implicitly

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mandating celibacy and secrecy for gay students. Canadian law has evolved over the past several decades to be strongly supportive of LGBT rights, with Canada moving to marriage equality more than a decade before the United States, and with the courts construing national civil rights law to ban sexual orientation discrimination by government and businesses. The judiciary has led the way in this, “reading in” the civil rights protection to charter provisions and laws that did not expressly contain it, and accepting constitutional equality claims in support of same-sex marriage before Parliament took steps to ratify those decision as national law. Thus, it is not surprising that press reports reflected the open hostility and skepticism of several members of the Court to TWU’s religious freedom claims during the oral argument. Justice Rosalie Abella asked, “Is there such a thing as a religious law school? Can a law school have a religion, and is it the right of the law school to have a religion no matter what its tenets? Have we gone so far? Can a law school be Jewish, Muslim, or Christian? Reported the *Vancouver Sun*’s reporter covering the oral argument, Ian Mulgrew, “TWU lawyer Robert Staley looked flummoxed.” “Whose charter rights is engaged?” asked Justice Abella. “The law school’s? Is there anything (in previous decisions) that says a law school has a religious right?” Unlike the U.S. Supreme Court, the Supreme Court of Canada evidently is willing to engage in extensive hearings, in this case over several days, in order to accommodate more than twenty “intervening” parties who seek to weigh in on the issues.

CHILE – At the end of November, the Constitution Committee of the Senate began debate on President Michelle Bachelet’s proposed marriage equality bill. Advance polling suggested that the measure was likely to pass the Senate by a narrow majority, but approval in the Chamber of Deputies was less certain.

EGYPT – Egypt has again arrested gay men and convicted them of “inciting debauchery” – which is the word Egyptian courts use to describe socializing between gay men, even where actual sexual conduct is not involved. Sixteen men were convicted and freed on bail while appealing their sentences. According to the Egyptian Initiative for Personal Rights (EIPR), at least 75 people have been arrested since an incident at which rainbow flags were raised at a concert in Alexandria on September 22. *BBC.com*, Nov. 28.

ESTONIA – A lesbian couple are seeking Supreme Court review of a circuit court decision that their U.S. marriage, celebrated in 2015, is not valid in Estonia, and their relationship cannot be recognized because they have not entered into a cohabitation agreement. Their attempt to enter into such an agreement was stymied in 2016, when several notaries refused to register their partnership, and they received a written statement from the Chamber of Notaries that a couple which has registered its marriage in a foreign country cannot enter into an additional cohabitation agreement in Estonia. The two women would like to be able to live together in Estonia, and an administrative court had at first been supportive, but the circuit court overturned the decision, according to a Nov. 23 article in the *Baltic Times*.

GERMANY – The Federal Constitutional Court has construed the constitutional guarantee of personal freedom to require the government either to allow the introduction of a third gender in official documents, or to dispense with gender identification in public documents entirely. The ruling came in a case brought by Vanja (identified only by one name), a German citizen born in 1989, contesting the legal requirement that every person be registered either as male or female. The *New York*

Times (Nov. 8) reported that the court said: “The assignment to a gender is of paramount importance for individual identity; it typically occupies a key position both in the self-image of a person and how the person is perceived by others. It also protects the sexual identity of those persons who are neither male nor female.” The court labeled as discriminatory the requirement that people declare themselves either female or male in formal registration with the state. In 2014, Vanja, who had been registered by their parents as female at birth, sought to change their sex designation from “female” to “inter/diverse,” but the registrar rejected their application, stating that such a designation was not legally recognized, and a local court rejected Vanja’s suit to overrule the registrar. The Constitutional Court’s ruling overrules the lower court and the registrar, and charges the state to correct the situation.

INDIA – The Supreme Court notified Air India that it was violating the law by refusing to accept an application for a flight attendant position from a qualified transgender woman. Shanavi Ponnusamy, who transitioned with gender confirmation surgery in 2014, submitted herself to the application process four times and did very well on the written tests, but each time was told that flight attendant positions were reserved for women and that Air India had no category for transgender applicants. The Court pointed out that it has previously recognized the existence of a “third gender” and that the nation’s laws do not allow discrimination on this basis. According to the latest census in 2011, the population of India is over 1.25 billion, with an estimated half a million transgender individuals. Ponnusamy’s counsel pointed out to the court that Air India actually suffers a shortage of flight attendants, with 400 vacant posts at present. *Hindustan Times*, Nov. 7; *EFE Ingles*, Nov. 6.

INTERNATIONAL / PROFESSIONAL

MALTA—The Equality Ministry is taking its own sweet time finalizing documents and publishing regulations to implement the legislature’s decision to allow same-sex marriages, reported *Times of Malta* on November 24. “Couples who have entered into civil unions cannot register their union as a marriage because the legal notice bringing into force a law enacted more than three months ago has not been published yet,” reported the *Times*. Government spokespeople urged patience, stating that the publication will take place “in a few weeks’ time.”

MEXICO – The gradual spread of marriage equality through the Mexican states continues apace. In November, there were reports that the Baja California state government had issued a decree that same-sex couples could marry with having to get a court order (called an “amparo”). Under a ruling of the Supreme Court of Mexico, same-sex couples who are denied the ability to get a marriage license under state law solely because of their gender are entitled to obtain an amparo from the courts, introducing an expensive administrative step, but state governments have been addressing the issue only gradually. If the reports out of Baja California are correct, it has become the 13th state out of 31, or possibly the 14th (reporting is scattered to some extent) to simplify matters, either through legislation or executive action. It was previously reported that local government officials in Chiapas have finally issued the required notices so that same-sex couples can marry without the need to seek an amparo, responding four months after the Supreme Court had issued a final ruling striking down the state’s ban on same-sex marriage. (Based on reporting by journalist Rex Wockner).

MOZAMBIQUE – The Constitutional Council has struck down a law that was used to stop the country’s LGBTQ association, Lambda, from being

registered. Even though criminal penalties for homosexual conduct were repealed last year, the government has persisted in refusing to accept registration of Lambda, citing a provision stating that organizations can be registered only if they benefit “the moral, social and economic order of the country and not offend the rights of third parties or the public good.” The United Nations Human Rights Council has criticized Mozambique for refusing to register Lambda since 2011. *equal-eyes.org*, Nov. 12.

NEPAL – A transgender woman and man have registered their marriage in Dadeldhura, reported as the first such registration in Nepal by *The Himalaya Times* (Nov. 27). Monika Shahi and Ramesh Nath Yogi spoke at a press conference in the capitol to announce, belatedly, that they had married on May 7. The couple has received a marriage certificate from Dadeldhura. Both members of the couple expressed their joy and pride at their new marital estate. “Shahi further hoped that her marriage would be a representative for the transgender community, breaking the stereotypical thinking of the Nepali Society,” reported the *Times*.

SOUTH AFRICA – Judge Ronel Tolmay, of the High Court in Pretoria, has refused to confirm a surrogate parenting agreement between a gay male couple and a surrogate mother, finding that it was not in the best interest of the prospective child – not because the men are gay, but because they are not a cohabiting couple and the older of the two (by many years) is still “in the closet.” *The Independent on Saturday* (Nov. 24) reported that the judge “made it clear it was of no importance that they were homosexual. However, the fact that HN [the older man] wanted to hide it could impact on the unborn child.” The “real concern” of the court was “that they did not live

together and because HN wanted to be discreet about his sexuality. ‘This means he will have to be discreet about the fact that he is the parent of a child born from surrogacy to him and his same-sex partner,’ Judge Tolmay said. She added the parties did not deal with what effect it would have on a child if one of them needed to hide ‘the very essence of who he is. A lot of scenarios come to mind. I can see a little toddler excitedly running toward his father in public, shouting out “daddy.” Would the father pretend not to be the parent? How will this impact on the child,’ she asked. ‘No one can judge a gay person who, because of persisting public prejudice, is reluctant to reveal his sexual orientation. However, the court must always place the rights of the child first. If HN in future finds it less daunting to be open about his sexual orientation, he can still approach the court and may obtain parental rights.’”

TAJIKISTAN – The BBC reported on November 7 that Rohi Zindagi (Life Path), a non-governmental organization decided to protecting the rights of sexual minorities in Tajikistan, had closed down under unrelenting pressure from the government. The head of the organization said, “The activists were tired of inspections by the local administration, fire department, prosecutor’s office as well as other inspection bodies and decided to stop their activities.” The organization had been funded from abroad. The prosecutor’s office denied the allegation that they were pressuring the organization. *BBC International Reports*, Nov. 7. In October, several news organizations had reported that the government was attempting to establish an official list of LGBT people in the country, allegedly in order to “protect” them and facilitate public health efforts to eradicate HIV.

TURKEY – The City of Ankara, capital of Turkey, has moved to ban an LGBT

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film festival, claiming that the ban was necessary because the films' content "could incite grudges and enmity toward a part of society." Ankara officials have sought to ban a variety of LGBT-related activities, citing the possibility that they could incite violent action and disturb public order. *Reuters*, Nov. 19.

UNITED KINGDOM – Daryll Rowe was convicted of five counts of grievous bodily harm with intent, and five counts of attempt, on November 15 in Lewes Crown Court. The jury heard evidence that Rowe, who is HIV-positive, made assignments with men using the Grindr app, then "becoming abusive and aggressive after they had sex," according to a report in *nostraightnews.com*, Nov. 15. Four of his sexual partners tested positive for HIV after their encounters with him. The case came to the attention of the police when a clinic in Brighton noticed "similarities" in how two clients reported having contracted HIV. When questioned by police, Rowe denied being HIV-positive and was released, but there was evidence that he had been diagnosed in April 2015 in Edinburgh, but had refused to take medication. This was reportedly the first such conviction in England. Sentencing has been delayed to January to allow time for Rowe to undergo psychiatric examination. *European Union News*, Nov. 22.

NOVEMBER ELECTION NOTES

The general elections held in the states in November resulted in significant advances by openly LGBT candidates.

DANICA ROEM, a transgender woman, and **DAWN ADAMS**, a lesbian, were elected to the Virginia House of Delegates, becoming the

first openly transgender and openly lesbian candidates to be elected to that body. However, the *Richmond Times-Dispatch* reported that the incumbent Republican House member in Adams' district had filed a petition for a recount in Richmond Circuit Court, noting the thin margin certified by the State Board of Elections of 336 votes out of more than 39,000 cast. G. M. Loupassi had conceded the race to Adams on election night, but that was before the final count certified by the Board was known.

Two transgender candidates, **ANDREA JENKINS** and **PHILLIPE CUNNINGHAM**, were elected to the Minneapolis, Minnesota, City Council, the first transgender people to serve there and to be elected to the city council of a major U.S. city.

JENNY DURKAN, a lesbian, won election as mayor of Seattle, Washington. She had previously served as the only openly-LGBT U.S. Attorney in the U.S., by appointment of President Barack Obama.

The election resulted in an entirely LGBT City Council being elected in Palm Springs, California. Previously elected to four-year terms in 2015 were Mayor Robert Moon, J.R. Roberts and Geoff Kors, all openly-gay men. Newly elected on November 7 were **LISA MIDDLETON**, the first transgender person to be elected to any nonjudicial office in California, and **CHRISTY HOLSTEGE**, who identifies as bisexual. Although an entirely-LGBT City Council was a first for Palm Springs, the previous council had only one straight member.

STEPHE KOONTZ, a transgender woman, won election to the Doraville, Georgia, City Council.

TYLER TITUS, a transgender man, won election to the school board in Erie, Pennsylvania.

SEAN STRUB, an openly-gay and HIV-positive man was elected mayor of Milford, Pennsylvania.

ALLISON IKLEY-FREEMAN, a lesbian, won a very close special election to fill a vacant seat in District 37 in the Oklahoma State Senate, becoming that body's first openly LGBT member.

PROFESSIONAL NOTES

LeGaL Executive Director **MATTHEW SKINNER** has been named Executive Director of The Richard C. Failla LGBTQ Commission of the New York State Courts, effective December 14. The Commission was established earlier this year by New York's Chief Judge, Janet DiFiore, to study and report on LGBTQ-related issues in the state court system, and is named for the first openly-gay man to sit in the Supreme Court, New York's elected trial court of superior jurisdiction. Justice Failla, who was a member of the founding board of Gay Men's Health Crisis, had also served as New York City's first Chief Administrative Judge when that position was established during the administration of Mayor Edward I. Koch. As Executive Director of LeGaL, Matt Skinner expanded the activities of the organization and its staff, overseeing a wide range of public service and educational activities and significant membership growth, and supervised the monthly production and circulation of *LGBT Law Notes*, as well as co-hosting the monthly Law Notes podcast. The Board of Directors of LeGaL has begun a search for a new Executive Director.

SUSAN SOMMER has been appointed General Counsel of the New York City Mayor's Office of Criminal Justice, after having served for many years as a staff attorney and Director of Constitutional Litigation at Lambda Legal. At Lambda, she took a leading role in the fight for marriage equality, arguing important cases before appellate courts, including the New York Court of Appeals. She also participated several times as a panelist in LeGaL's annual LGBT Law Year in Review CLE programs.

The *Washington Blade* reported on November 30 that **RANDY BERRY** is no longer the Special U.S. Envoy for the Promotion of LGBT and Intersex Rights in the State Department. Berry was designated to fill this new position by Secretary of State John Kerry in 2015, and had served in the position for two years. A State Department spokesperson told the *Blade* that two years was the normal term for foreign service officer assignments, and that Berry is currently serving as a deputy assistant secretary in the Department's Bureau of Democracy, Human Rights and Labor. The spokesperson also stated that the Department intends to continue to staff the special envoy position, and noted that Secretary of State Rex Tillerson had said as much to Senator Robert Corker (R-Tenn) in August. A successor to Berry is being sought.

We are sad to note the passing of **EDWARD FLANAGAN**, the first openly-gay statewide elected official in the United States, who died on November 3, age 66. Flanagan, who had previously run unsuccessfully for the position of Attorney General in 1988, was elected State Auditor of Vermont in 1992, and was re-elected three times, including two after he publically "came out" as gay in 1995. In 2000, he was the Democratic candidate for the U.S. Senate from Vermont, but was defeated by incumbent Senator James Jeffords. He was elected to the state Senate in 2004, and twice reelected. His health was severely compromised by a 2005 automobile accident that left him in a coma for several weeks.

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- Maillard, Kevin, Other Mothers, 85 Fordham L. Rev. 2629 (May 2017) (legal issues confronting unmarried lesbian same-sex partners of birth mothers under domestic relations law).
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- Rushin, Stephen, and Jenny Carroll, Bathroom Laws as Status Crimes, 86 Fordham L. Rev. 1 (Oct. 2017).
- Shin, Jae Won, Coming Out of the Closet: A Comparative Analysis of Marriage Equality Between the East and West, 49 N.Y.U. J. Int'l L. & Pol. 1119 (Summer 2017).
- Speer, Neena, The Gay Rights Movement Rhetoric Has Adopted Legal Rhetoric From the Civil Rights Movement: "Immutable Characteristic" and Controversy Between Equating "Gay" and "Black," 11 S. J. Pol'y & Just. 131 (Fall 2017).
- Tang, Aaron, Reverse Political Process Theory, 70 Vand. L. Rev. 1427 (Oct. 2017) (Supreme Court's abandonment of the "political powerlessness" factor in applying equal protection requirements).
- Walsh, Mark, Cake Talk, 103-NOV A.B.A. J. 20 (Nov. 2017) (re *Masterpiece Cakeshop*).
- Weinstein, James, Hate Speech Bans, Democracy, and Political Legitimacy, 32 Const. Comment. 527 (Fall 2017).

“Voi dire” cont. from page 477

‘The critical factor’ in making this determination is whether the potentially prejudicial issue is ‘inextricably bound up with the conduct of the trial’ such that there is a ‘consequent need, under all the circumstances, specifically to inquire into the possible specific prejudice in order to assure an impartial jury.’”

The court went on to apply this clarified standard to plaintiff Berthiaume’s case and reiterated all of the reasons that the trial court should have attempted to determine whether any of the jurors might harbor prejudices based on the sexual orientation of plaintiff Berthiaume or the various gay witnesses in the case. Berthiaume was asserting various constitutional and tort claims against the defendant police officer and the city in connection with his injuries arising from an arrest that did not result in a prosecution. For a full summary of the facts, see the article about this case in the November 2017 issue of *Law Notes*. – *Matthew Goodwin*

“Surrogate” cont. from page 488

The court devoted a final paragraph about A and B having “most unwisely and unaccountably” resorted to social media to discuss their situation, as to which the court “made an order restraining A and B from generating further publicity about this matter.” Preserving confidentiality in contested custody cases is generally deemed to be in the best interest of the child. The end result, which brought some startled comment from the gay press in the U.K., is that the surrogate, who has no genetic relationship to the child, continues, together with her husband, as legal parents, while the child will live with A and B as, in effect, de facto parents. The surrogate and her husband will have continuing contact with the child through the visitation order and, still to be sorted out in full, there may be some restrictions on where and when A and B can travel with the child outside the country. The court’s call for the government to establish an appropriate statutory legal framework to govern such situations is heartfelt. ■



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.

Listen through iTunes or at [legal.podbean.com!](http://legal.podbean.com)

EDITOR’S NOTES

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

All points of view expressed in *LGBT Law Notes* are those of the author, and are not official positions of LeGaL – The LGBT Bar Association of Greater New York or the LeGaL Foundation.

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