

L G B T  
LAW NOTES

February 2018

# WAITING FOR CAKE

*As SCOTUS Refuses to Sink its Teeth  
Into LGBT Legal Entrees*

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# Two More LGBTQ-Related Controversies Drop off the Supreme Court Docket

By Arthur S. Leonard

As the Supreme Court's 2017-18 Term began in October, it looked like a banner term for LGBTQ-related cases at the nation's highest court. Petitions were pending asking the Court to address a wide range of issues, including whether LGBTQ people are protected against discrimination under federal sex discrimination laws covering employment (from Georgia) and educational opportunity (from Wisconsin), whether LGBTQ people in Mississippi had standing to seek a federal order to prevent a viciously anti-gay religiously-motivated law from going into effect, and whether the Texas Supreme Court erred in holding that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), did not necessarily

case, *Whitaker v. Kenosha Unified School District*, has settled, with the school district agreeing to withdraw its Supreme Court petition. It may be that the only LGBTQ-related issue that the Court decides this term is the one it heard argued in December: whether a business owner's religious objections to same-sex marriage or his right to freedom of speech would privilege him to refuse to make a wedding cake for a same-sex couple. An opinion expected sometime in the coming months.

On January 8, the Supreme Court refused to review a ruling by the 5th Circuit Court of Appeals, *Barber v. Bryant*, 860 F.3d 345 (5th Cir.), *petition for rehearing en banc denied*, 872 F.3d 671 (2017), which had dismissed a

(b) sexual relations are properly reserved to such a marriage; and (c) male (man) or female (woman) refers to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." Among other things, the law would protect government officials who rely on these beliefs to deny services to individuals, and would preempt the handful of local municipal laws in the state that ban discrimination because of sexual orientation or gender identity, so that victims of discrimination would have no local law remedy. Mississippi does not have a state law banning sexual orientation or gender identity discrimination, so H.B. 1523 in relation to private businesses and institutions was mainly symbolic when it came to

**In December, the Court declined to hear the employee benefits case and the Title VII employment discrimination case. And now the Court has declined to hear the Mississippi cases, and the Wisconsin case has settled.**

require a municipal employer to treat same-sex married couples the same as different-sex married couples in their employee benefits plans. The Court had already granted review in a "gay wedding cake" case from Colorado (*Masterpiece Cakeshop*, which was argued on December 5), and another petition involving a Washington State florist who refused to provide floral decorations for a same-sex wedding was waiting in the wings.

But the hopes for a blockbuster term have rapidly faded. In December, the Court declined to hear the employee benefits case and the Title VII employment discrimination case. And now in January, the Court has declined to hear the Mississippi cases, *Barber v. Bryant* and *Campaign for Southern Equality v. Bryant*, and the Wisconsin

constitutional challenge to Mississippi's infamous H.B. 1523, a law enacted in 2016 that protects people who discriminate against LGBTQ people because of their religious or moral convictions. The 5th Circuit had ruled that none of the plaintiffs – either organizations or individuals – in two cases challenging the Mississippi law had "standing" to bring the lawsuits in federal court.

H.B. 1523, which was scheduled to go into effect on July 1, 2016, identifies three "religious beliefs or moral convictions" and protects against "discrimination" by the state anybody who acts in accord with those beliefs in a wide range of circumstances. The beliefs, as stated in the statute, are: "(a) Marriage is or should be recognized as the union of one man and one woman;

activity taking place outside of the cities of Jackson, Hattiesburg and Oxford, or off the campus of the University of Southern Mississippi.

Two groups of plaintiffs brought constitutional challenges against the law in the U.S. District Court for the Southern District of Mississippi, where the case came before Judge Carlton W. Reeves, the same judge who ruled for plaintiffs in a case challenging Mississippi's ban on same-sex marriage a few years earlier. He issued a preliminary injunction against implementation of H.B. 1523 on June 30, 2016, the day before it was to go into effect, finding that it would violate the 1st Amendment by establishing particular religious beliefs as part of the state's law. The plaintiffs also challenged it on Equal Protection grounds. Judge Reeves refused to stay

his preliminary injunction, and so did the 5th Circuit. One of the plaintiff groups was assembled by Lambda Legal; the other group was anchored by Campaign for Southern Equality, represented by Robbie Kaplan.

The state appealed the grant of preliminary injunction to the 5th Circuit, where a unanimous three-judge panel ruled on June 22, 2017, that the district court did not have jurisdiction to issue the injunction because, according to the opinion by Circuit Judge Jerry Smith, none of the plaintiffs could show that they had suffered or were imminently likely to suffer a “concrete and particularized injury in fact,” which was necessary to confer the necessary “standing” to challenge the law in federal court. In the absence of standing, he wrote, the preliminary injunction must be dissolved and the case dismissed.

The plaintiffs asked the full 5th Circuit to reconsider the ruling *en banc*, but the circuit judges voted 12-2 not to do so, announcing that result on September 29. The dissenters, in an opinion by Judge James L. Dennis, bluntly stated that “the panel decision is wrong” and “misconstrues and misapplies the Establishment Clause precedent.” Indeed, wrote Judge Dennis, “its analysis creates a conflict between our circuit and our sister circuits on the issue of Establishment Clause standing.”

Judge Dennis pressed home the point by citing numerous cases from other circuits which, he held, would support allowing the plaintiffs in this case to seek a preliminary injunction blocking the law from going into effect. This gave hope to the plaintiffs that they might be able to get the Supreme Court to take the case and reverse the 5th Circuit, since one of the main criteria for the Supreme Court granting review is to resolve a split in authority between the circuit courts on important points of federal law.

However, on January 8 the Court denied the petitions the two plaintiff groups had filed, without any explanation or open dissent, leaving unresolved important questions about how and when people can mount a federal court challenge to a law of this sort. In the meantime, shortly after the 5th Circuit had denied reconsideration, H.B. 1523 went into effect on October 10.

A challenge to H.B. 1523 continues in the District Court before Judge Reeves, as new allegations by the plaintiffs require reconsideration of their standing and place in question, especially in light of the Supreme Court’s June 2017 ruling, *Pavan v. Smith*, 137 S. Ct. 2075, whether the law imposes unconstitutional burdens on LGBTQ people seeking to exercise their fundamental constitutional rights.

Two days after the Court announced it would not review the 5th Circuit ruling, the parties in Whitaker, 858 F. 3d 1034 (7th Cir. 2017), involving the legal rights of transgender students under Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the 14th Amendment, announced a settlement. Under their agreement the school district will withdraw its cert petition.

The Supreme Court had been scheduled to hear a similar transgender student case last March, *Gloucester County School Bd. v. G. G. ex rel. Grimm*, but that case was dropped from the docket after the Trump Administration withdrew a Guidance on Title IX compliance that had been issued by the Obama Administration. Since the 4th Circuit’s decision in Gavin Grimm’s case had been based on that Guidance rather than on a direct judicial interpretation of the statute, the Supreme Court vacated the 4th Circuit’s ruling and sent the case back to the 4th Circuit for reconsideration. *See* 137 S. Ct. 1239 (Mar. 6, 2017). That court, in turn, sent it back to the district court, which dismissed the case as moot since Grimm had graduated in the interim.

Ashton Whitaker is a transgender boy who graduated from Tremper High School in the Kenosha School District last June. His case would have given the Supreme Court a second chance to address the Title IX issue. Whitaker transitioned while in high school and asked to be allowed to use the boys’ restroom facilities, but district officials told him that there was an unwritten policy restricting bathroom use based on biological sex. He sued the district under Title IX and the Equal Protection Clause. U.S. District Judge Pamela Pepper (E.D. Wisconsin) issued a preliminary injunction on Whitaker’s

behalf in September 2016, and refused to stay it pending appeal. *See* 2016 WL 5239829 (Sept. 22, 2016).

On May 30, 2017, the 7th Circuit upheld Judge Pepper’s ruling, finding that even though the Trump Administration had withdrawn the prior Title IX Guidance, both Title IX and the 14th Amendment require the school to recognize Whitaker as a boy and to allow him to use boys’ restroom facilities. The school district petitioned the Supreme Court on August 25 to review the 7th Circuit’s decision, even though Whitaker had graduated in June.

In the meantime, Judge Pepper ordered the parties to mediation to attempt a settlement. Whitaker’s graduation in June undoubtedly contributed to the pressure to settle, and the parties asked the Supreme Court several times to extend the deadline for Whitaker to file a formal response to the petition as the negotiations continued. According to press reports on January 10, the case settled for \$800,000.00 in damages for Whitaker plus reasonable attorneys’ fees and costs, and an agreement that the district would withdraw its petition and not discriminate against Whitaker as an alumnus. Whitaker is represented by the Transgender Law Center and cooperating attorneys from Relman, Dane & Colfax PLLC (Washington, D.C.) and Robert (Rock) Theine Plechl of McNally Peterson S.C. (Milwaukee).

The settlement and withdrawal of the petition leaves the 7th Circuit’s opinion standing as the first federal circuit court ruling to hold on the merits that Title IX and the 14th Amendment require public schools to respect the gender identity of their students and to allow students to use sex-designated facilities consistent with their gender identity. However, lacking a Supreme Court ruling on the point this decision is only binding in the three states of the 7th Circuit: Wisconsin, Illinois, and Indiana, the same three states bound by another 7th Circuit last year holding that employment discrimination because of sexual orientation violates Title VII of the Civil Rights Act of 1964. ■

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# Foreign and International Courts Issue a Burst of LGBT Rights Rulings

By Arthur S. Leonard

Over the course of just four days, January 8 through January 11, 2018, major courts on three continents have issued rulings that will affect the rights of tens of millions of LGBT people. On January 8, the Supreme Court of India ordered reconsideration of the 2014 decision that had restored the country's law against gay sex, in an Order that quoted extensively from prior rulings critical of the 2014 decision. On January 9, the Inter-American Court of Human Rights advised Costa Rica – and thus also sixteen other countries in Central and South America that are bound by the American Convention of Human Rights and do not yet have marriage equality – that same-sex couples are entitled to marry and that transgender people are entitled to get legal name changes without having to undergo sex reassignment surgery. And on January 11, one of the Advocates General of the European Court of Justice (ECJ), responding to a request for a preliminary ruling from the Constitutional Court of Romania, advised the ECJ that same-sex spouses of the citizens of member nations must be treated the same as different-sex spouses under the European Union Directive governing movement between states.

India has the second largest population of any country, over 1.3 billion people by the latest estimate. The European Union member countries have more than 500 million residents, and the combined countries within the Inter-American Union have close to a billion people, although some large countries, including Canada and the United States, are not subject to the Inter-American court's ruling. But, of course, both Canada and the United States have marriage equality and don't criminalize consensual gay sex among adults. This means that within the space of four days courts have potentially expanded LGBTQ rights to an extraordinary proportion of the world's population,

which is currently estimated at about 7.6 billion people, and marriage equality may soon become the norm throughout the Western Hemisphere, with only a few holdouts among states that do not recognize the jurisdiction of the Inter-American court.

The India ruling is yet another step in a complicated and long-running story. In 1860, under British Administration, the Indian Penal Code was adopted including what is now Section 377, providing, "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." This colonial enactment was carried over into national law when India became independent and self-governing after World War II. It has been interpreted to outlaw all same-sex oral and anal intercourse. Although infrequently enforced, it has had the same stigmatizing effect as anti-sodomy laws in western societies before the slow process of decriminalization got under way during the second half of the 20th century.

Many LGBTQ people in India rejoiced and went heavily public in celebratory demonstrations in 2009 when the Delhi High Court, responding to a lawsuit filed by the NAZ Foundation, an HIV/AIDS advocacy non-governmental agency, ruled that Section 377 was unconstitutional as applied to private consensual adult same-sex intercourse. *NAZ Foundation v. Government of NCT of Delhi*, 111 DRJ 1 (2009). As the government did not initiate an appeal, many saw the lengthy, scholarly ruling as final and definitive.

However, Indian jurisprudence allows for anybody who is offended by a court ruling to ask the nation's Supreme Court to review it, and a group of religious and social conservatives, led by Suresh Kumar Koushal, a Hindu

astrologist, brought their case to the Supreme Court, where a two-judge bench reversed the High Court ruling in 2014, holding that the Constitution of India did not impede the government from maintaining the existing law, and rejecting the High Court's citation of decisions from other countries (such as the U.S. Supreme Court's 2003 *Lawrence v. Texas* ruling) to support its decision. *Koushal v. NAZ Foundation*, 1 SCC 1 (2014). The Supreme Court panel minimized the significance of the issue, claiming that because there were very few homosexuals as a proportion of the population, it was not a matter of great importance. It also opined that the question of what sexual conduct to outlaw was for the legislature, not the courts, to decide.

Obtaining further review from a larger panel of the Court (which has 26 judges overall) is a time-consuming process, requiring filing "corrective petitions" and persuading a panel of the Court that the issue should be taken up anew. This process has been ongoing at the instance of NAZ Foundation and its supporters, but a new group of plaintiffs emerged in 2016 and initiated a petition directly with the Supreme Court, arguing that recent rulings in other cases by the Court, most notably a later 2014 ruling on the rights of transgender people, *National Legal Service Authority v. Union of India* 5 SCC 438 (2014), had cast significant doubt on the reasoning of the Koushal decision. This argument was bolstered last year when a nine-member panel of the Court, ruling on a challenge to a new national genetic identification system, *Puttaswamy v. Union of India*, 10 SCC 1 (2017), specifically discussed and disparaged the Koushal decision's treatment of constitutional privacy and the rights of LGBTQ people.

The Court's January 8 Order in *Johar v. Union of India Ministry of Law and Justice*, Writ Petition No. 76/2016, by a three-judge panel including Chief

Justice Dipak Misra, provided an extensive summary of the arguments against the constitutionality of Section 377, quoting extensively from the 2014 transgender and 2017 privacy rulings, particularly those passages critical of the *Koushal* decision, and granted the petitioners' request that a larger panel of the Court be convened to reconsider that decision. Interestingly, only the Petitioners were present at the Court's hearing on January 8, with the argument being presented by Senior Advocate Arvind Datar. Nobody appeared from the government to oppose the request for reconsideration. The Order emerged immediately after the hearing.

While the Order does not specifically state that all of the Petitioners' arguments are correct, after concluding its summary of the arguments and what the Petitioners are seeking, the Court stated, "Taking all the aspects in a cumulative manner, we are of the view, the decision in Suresh Kumar Koushal's case requires re-consideration. As the question relates to constitutional issues, we think it appropriate to refer the matter to a larger Bench."

A different Bench of the Court is presently considering the curative petition that was filed by the NAZ Foundation, so there was some speculation in the Indian press that the two cases could be combined before that larger panel. "In the meantime," wrote the Court, "a copy of the petition be served on the Central Agency so that the Union of India can be represented in the instant matter. Let the matter be placed before Honorable the Chief Justice of India, on the administrative side, for consideration of the appropriate larger Bench."

Indian jurisprudence is famous for its slow motion, but just a week later the Chief Justice appointed a five-judge bench (including himself) to take up this case as well as several other pending constitutional cases, although his action provoked protest from some of the senior judges on the court who had not been appointed to this bench. News reports indicated that the court may be moving with unaccustomed speed to render a decision, as the existing state of the law

is an embarrassment to the court, in light of last year's privacy decision and open criticism of the *Koushal* rulings. Thus, commentators were optimistic that the Delhi High Court's original ruling striking down criminalization of consensual gay sex will ultimately prevail, and gay sex will become legal in the world's second largest country. However, some of the press reports seemed overly enthusiastic to this writer, as they quoted from the criticisms of the *Koushal* decision that were quoted in the Order, without making clear that this was part of the Court's summary of Datar's argument, rather than being a statement by the Court itself.

The Inter-American Court's ruling on January 9 came in response to a petition submitted two years ago by Luis Guillermo Solis, the President of Costa Rica, who had run for office on a pledge to expand LGBTQ rights in his Central American country. *Opinion Consultiva*, OC-24/17 (2017). In the face of legislative intransigence, Solis inquired whether Costa Rica was obligated under the American Convention on Human Rights to let same-sex couples marry. He also inquired about transgender rights. The Court, which actually sits in Costa Rica's capital city, came back with a strong affirmation for LGBTQ rights. The opinion is initially available only in Spanish. According to translations published in English-language media sources, the court said that governments subject to the Convention "must recognize and guarantee all the rights that are derived from a family bond between people of the same sex," and that establishing a separate institution for same-sex couples, such as civil unions, was not adequate from the point of view of legal equality. The governments must "guarantee access to all existing forms of domestic legal systems, including the right to marriage, in order to ensure the protection of all rights of families formed by same-sex couples without discrimination."

However, recognizing the kind of legislative intransigence encountered in Costa Rica and many other Central and South American countries, where the Roman Catholic Church has a

heavy influence on social policy, the court recommended that government pass "temporary decrees" while new legislation is considered.

The Inter-American Court, in common with the European Court of Human Rights, is not empowered directly to order a government to do anything. Compliance requires acquiescence, and sometimes the court has resorted to demanding that governments explain why they have not complied with its rulings. For example, it took Costa Rica several years to come into compliance with a ruling by the Inter-American Court against bans on the use of in vitro fertilization.

President Solis reacted to the decision by calling for full compliance by the countries of the Inter-American Union. The Tico Times reported on January 10 that he told reporters, "Costa Rica and the other countries that have accepted the jurisdiction of the Inter-American Court must fully comply with the court's opinion, respecting each country's processing time, jurisdictional and administrative spaces. Solis pointed out that Costa Rica's compliance would require a "gradual process," requiring consultation between the various branches of government and the political parties. It was reported that at least one same-sex couple expected to marry in mid-January, but it was uncertain whether the Civil Registry would accept their marriage immediately. One international wire service story reported that at least four same-sex marriages had already taken place privately (presumably with notaries presiding as required by law), but registration could not yet take place because the Civil Registry has a committee studying the Inter-American Court ruling's implications and scope.

The Court also addressed a question of transgender rights, recognizing as a human right that transgender people should be able to register themselves using the name and sex with which they identify, thus lining up with those countries that have in recent years moved towards recognizing self-declared gender identity without interposing a requirement that the

individual document surgical gender confirmation procedures.

Commented Solis, “The court’s opinion ratifies our commitment to guaranteeing people access to the rights they acquire through their personal relations, without any sort of discrimination.” In a formal press release, the government stated: “Love is a human condition that should be respected, without discrimination of any kind. The State confirms its commitment to comply.”

Unfortunately, the ruling seems to have provoked a political backlash, as a presidential election was scheduled for February 4 and an anti-marriage-equality candidate was experiencing a surge in polling that might put him in a run-off with the leading candidate.

The countries that are legally bound by rulings of the court include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam and Uruguay. Some of those countries still penalize gay sex, while others already have marriage equality: Colombia, Brazil, Uruguay and Argentina. Litigation over marriage equality is pending in the Supreme Court of Panama. In Mexico, same-sex couples can marry in several states and the capital district, and all of the states are required to recognize those marriages, while a Supreme Court ruling mandates that lower courts issue orders, called “amparos,” requiring local officials to allow particular same-sex couples (or groups of couples) who obtain the orders to marry. The Inter-American Court’s ruling may hasten the spread of marriage equality to the remaining Mexican states.

Meanwhile, back in the European Union, Advocate General Melchior Wathelet’s preliminary ruling in the case of Relu Adrian Coman, a Romanian citizen who married Robert Clabourn Hamilton, an American citizen, in Brussels, Belgium, while Coman was living there and working for a European Union agency, may portend a significant advance for marriage equality in Europe. *Coman v.*

*Inspectorate General for Immigration*, Case C-673/16 (January 11, 2018). Coman sought to bring his spouse back home to Romania, but the Romanian government was unwilling to issue the kind of spousal visa that is routinely granted when Romanians contract different-sex marriages elsewhere in Europe. Coman brought his case to the Constitutional Court of Romania, which referred the issue to the European Court of Justice for a determination of what obligation the country might have as a member of the Union.

Such matters are first presented to the office of the Advocate General (of which there are several), for an opinion advising the Court. If the Court decides to follow the Advocate General’s recommendation, its ruling becomes law throughout the European Union.

In some respects, Wathelet’s opinion is narrow and technical, because it doesn’t address a broad question of rights, but rather the narrower question of interpreting the Directive that guarantees freedom of movement within the European Union, with an eye to breaking down nationality barriers that would inhibit the movement of labor across national lines. Directive 2004/38 describes the “free movement of persons” as “one of the fundamental freedoms of the internal market.” The Directive supports such freedom by requiring member states to grant freedom of movement to family members of their citizens, and of course a “spouse” is a family member, but the term “spouse” is not generally defined. When the Directive was adopted in 2004, only two countries in Europe allowed same-sex marriage, but many others had registered partnerships for same-sex couples, so the Directive provides for free movement rights for such partners, but only “if the legislation of the host Member State treats registered partnerships as equivalent to marriage.”

In the case of Romania, not only is marriage defined as the union of a man and a woman, but the country’s marriage law specifies that same-sex couples may not marry, and the country provides no registered partnership

status for same-sex couples. Thus, the question under EU law is whether the protection for family life and for spousal relationships would extend to same-sex spouses, overriding national law on the question of who is entitled to a residence visa (as opposed to the short-term entry visa of up to three months for tourists and business visitors). The key to this, it proved, was the established practice both in this Court and the European Court of Human Rights to adjust the definitions of terms in reaction to social developments.

Wathelet quoted an earlier decision stating that “EU law must be interpreted ‘in the light of present day circumstances,’ that is to say, taking the ‘modern reality’ of the Union into account.” This is to avoid the law become static and placing a drag on economic and social development. Wathelet noted that in a 2001 ruling, reflecting “present day circumstances” at that time, the Court had considered marriage to be “a union between persons of the opposite sex.” But this does not reflect the “modern reality.”

“In fact,” he wrote, “while at the end of the year 2004 only two Member States allowed marriage between persons of the same sex, 11 more Member States have since amended their legislation to that effect and same-sex marriage will be possible in Austria, too, by 1 January 2019 at the latest. That legal recognition of same-sex marriage does no more than reflect a general development in society with regard to the question. Statistical investigations confirm it; the authorization of marriage between persons of the same sex in a referendum in Ireland also serves as an illustration. While different perspectives on the matter still remain, including within the Union, the development nonetheless forms part of a general movement. In fact, this kind of marriage is now recognized in all continents. It is not something associated with a specific culture or history; on the contrary, it corresponds to a universal recognition of the diversity of families.”

Wathelet also referred to decisions by the European Court of Human Rights, including those protecting the right of

a national of a signatory state to the European Convention on Human Rights to bring a same-sex partner into the country. He also noted that European law now includes a ban on sexual orientation discrimination by Member States, and strong protection both under the European Union's Charter and under the Human Rights Convention for "family life."

He also contended that adopting a gender-neutral concept of spouse was consistent with the objective of the Directive, "to facilitate that primary and individual right to move and reside freely within the territory of the Member States which is directly conferred on citizens of the Union." Freedom of movement would be impeded if lawfully married individuals could not bring the legal spouses with whom they have established a family relationship with them to return to live in their home country.

Thus, he recommended that the Court answer the questions posed by the Romanian Constitutional Court as follows: that "the term 'spouse' applies to a national of a third State of the same sex as the citizen of the European Union to whom he or she is married" for purposes of complying with Directive 2004/38 on freedom of movement. As applied directly to Mr. Coman's case, it means that his marriage to an American citizen while Coman was living in Belgium, a European Union country that allows same-sex marriages, gives his spouse a derivative right under the Directive to obtain, automatically, the same kind of spousal visa to enter and live in Romania that would be provided to a different-sex spouse. Since Hamilton is not a citizen of any European Union Member State, his right is not direct and must be derived from the right of his husband to have Romania respect his marriage and family life, at least to the extent of allowing him to live together with his husband in his home country.

Reflecting the social divisions within the Union, several Eastern European nations – Latvia, Hungary, Poland and Romania – opposed this conclusion, while it was supported by submissions from the Netherlands and the European Commission. ■

## 7th Circuit Allows Bisexual Jamaican's Torture Claim to Proceed but Denies Stay of Removal

By Bryan Johnson-Xenitelis

The U.S. Court of Appeals for the 7th Circuit has denied an alleged bisexual Jamaican man's stay of removal but has allowed his *pro se* petition for review to proceed *in forma pauperis*, in *Fuller v. Sessions*, 2018 WL 316556, 2018 U.S. App. LEXIS 444 (7th Cir. January 8, 2018).

The court had previously denied a petition for review and affirmed the Board of Immigration Appeals (BIA) ruling that Petitioner's prior conviction constituted a "particularly serious crime" rendering him ineligible for

that Petitioner "failed to demonstrate circumstances so exceptional that they warranted the use of the Board's sua sponte power to revisit a case." A petition for review was filed as well as two interim motions: 1) requesting a stay of removal; and 2) requesting the petition to be permitted to proceed *in forma pauperis*.

Writing for a panel of the court, Chief Judge Diane Wood noted that only the motions, not the merits of the Petition itself, were before the court at this time. Judge Wood noted Petitioner

**"The court is 'loathe to think that U.S. immigration law is so draconian that it compels a court to send a man to certain death . . .'"**

"withholding" of removal under the Immigration and Nationality Act as well as the Convention Against Torture. The instant petition for review argued for eligibility for "deferral" of removal under the Convention Against Torture, a relief that is not barred by criminal activity. After Petitioner filed a motion with the BIA to reopen or reconsider its ruling, which was denied, he filed another notice of appeal (which the BIA considered a motion to reopen), arguing that he was "ignorant, unprepared, and unrepresented," and submitted three letters in support of his claims from Jamaican individuals requesting "their names not be publicized because they fear that they will be targeted as sympathizers of gay people and be harmed." The Board found Petitioner had not credibly shown that he was bisexual or that the Jamaican government would "regard him as such," denied the motion as time- and number-barred, and further found

argued the new evidence he submitted was not previously available because of deprivation of counsel, that he did not understand the legal requirements for the relief he sought, that the persons submitting the letters were "afraid of repercussions for these letters," and reported that while Petitioner was approached by DHS/ICE "insisting that he sign a deportation order," "he has refused to do so but has been told that he faces federal charges if he refuses to comply."

Judge Wood found that "this is far from a frivolous motion," and explained that the court had requested the Attorney General to file a formal response in the matter. The Attorney General made two arguments in response to the motion: 1) the motion to reopen was time- and number-barred; and 2) the new evidence does not change the Immigration Judge's determination that Petitioner's assertion he was bisexual was not credible.



With respect to time- and number-barred motions, Judge Wood stated that the court is “loathe to think that U.S. immigration law is so draconian that it compels a court to send a man to certain death, just because he violated the time and number requirements for motions to reopen,” but held that the decision ultimately rested upon a discretionary determination which was not reviewable by the court. However, she wrote, the court “remains authorized to review constitutional claims and questions of law, including whether the Board considered all relevant evidence before exercising its discretion.” Judge Wood ruled, however, that “while we might have given a more sympathetic reading to [the new] evidence,” the discretionary decision below was unreviewable. However, she observed that the Petitioner now identifies as bisexual, that the evidence in the case could be readily available on the internet, and that Petitioner’s life “may well be in danger.” She finally stated that she hoped the Attorney General would refrain from acting to remove Petitioner while the case was pending before the court, and that any future action taken should the Petitioner lose on the merits “take full account of the serious risk to life that [Petitioner] faces.” Judge Wood denied the request for a stay but permitted Petitioner to proceed on his petition for review *in forma pauperis*.

Circuit Judge Daniel Manion concurred in the ruling, stating that “a fact-bound case such as this underscores why ‘the Attorney General’s discretionary judgment whether to grant relief . . . shall be conclusive unless manifestly contrary to the law and an abuse of discretion.’” He stated that “the only clear evidence that Fuller is bisexual is because he says so,” that “any added risk to his life is brought on by his careless and seemingly indiscriminate sexual behavior,” and proposed that perhaps Petitioner could be deported to a country other than Jamaica to avoid harm. ■

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## 4th Circuit Remands Gay Asylum Case to BIA For Failure to Explain Decision

*By Katie Hansson*

In *Molina Mendoza v. Sessions*, 2018 WL 460654, 2018 U.S. App. LEXIS 1185 (4th Cir. Jan. 18, 2018), the U.S. Court of Appeals for the 4th Circuit remanded the case of a gay Mexican citizen seeking asylum in the United States to the Board of Immigration Appeals (BIA) for failure to explain its decision in terms that would permit effective judicial review. “Show your work,” directed Circuit Judge Allyson K. Duncan for the court.

On March 16, 2014, the Petitioner, Felipe de Jesus Molina Mendoza, presented himself at the U.S. border and requested asylum based on two grounds. First, he claimed that he suffered persecution due to his sexual orientation while living in Mexico. Second, he claimed a well-founded fear of future persecution due to his sexual orientation if he returned. In the context of asylum claims, the term persecution is an extreme concept that includes “the infliction or threat of death, torture, or injury to one’s person or freedom.” *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005). In order to establish a “well-founded fear of future prosecution,” an asylum applicant must demonstrate that his or her fear is objectively reasonable. *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010).

From an early age, Molina Mendoza was mistreated for being gay. When he was five or six years old, a female caretaker sexually abused him. Additionally, his father beat him with a belt for wearing women’s clothing. He first entered the U.S. in 2000 without authorization, and remained here for nine years. He experienced temporary freedom from discrimination by hiding his sexual orientation. He returned to Mexico City in 2009 to pursue a university education. While living as an openly gay man in Mexico City, Molina Mendoza experienced harassment and discrimination.

In the proceedings before the Immigration Judge, Molina Mendoza testified about the mistreatment

he experienced in Mexico, and proffered documentary evidence that discrimination and violence against Mexico’s LGBTQ community is widespread. The documentary evidence included: (1) a report by Northwestern University School of Law finding that over 250 LGBTQ individuals were murdered in Mexico between 2010 and 2013, and that the Mexican government failed to adequately investigate and prosecute many of the murders; (2) a report by a Canadian human rights organization finding that 76.4% of LGBTQ people in Mexico experienced physical violence because of their sexual orientation or gender identity; and (3) a report by Mexico’s National Human Rights Commission concluding that “Mexico suffers from a discrimination problem against the LGBT[Q] population.” Conversely, one of the articles in the record contained evidence that the Mexican government is working to fight discrimination against the LGBTQ community.

On March 9, 2016, the Immigration Judge denied Molina Mendoza’s application for asylum. The Immigration Judge found that Molina Mendoza failed to establish that LGBTQ individuals in Mexico face a pattern of harm, and that even if LGBTQ individuals in Mexico face a pattern of harm, Molina Mendoza failed to demonstrate that such harm is sufficiently severe to constitute persecution. The Immigration Judge specifically stated that Molina Mendoza did not proffer persuasive evidence that his “life or freedom [would] be threatened” if he returned to Mexico. The Immigration Judge did not use any of the record evidence that Molina Mendoza proffered that demonstrated LGBTQ individuals in Mexico are routinely harassed, attacked, and murdered because of their sexual orientation.

Molina Mendoza timely appealed his future-persecution claim to the BIA, and the BIA adopted and affirmed the Immigration Judge’s decision. The

BIA did not make any new factual determinations or provide any further explanation for the Immigration Judge's findings.

Molina Mendoza subsequently petitioned the 4th Circuit to review the BIA's decision. The court of appeals remanded the case without reaching the merits of Molina Mendoza's challenge, because the Immigration Judge and the BIA failed to explain their findings in a manner that permits effective judicial review.

Specifically, Judge Duncan wrote for the court, "The Immigration Judge and the BIA failed to meaningfully assess evidence contradicting two of their key findings: (1) that LGBTQ individuals in Mexico do not face a pattern or practice of harm, and (2) that, even if a pattern of harm exists, the mistreatment does not rise to the level of persecution, i.e., the threat or infliction of death, torture or serious injury to the victim's person or freedom." Judge Duncan noted that the record contained significant evidence that undermined the Immigration Judge's determination that LGBTQ individuals in Mexico do not face a pattern of discrimination and harm. In fact, the Immigration Judge failed to address two of the reports in their entirety.

The court ultimately held that the Immigration Judge did not meaningfully account for much of the evidence on the record, and thus remanded the case for the BIA to reevaluate whether Molina Mendoza's fear of future prosecution was objectively reasonable. Judge Duncan opined that "our review is obstructed by 'a problem that has become all too common among administrative decisions challenged in this court—a problem decision makers could avoid by following the admonition they have no doubt heard since their grade-school math classes: Show your work'" (citing *Patterson v. Comm'r of Soc. Sec. Admin.*, 846 F.3d 656, 663 (4th Cir. 2017)).

Molina Mendoza is represented by Helen Parsonage, of Elliot Morgan Parsonage, Winston-Salem, North Carolina. ■

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*Katie Hansson is a law student at University of Florida (class of 2018).*

## New York Appellate Division Rules in HIV Defamation Case

*By Chan Tov McNamarah*

A January 16 decision by the New York Appellate Division considered the controversial question of whether an imputation of HIV could qualify under the "loathsome disease" category for the purposes of constituting defamation per se. The ruling, *Nolan v. State of New York*, 2018 WL 411628, 2018 N.Y. App. Div. LEXIS 250 (1st Dept.), modified a 2015 Court of Claims order granting a model's motion for summary judgment against the state of New York for featuring her photograph in an HIV and AIDS anti-discrimination campaign. Justice

to her, the photographer had sold the image to Getty.

After learning of the ad, Nolan immediately contacted the photographer, who asked DHR to pull the advertisement. Subsequently, Nolan filed a claim against the State asserting causes of action for defamation, defamation per se, and a violation of Civil Rights Law §§50 and 51, which bar the nonconsensual use of a person's image for commercial purposes. The claim alleged that the ad had caused Nolan "emotional distress," "anguish," and had resulted in an impairment

### In 2013, the DHR and DOH AIDS Institute launched an HIV anti-discrimination campaign.

Angela M. Mazzarelli wrote for the court, holding that the plaintiff was entitled to judgment on her defamation per se claim.

In 2013, the New York State Division of Human Rights (DHR) and New York State Department of Health (DOH) AIDS Institute launched an HIV anti-discrimination campaign that included a newspaper advertisement featuring a photograph of claimant-respondent, model Avril Nolan, as well as the words "I AM POSITIVE (+)" and "I HAVE RIGHTS." The advertisement also stated "people who are HIV positive are protected by the New York State Human Rights Law. Do you know your rights?" DHR's advertisement did not include any information that suggested that Nolan did not have HIV.

The image used in the campaign had been purchased from Getty Images. Two years prior, Nolan had posed for the photograph as a part of a separate magazine article, but she had never signed a release, nor did she give the photographer permission to sell her photograph. Unbeknownst

of her reputation. Nolan sought \$1.5 million as damages.

The State opposed Nolan's motion, filing a cross motion for partial summary judgment and seeking dismissal of the Civil Right Law claim. The State's arguments were threefold: (1) Nolan's defamation action failed because she could not show an actual economic or pecuniary loss; (2) her defamation per se claim failed because DHR had not acted with malice and because HIV-infection was not a "loathsome disease;" and (3) claimant's motion should be denied on her Civil Rights Law claim because DHR was not a "commercial enterprise" when it published the advertisement.

The Court of Claims granted Nolan's summary judgment motion on October 8, 2015, on the issues of liability on her defamation per se and Civil Rights Law claims, and denied the State's cross-motion for partial summary judgment on the Civil Rights Law claims, and the State appealed. The Court of Claims denied Nolan's summary judgment on the general defamation claim.

Justice Mazzairelli laid out the two questions before the court: (1) Whether claimant Avril Nolan had to prove actual harm to her reputation, or whether she must establish merely that she has been actually injured although her reputation remains intact; and (2) whether, for purposes of establishing defamation per se, an imputation of HIV qualifies as a “loathsome disease,” thereby relieving the target of the statement from having to prove special damages.

On the first issue, the State argued that Nolan’s intangible damage in the form of emotional distress was insufficient to sustain her general defamation claim. The appellate panel agreed, with Mazzairelli writing that the lower court should have dismissed that claim rather than merely denying Nolan summary judgment on it.

Next, the court addressed the State’s argument that Nolan’s embarrassment and discomfort failed to meet the requirement for damages, and that instead she was required to plead and prove actual damage to her reputation. Consulting New York case law, Mazzairelli wrote that “the state of law in New York is such that mental anguish is an alternative to reputational injury in establishing damages in a defamation case.” At her deposition Nolan had testified vaguely that the ad had made some encounters “awkward” or uncomfortable.” The appellate court found her testimony sufficient, and held that Nolan’s defamation per se claim survived.

Turning to the core of Nolan’s defamation per se claim, Justice Mazzairelli laid out the four categories that constitute defamation per se: “(1) statements charging the plaintiff with a serious crime; (2) statements tending to injure the plaintiff in her trade, business or profession; (3) statements that impute to the plaintiff a ‘loathsome disease’; and (4) statements that impute unchastity to a woman.”

In her complaint, Nolan—while taking issue with the archaic term “loathsome”—purported to qualify under the “loathsome disease” category because, in her opinion, the imputation of HIV presently results in societal ostracism. In response, the State argued that predominant community attitudes

towards persons living with HIV have shifted, and therefore militated against such a finding.

The court began its analysis with a definition of defamatory material. “Defamatory material,” wrote the Judge “tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him.” *Mencher v. Chesley*, 297 N.Y. 94, 100 (1947). Important to that understanding is the “current contemporary public opinion” regarding the medical condition.

The State contended the issue should be viewed in relation to cases holding that societal advancements in attitudes towards LGBT individuals rendered lingering prejudice “insufficient to warrant the inclusion of a false imputation of homosexuality in the categories of material that give rise to a finding of defamation per se.” *Yonaty v. Mincolla*, 97 AD3d 141 (3d Dept. 2012, lv denied 20 NY3d 855 (2013)). The State’s position was that progress in the treatment of persons with HIV meant that “HIV is no longer a shameful condition worthy of heightened treatment under defamation laws.” It also pointed to widespread acceptance of celebrities with HIV, such as Magic Johnson and Charlie Sheen.

But the court was not convinced by any of the State’s arguments. First, Justice Mazzairelli rejected the analogy between the treatment of persons with HIV and societal attitudes toward homosexuals. She reasoned that HIV affected a “broad spectrum of the population,” unlike “stigma” against homosexuals, which was limited in scope. The court also highlighted the lack of legislation expressly protecting those with HIV and AIDs from discrimination and stigma, as opposed to those with disabilities. Finally, the court rejected the State’s argument that the entire “loathsome disease” category was archaic and had no place in the court’s jurisprudence, finding instead that “certain medical conditions such as HIV unfortunately continue to subject those who have them to a degree of societal disapproval and shunning . . .”

Instead, the court found convincing

the claimant’s proffered evidence of sociological studies establishing the existence of continued stigma against persons living with HIV. For example, the claimant cited studies that show that people avoid getting tested for HIV because of “the perceived social repercussions of a positive result.” Additionally, the court believed that DHR’s needed to launch an anti-discrimination campaign was an implicit recognition of the continued societal stigma attached to HIV. Consequently, the court held that the advertisement at issue fell under the “loathsome disease” category of defamation per se.

But the court was quick to clarify that its conclusion did not mean that the judges themselves regarded HIV as “loathsome,” and in fact noted that they disfavored the use of the word. The court instead suggested a formulation for the “loathsome disease” category that found a particular condition actionable, not because it was shameful, but because “a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law and the full embrace of society.”

Justice Mazzairelli ended her opinion by holding that the lower court had incorrectly awarded Nolan summary judgment for her claims under 50 and 51 of the Civil Rights Law, and had erred by denying the State’s cross motion for partial summary judgment. Because DHR’s ad implicated the State’s sovereign rights and interests, the court found that the statute would not apply to it. Moreover, the fact that the DHR had engaged in a noncommercial campaign promoting civil rights, as opposed to a plainly commercial and non-sovereign activity, further suggested that sections 50 and 51 would not apply. As such, Nolan’s Civil Rights Law claims were defeated.

Accordingly, the court ruled that the order of the Court of Claims should be modified to deny Nolan summary judgment on her Civil Rights Law claims, and to grant the State summary judgment dismissing the general defamation claim. ■

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

# Judicial Integrity v. Public Access: The Difficult “Conundrum” of the Prop 8 Tapes

By Eric Lesh

U.S. District Judge William Orrick (N.D. Cal.) in San Francisco has ruled that he would not grant a motion to unseal video recordings of the 2010 U.S. District Court trial that found California’s discriminatory marriage ban, Proposition 8, unconstitutional. The balancing of interests at stake, namely judicial integrity versus the public’s right of access, as Judge Orrick aptly describes in his decision, “presents a conundrum.” *Perry v. Schwarzenegger*, 2018 U.S. Dist. LEXIS 8270 (N.D. Cal., Jan. 17, 2018).

On one side of the v. is media intervenor KQED, Inc. requesting that the video recordings be unsealed. KQED’s effort is supported by the original plaintiffs and the City of San Francisco.

*Perry*, 558 U.S. 183 (2010) (per curiam). Judge Walker allowed the video recording to move forward over the first two days, in case the stay was lifted. Unfortunately, the Supreme Court later entered a further stay, ruling that the trial court did not follow proper procedures before allowing the live video.

The entire trial and closing arguments were videotaped however, but only after Proponents dropped their objection. The reason for their doing so, rested on assurances from Judge Walker that the video would be “quite helpful” for his chamber use in “preparing the findings of fact,” but not for the “purposes of public broadcasting.” In August of 2010, Judge Walker issued

least in the foreseeable future.” With this ruling, the Ninth Circuit agreed that this was indeed a “judicial integrity” issue and warranted keeping the recordings under seal – at least until the ten-year mark when a local district court rule presumptively allows sealed documents from a trial to become public.

Seven years later, KQED, the plaintiffs, the ACLU and others once again sought to unseal the tapes, offering up strong arguments in favor of access. As Kate Kendall, executive director of the National Center for Lesbian Rights, stated in a declaration to the court, the release of the videos “will meaningfully contribute to the public’s understanding of the evidence that was presented by the parties during this contested federal trial, evidence that continues to have relevance and resonance today.”

At a June 2017 hearing, Judge Orrick previewed his latest ruling during his opening remarks, in which he noted that he did not believe the Ninth Circuit intended to keep the trial recordings permanently sealed, and suggested that a motion to unseal them could be reconsidered in 2021 — 10 years after the appeal.

True to his word (but with slight revision), in the January 2018 ruling Judge Orrick concluded that the compelling interest in judicial integrity precluded release, but that that the common-law right to public access applied to the video recordings, and that unless compelling reasons somehow surfaced, the recordings would be released in August 2020, the 10th anniversary of the district court’s original merits ruling in the case. Thus, there is every reason to expect that the court will ensure that future generations have access to this historic trial, and can watch the Proponents’ hateful arguments unravel under the weight of judicial scrutiny, a few more years patience will be required. ■

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

## Faithful readers of *Law Notes* may recall the eight-year saga that led up to this latest ruling.

And naturally they want the tapes released. After all, as anyone who has read or seen the dramatization of the Prop 8 trial will know, the plaintiffs presented a moving case, supported by testimony from their families and from leading experts. On the other side, the Proponents of Proposition 8 oppose the request to unseal—presumably because they would rightly be embarrassed by their witnesses and experts who lacked any evidence to support their claims that wasn’t based on junk science and homophobia.

Faithful readers of *Law Notes* may recall the eight-year saga that led up to this latest ruling. Back in 2010, to satisfy the public interest in the case, U.S. District Court Chief Vaughn Walker, scheduled the entire trial to be broadcast live as part of the court’s pilot program for public access to the court process. On the first day of trial, the U.S. Supreme Court put a temporary stop to everything after proponents objected to the livestreaming. *Hollingsworth v.*

his historic ruling finding Proposition 8 unconstitutional. Proponents appealed, Judge Walker retired, and the Ninth Circuit affirmed his ruling.

After retirement, Judge Walker “displayed” excerpts from the video recordings at a handful of public appearances. Proponents asked for the recordings to be returned to the court’s possession, and the plaintiffs asked the video to be unsealed.

In 2011, U.S. District Court Judge James Ware initially denied the request that the video be returned and held that the common-law right of public access warranted granting the motion to release the tapes. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). Proponents again appealed, and this time the Ninth Circuit agreed with them and reversed, *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012), after finding that Proponents reasonably relied on Judge Walker’s assurances “that the recording would not be broadcast to the public, at

# Federal Judge Restricts *Bivens* Remedy in Transgender Inmate Case

By William J. Rold

A new federal district court ruling provides an opportunity to explore the extent to which federal inmates can still bring *Bivens*-type actions on their claims of unconstitutional treatment while incarcerated. *Leibelson v. Collins*, 2017 U.S. Dist. LEXIS 212026, 2017 WL 6614102 (S.D. W.Va., Dec. 27, 2017).

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), the Supreme Court ruled that a person subject to an unreasonable search by federal officials could sue for damages directly under the Fourth Amendment. A “*Bivens* claim” has been shorthand ever since for a damages suit directly under the constitution against federal defendants. The Supreme Court approved other applications: *Carlson v. Green*, 446 U.S. 14, 19 (1980), recognized a claim under the Eighth Amendment by a federal prisoner’s estate for failure to treat his asthma; and *David v. Passman*, 442 U.S. 228, 248-9 (1979), allowed a damages gender discrimination claim by a Congressional assistant under the Equal Protection component of the Fifth Amendment.

Meanwhile, a post-Civil War statute to protect the rights of newly freed persons, now codified as 42 U.S.C. § 1983, was resuscitated for suits against state officials for equitable relief and damages for constitutional violations. However, there is no civil statutory counterpart to § 1983 for damages for constitutional violations against federal officials, and the Federal Tort Claims Act specifically excludes them. 28 U.S.C. § 2679(b)(2)(A). Thus, when this writer began to practice civil rights law in the mid-1970’s, the *Bivens* remedy was regarded as the practical counterpart to § 1983 for damages against federal officials for constitutional torts.

In the ensuing decades, as federal courts became less hospitable to civil rights plaintiffs, concerted efforts were made to limit both § 1983 and *Bivens*. In the latter case, since *Bivens*

involves no statute, the Supreme Court has curtailed the reach of the remedy through a pinched and sometimes barely recognizable reinterpretation of its own precedent. The Court says it has not endorsed *Bivens* in a new case in over 30 years – although this is not quite true.

In the aftermath of 9/11, attempts to recognize judicially the humanity of people incarcerated as suspected “terrorists” in Brooklyn’s Metropolitan Detention Center clashed with the pleadings requirements for stating a claim (particularly against high-ranking officials) in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Now, nearly every civil rights case faces a motion to dismiss for failure to state a claim under F.R.C.P.

a factor must cause a court to hesitate before answering . . .” *Id.* at 1858. The Court gave sweeping examples: the case is different “in a meaningful way” from previous *Bivens* actions; the context is new; the rank of the defendants is different; the constitutional right is different; the “generality or specificity of the official action” varies; the guidance of prior judicial action is unclear; the authority under which the officer acted differs; Congress creates new remedies; Congress fails to create new remedies; or there are “potential special factors that previous *Bivens* cases did not consider.” *Id.* at 1959-60. If there are “special factors counselling hesitation,” the court must “weigh the costs and

## Concerted efforts were made to limit both § 1983 and *Bivens*.

12(b)(6), citing *Iqbal* and its evil twin, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Worse, in *dicta*, *Iqbal* noted that the *Bivens* remedy is now considered a “disfavored” judicial activity. 556 U.S. at 675.

Last year, in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), in a continuation of litigation involving the suspected Brooklyn “terrorists” (now former detainees seeking damages), the Court eviscerated most of what was left of *Bivens*. In a 3-1-2 decision (Justices Sotomayor, Kagan and Gorsuch not participating; Justice Thomas concurring but writing that the “majority” had not gone far enough), the court held that a *Bivens* claim should not be allowed if there exists any way that the Court would “hesitate” to hear it, by imposing a “test for determining whether a case presents a new *Bivens* context.” 137 S. Ct. at 1857. The Court wrote tautologically: “Thus, to be a ‘special factor counselling hesitation,’

benefits of allowing a damages action to proceed.” *Id.* at 1857-58.

In *Ziglar*, the Court held that the “Executive” defendants (high Bureau of Prison and Justice Department heads) could not be sued under *Bivens* under the new test. It remanded the question of liability of the warden for the lower courts to determine whether they should “hesitate.” In this writer’s view, all of this “gobbledygook,” as Justice Scalia used to write, was an effort of a six-member Court to avoid over-ruling *Bivens* but giving district courts every reason not to follow it ever again.

Against that background, we turn to *Leibelson v. Collins*, where a transgender former prisoner sued for violation of her rights to equal protection, religious freedom, freedom from excessive use of force, and violations of state tort law during her incarceration. The lengthy opinion of U.S. District Judge Irene C. Berger deals mostly with the first 3 of 8 counts: violation of the Eighth

Amendment; violation of the Equal Protection component of the Fifth Amendment on the basis of sexual orientation; and the same violation on the basis of sexual identity.

Benjamin Liebelson was a well-known gay and transgender inmate with a history at the Federal Bureau of Prisons. She was knowingly permitted to double cell with a lover at a previous institution and at the institution at issue (FCI- Berkeley, where she was incarcerated for four months), until she was allegedly caught having sex under a blanket instead of standing for the count. She alleges that thereafter she was punished, separated from her partner, subjected to verbal abuse, denied religious services, subjected to excessive force in body searches (fingers in rectum), denied meals, spat upon, and punished excessively for minor rules violations that did not result in segregation for cisgender inmates.

The opinion details Liebelson's life before and during incarceration, much of which seems unnecessary; but it provides a flavor of the daily life of a transgender inmate. Liebelson was not, according to the Court, a model inmate, having collected infractions, including breaking fire sprinklers repeatedly to flood her unit. On the day of her body cavity search, officers had to use force to remove her from her cell. She had no tickets after her transfer from FCI-Berkeley, however.

Defendants filed motions for summary judgment on qualified immunity and on what they styled "declining to extend *Bivens* remedy." Judge Berger's decision interweaves its *Bivens* rulings with qualified immunity, but the thrust of the disposition is to grant summary judgment to all except two defendants on two claims: excessive force; and denial of meals. Judge Berger specifically applied *Ziglar's* "hesitation" jurisprudence to Liebelson's claims of Fifth Amendment violation of her Equal Protection right to be free of discrimination based on sexual orientation and sexual identity. This includes the verbal abuse, the singling-out for punishment, and the spitting. It is unclear where Judge Berger's limit is on the refusal to recognize damages remedies for denial of Equal Protection under the Fifth Amendment.

Judge Berger did not find Liebelson's religious claims to be genuine; the prison defendants said she wanted to attend merely to see her boyfriend and the minister had to evict them for disrupting the service. There was insufficient evidence for a jury question on this point, so Judge Berger did not rule on whether First Amendment *Bivens* damages claims were barred by *Ziglar*.

Judge Berger found a jury question on the insertion of an officer's fingers into Liebelson's rectum. Perhaps poorly advised, the officer insisted he did not do it and made no argument that it was necessary for a proper search under the circumstances. The ruling, however, necessarily holds that a *Bivens* claims on excessive force is permitted to go to the jury. Judge Berger ruled that in the Fourth Circuit "there is no *de minimis* injury threshold for an excessive force claim," citing *Hill v. Crum*, 727 F.3d 312, 316 (4th Cir. 2013). The court also relies on § 1983 cases on excessive force and the standard of *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), which was a § 1983 case and did not apply to federal defendants. She ignored minor discrepancies in Liebelson's deposition testimony and complaints, saying they were for the consideration of the jury, not for summary judgment, noting that "such inconsistencies are common in victims of sexual abuse."

Similarly, the denial of food claim is a *Bivens* claim under the Eighth Amendment. The background is intertwined with the sexual orientation and identity issues in the case: other inmates were refusing to let Liebelson sit in the dining hall or eat unless she provided sexual favors. The jury question was whether the officer in charge's remedy (sneaking Liebelson food on occasion) was adequate or deliberate indifference. It will be difficult to try this point without the *res gestae*. In fact, Liebelson's sexuality is intertwined in the entire matter. Interestingly, the Supreme Court's only transgender case to date – *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) – was itself a *Bivens* case, of more recent vintage. It was not mentioned in the majority opinion in *Ziglar*, but

it appears in Justice Breyer's dissent, as does a reference to Justice Scalia's dissent in *Sell v. United States*, 539 U.S. 166, 193 (2003) ("A [*Bivens*] action . . . is available to federal pretrial detainees challenging the conditions of their confinement"). Judge Berger finds that the food claim, while a "new context" under *Ziglar*, is "quite analogous" to *Carlson v. Green*, *supra*; that the law on the right to food is "regularly litigated" and "well-established"; that "there was nowhere for gay or transgender inmates to sit 'without having to submit to doing things that we don't want to do'"; and that "a jury could find that [defendant] failed to act despite knowing that Ms. Leibelson would either go hungry or face sexual abuse from her fellow inmates."

Judge Berger grants qualified immunity to all of the defendants except the two involved in the issues going to trial. The opinion does not say what the court is going to do with the state law claims. Judge Berger deserves kudos for proceeding with the *Bivens* claims still permitted after *Ziglar*.

It cannot go without mentioning, however, that the Founders were concerned with excessive power by the Central Government at the time of the adoption of the Bill of Rights, and they sought to place restrictions on a new Congress they did not fully trust – because Congress, if left to its own devices, might not protect them. Yet, it is the Originalists who often cry the loudest that it is Congress who must establish any damages remedy for violations of the Constitution by federal officials. In so arguing, they turn original intent on its head.

Leibelson is represented by Fein & DelValle, *pro hac vice*, Washington, D.C.; and Goddard & Waggoner, Clarksburg, West Virginia. Defendants are represented by the United States Department of Justice, Washington, D.C.; and the Federal Bureau of Prisons appeared as an "interested" party. ■

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

# Lawsuit Alleging NYPD Discriminatorily Enforced Prostitution Loitering Law against Transgender People Survives Motion to Dismiss

By Ryan Nelson

Judge Kevin Castel of the U.S. District Court for the Southern District of New York resolved a complex motion to dismiss in a case challenging the constitutionality of the New York City law prohibiting loitering for the purpose of prostitution, the City's policies and customs implementing that law, and the legality of the law's enforcement against eight women of color (five of whom are transgender and three of whom are cisgender) who were arrested despite their allegedly "doing nothing more than walking down the street in the neighborhoods where they live." *D.H. v. City of New York*, 2018 U.S. Dist. LEXIS 4717 (S.D.N.Y., Jan. 9, 2018).

The plaintiffs (represented by Cleary Gottlieb Steen & Hamilton LLP and the Legal Aid Society) allege, among other things, that: a) the law is unconstitutionally vague and overbroad; b) the City and several associated individuals (represented by the City's Law Department and Department of Corrections) subjected them to unlawful discrimination based on their race, gender, and gender identity; and c) they were arrested without probable cause while engaging in protected speech in violation of their liberty interests in self-expression, bodily integrity, and privacy. Plaintiffs seek an injunction restraining defendants from enforcing the law, declaratory relief that the law is void, and damages. In the instant motion, defendants move to dismiss on standing grounds all claims to the extent that they seek injunctive and declaratory relief (but not to the extent that they seek damages) and further move to dismiss several of the claims for allegedly failing to state a claim upon which relief can be granted.

With respect to standing, the court dismissed plaintiffs' vagueness and overbreadth claims after concluding that plaintiffs' alleged injuries were not

caused by the law's alleged vagueness or overbreadth. On the contrary, the court concluded, the pleadings allege only that the defendants "falsely alleged" that plaintiffs violated the law, not that the law as applied to these plaintiffs was vague or overbroad. However, the court concluded that one plaintiff does have standing to sue for injunctive and declaratory relief on her discrimination claim because her injuries are imminent, traceable to defendants, and redressable, whereas the court dismissed for want of standing all other claims seeking injunctive and declaratory relief by all other plaintiffs.

First, the court held that one of the transgender plaintiffs plausibly alleged imminent injury because police officers allegedly told her that, "if they saw 'girls like them' [presumably referring to transgender women] outside after midnight, they would arrest them." Second, the court held that the same plaintiff had shown that her imminent injuries were plausibly traceable to defendants' allegedly discriminating against her based on her gender identity. However, the court found a lack of traceability with respect to her gender and race discrimination claims and, thus, dismissed those claims for want of standing. Third, the court held that injunctive and declaratory relief would redress this one plaintiff's gender identity discrimination claim.

With respect to the alleged failure to state a claim upon which relief can be granted, the court dismissed several of plaintiffs' claims on the merits even though many of these claims were sufficiently dismissed on standing grounds. Foremost, the court dismissed plaintiffs' vagueness claim because, the court reasoned, people of common intelligence would not need to guess at the law's meaning or differ as to its application. Next, the court dismissed plaintiffs' overbreadth claim because

offers to engage in illegal transactions (e.g., solicitations of prostitution) are excluded from First Amendment protection, so a law barring such speech is not so broad as to prohibit a substantial amount of protected speech.

Further, upon review of circumstantial and direct evidence of bias by City police officers, the court refused to dismiss several plaintiffs' claims of intentional discrimination against individual defendants to the extent that such claims seek damages; recall that such claims were dismissed for lack of standing to the extent that they seek injunctive or declaratory relief. Yet, the court dismissed all other discrimination claims against individual defendants seeking damages, noting that proffered statements of non-defendants; allegations of falsified arrest records; and statistics allegedly demonstrating the disparate impact of arrests under this law against women, racial minorities, and transgender people were irrelevant to show the necessary discriminatory intent of the individual defendants. Judge Castel then concluded the opinion by dismissing many of the plaintiffs' remaining claims (e.g., conspiracy, municipal and supervisor liability).

This opinion paves the way forward for the court to meaningfully review not only whether and how much individual plaintiffs were discriminated against by individual police officers, but also whether the law itself should be enjoined and declared void (either entirely or, more likely, to the extent that the City and its police officers apply it in a discriminatory manner to transgender people). Indeed, this case leaves open the possibility that the City will be forced—at long last—to defend at least some of its policing practices as they affect transgender people. ■

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*Ryan Nelson is corporate counsel for employment law at MetLife.*

# 1st Circuit Affirms Jury Verdict for Lesbian Firefighter in Title VII “Sex-Plus” Case

By Arthur S. Leonard

A three-judge panel of the Boston-based 1st Circuit Court of Appeals affirmed a Title VII jury verdict for Lori Franchina, a lesbian firefighter who won her claim of hostile environment sexual harassment and retaliation against the Providence, Rhode Island, fire department. The January 25 decision harshly condemned the Providence Fire Department for its treatment of Franchina, concluding, “The abuse Lori Franchina suffered at the hands of the Providence Fire Department is nothing short of abhorrent and, as this case demonstrates, employers should be cautioned that turning a blind eye to blatant discrimination

The 1st Circuit has a twenty-year old precedent barring sexual orientation claims, but this case shows that they can be brought of the sexual orientation issues mingle with more traditional sex discrimination issues. Courts refer to such cases as “sex-plus” cases. The opinion by Circuit Judge Ojetta Rogeriee Thompson explained that Franchina’s evidence clearly supported liability under the sex-plus theory.

Franchina joined the Fire Department in 2002, assigned to the North Main Street Fire Station, where she experienced neither discrimination nor harassment and quickly advanced to a leadership position, eventually becoming a Rescue

she refused to engage with him. In a subsequent run that day, he embarrassed her in front of nurses, doctors, patients, and patient families in a hospital holding room, as he “began rubbing his nipples in a circular fashion, leapt up in the air, and screamed at Franchina, ‘My lesbian lover! How are you doing?’” Franchina testified that she was “horrified and felt belittled,” and other firefighters present were “similarly appalled.”

The court’s opinion goes on in detail about Ferro’s continued misbehavior, which became the talk of the Department. As a result, Chief Curt Varone initiated a complaint against Ferro, and when word of the resulting disciplinary proceeding got around, other male firefighters at that station “began to treat Franchina with contempt and disdain.” The court’s opinion documents in detail a litany of slights, insubordination, and even an attempt by a firefighter serving as a cook for the company to cause her food poisoning. Co-workers took to referring to Franchina by epithets such as “Frangina” (a play on her name and vagina), “bitch,” and “lesbo.” Some of the insubordination resulted in danger to patients her squad was assigned to rescue.

Even after she was transferred to a different station, the harassment continued when one of her persecutors from North Main Street showed up at the new station on an assignment and quickly spread the word about her. Franchina sought an obtained a state court injunction against one of her persecutors, but the Department failed to effectively execute an order that he not be assigned in any stations that had a rescue unit.

Although some disciplinary steps were eventually taken against individual employees, the Department never effectively put an end to the harassment, and “the constant ridicule and harassment Franchina experienced caused her to be placed on injured-on-duty (IOD) status, where she performed administrative tasks and eventually was

## Whether Title VII forbids discrimination because of sexual orientation or gender identity is one of the hot questions in employment discrimination law.

does not generally fare well under anti-discrimination laws like Title VII.” *Franchina v. City of Providence*, 2018 WL 550511, 2018 U.S. App. LEXIS 1919 (1st Cir., Jan. 25, 2018).

Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination because of the sex of an individual. Whether Title VII forbids discrimination because of sexual orientation or gender identity is one of the hot questions in employment discrimination law, but the Supreme Court’s recent decision not to review a negative answer to that question by a three-judge panel of the Atlanta-based 11th Circuit has put off a definitive answer. In the meanwhile, gay people encountering discrimination continue to file claims and sometimes, given the nature of the problems they encounter, have been able to win victories, even in federal circuits where the courts officially do not allow sexual orientation discrimination claims.

Lieutenant in charge of a rescue vehicle squad. Her problems began in 2006 when she was assigned to work a shift with Andre Ferro, “a firefighter with a history of sexually harassing female colleagues,” under her supervision.

On his first day under Franchina’s command, Ferro bluntly asked if she was a lesbian. When she said this was none of his business, he said, “I don’t normally like to work with women; but, you know, we like the same thing, so I think we’re going to get along.” She told him not to say such things, and immediately went into her office to avoid him, but soon an emergency call came in and their squad was dispatched to respond. During the run, Ferro “continued with his inappropriate prattle” and sexually charged talk, including suggesting that if Franchina wanted to have a child, “I could help you with that.” Franchina found his chattering so distracting that she asked him several times to stop talking and



requested not to come to the fire station.

At her discrimination trial, other women in the Department testified to a culture of discrimination, supporting Franchina's claim that the hostile environment she encountered was due to her sex as well as her sexual orientation. This led the court to conclude that her Title VII sex discrimination claim could go forward. The jury, resolving all issues against the Department, awarded her substantial damages, including "front-pay" which was adjusted by the trial judge to over half a million dollars and punitive damages (which the trial judge removed from the award).

Providence appealed the verdict and substantial damage award, claiming that most of Franchina's allegations were barred by the statute of limitations and that the trial judge had erred in allowing certain objectionable evidence to be shown to the jury, but the court of appeals rejected these arguments.

Most significantly, the court rejected Providence's argument that this was really a sexual orientation discrimination case that should have been dismissed by the trial judge under the circuit's precedent. Judge Thompson responded that this was a "sex-plus" case, which she described as "a flavor of gender discrimination claims where 'an employer classifies employees on the basis of sex plus another characteristic.'" The city argued that Franchina could not bring such a claim unless she could present evidence at trial of a comparative class of gay male firefighters who were not discriminated against. The city argued that absent such evidence, she could not establish the treatment she suffered was due to her sex.

The court rejected this argument, quoting earlier decisions holding that "the effect of Title VII is not to be diluted because discrimination adversely affects only a portion of the protected class." Thompson pointed out that the city's position conflicts with the text of Title VII as amended in 1991 to provide that if there are more than one causative factors for discrimination, some covered by Title VII and some not, as long as the plaintiff shows a factor covered by Title VII, they can establish a sex discrimination claim under the statute. Thus, "the sex-plus label is no more than a heuristic, a judicial

convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment and obtain a favorable verdict at trial even when not all members of a disfavored class are discriminated against" because another factor in addition to sex contributed to the discrimination – in this case, Franchina's sexual orientation.

The court found that the jury had a sufficient evidentiary basis to conclude that the Department violated Title VII in Franchina's case, because there was plenty of evidence to suggest that her sex as well as her sexual orientation were involved. The court pointed out that Franchina was not attempting to overturn the circuit's precedent against sexual orientation claims, and in fact the trial judge had dismissed a count of her complaint specifically based on sexual orientation, so that claim was not part of the trial.

The court upheld the trial judge's charge to the jury, which told them that Franchina "did not have to prove that all women were discriminated against or were harassed, but she must prove that she was harassed, at least in part, because she is a woman. In other words, she may meet this element by proving that she was harassed because she is part of a subclass of women, in this case lesbians, if she also proves that this harassment was at least in part because of her sex or gender."

The court also rejected the city's argument that an award of front-pay was inappropriate where the plaintiff did not present an expert witness to discuss how to determine the present value of future pay, which should be taken account of in the final damage award. The court pointed out that the trial judge had adjusted the jury award to take account of this factor, and that 1st Circuit precedents did not, strictly speaking, forbid awarding front-pay in the absence of expert testimony.

Franchina is represented by John Martin, Benjamin H. Duggan, and Kathy Jo Cook and KJC Law Firm LLC. The court received a joint amicus brief from GLBTQ Legal Advocates & Defenders (GLAD), Lambda Legal, the National Center for Lesbian Rights and the ACLU. ■



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# Divided Mississippi Supreme Court Refuses to Relieve Closeted Gay Doctor from One-Side Divorce Settlement Agreement

By Arthur S. Leonard

Voting 7-2, the Mississippi Supreme Court refused to relieve a closeted gay doctor, who is also HIV-positive, from the terms of a very one-sided divorce settlement agreement which he had signed with his ex-wife more than two years prior to filing an action to set the agreement aside or modify it as unconscionable and formed under duress. Under the agreement, which was approved by the Hinds County Chancery Court, all but \$5,000 a month of his income goes towards support of their one child and alimony for his wife, and obligates him to assume all the expenses of raising the child through college and potential marriage, among other things. *Smith v. Doe*, 2018 Miss. LEXIS 39, 2018 WL 549404 (Jan. 25, 2018). For confidentiality purposes, the court used pseudonyms to refer to the parties, using the names Carl Smith and Lisa Doe. Both of them are doctors. Justice James D. Maxwell, II, wrote for the court. Justices Leslie D. King and James W. Kitchens each wrote dissenting opinions, and Justice Kitchens also joined Justice King's opinion.

The divorce occurred because Lisa found out that Carl had been engaging in extramarital affairs with known and anonymous same-sex partners. He had lied to her about how he contracted HIV, and about allegations concerning his alleged pedophilic activities (trading nude pictures of underage boys online). Lisa, represented by two lawyers, proposed an extremely one-sided settlement agreement, which included a provision in which Carl, who was not represented by counsel at Lisa's insistence, acknowledged that the agreement was one that a court would not normally impose in a contested case. The provision stated: "Nevertheless, Husband is both willing to limit and restrict his rights and expand his

obligations regarding child support, alimony, and division of marital property and debt as contained in this agreement. These limitations and restrictions of rights and expansion of obligations are based, in part, by both Husband and Wife's mutual understanding of the unique difficulties in which Husband's behavior has placed the family unit." The agreement obligated Carl to pay over about 75% of his income to Lisa on a monthly basis, and although it stated that Carl had been encouraged and free to seek legal advice concerning the agreement, he testified that in fact Lisa threatened to go public with all the detrimental information he uncovered if he hired a lawyer. Carl testified that he had not seen the agreement until it was presented to him for signature, with no opportunity to review it or seek advice about it.

Carl made all payments for more than two and a half years, but then filed a complaint to set aside, or alternatively to modify, the agreement. He argued coercion, duress, and unconscionability. Wrote Justice Maxwell, "He suggested his wife had strong-armed him, threatening to disclose his affairs, disease, and alleged malfeasance if he did not sign the agreement. And he signed the agreement under duress, facing 'financial ruin, humiliation, loss of his medical license, criminal prosecution, and loss of contact' with his daughter. Carl also claims Lisa would not permit him to have an attorney review the agreement's terms."

Lisa, while "admitting that she was angry and behaved harshly toward Carl after she had unearthed much of his hidden second life and illicit activities," argued that "his coercion and duress allegations are not only false but are undermined by his express acknowledgements in the property-settlement agreement."

The chancellor granted Carl a hearing, but concluded after five days of testimony that a statutory limitation period for contesting a divorce settlement agreement approved by the chancellor barred Carl's complaint. Rule 60(b)(1) of the state's Rules of Civil Procedure requires an action to set aside an agreement on grounds of the other party's misconduct be filed within six months, but he waited more than two years. Although there are equitable grounds to grant relief from that time limit, the chancellor found that they do not apply in this case, and the Supreme Court backed up the chancellor in the finding that there was "no evidence of good cause in Carl's delay" and that granting relief "at this late date would cause actual prejudice to Lisa." The chancellor had also, alternatively, rejected Carl's contention that the agreement was unconscionable, noting that both of the parties are educated, licensed professionals and that "Carl was not overly browbeaten or otherwise coerced into signing a procedurally or substantively unconscionable agreement." Carl's complaint that after meeting all monthly financial requirements under the agreement he was left to live on only \$5,000.00 a month, was not calculated to carry much weight in Mississippi. (An on-line check shows that based on 2016 data, an annual income of \$60,000 both exceeds the national median family income and far, far, far exceeds the annual median family income in Mississippi, which is one of the poorest states with one of the lowest costs of living. No crocodile tears from the majority of the court for the philandering Carl on this account.

Wrote Justice Maxwell, "The chancellor essentially found Carl knew exactly what he was doing and exactly what he was obligating himself to do when he signed the settlement

agreement. Indeed, according to the agreement, Carl accepted its strict terms based on ‘the unique difficulties in which his behavior has placed the family unit.’ The chancellor recognized this and noted that ‘Carl was in a place of self-loathing and felt extreme guilt for his choices that had caused the destruction of his marriage and family.’ That his extramarital activities and devious behavior gave Lisa the upper hand in negotiating a favorable settlement did not negate that Carl ‘freely and willingly’ agreed to the settlement’s terms. Nor did Carl’s ‘self-imposed guilt’ and Lisa’s ‘obvious hostility,’ in the chancellor’s view, amount to an unconscionable disparity of bargaining power. Based on his advanced education, Carl was certainly aware of the finality of signed legal contracts and judgments. And the chancellor’s finding and the agreements express acknowledgements undermine Carl’s newly minted procedural unconscionability claim.”

As to the claim of substantive unconscionability, the court noted, as mentioned above, that Carl testified that he is “very stable” financially and can afford to make the payments. The chancellor did not find that any changed circumstances of the parties would themselves justify modifying the terms. “Here,” wrote Maxwell, “the chancellor ‘expressly determined that no fraud or overreaching existed in this matter.’ Thus, he deemed ‘all provisions of the agreements regarding fixed alimony or a division of property’ unmodifiable. We there find,” continued Maxwell, “even if Carl’s motion was not snagged on the chancellor’s Rule 60(b)(1) and Rule 60(b)(6) timeliness findings, the chancellor did not abuse his discretion in alternatively rejecting the merits of the unconscionability claims.”

Concluding, Maxwell noted that in light of the evidence presented, “this Court has significant public health and safety concerns. We therefore remand the chancellor’s order sealing the court file for the trial court to conduct the balancing test set out in *Estate of Cole v. Ferrell*, 163 So. 3d 921 (Miss. 2012), and determine whether the court file should remain under seal.” In *Estate of Cole*,

the court observed that confidentiality of settlement agreements by consent of the parties should generally be respected as it effectuates settlement of disputes, but that if there is an overriding public interest, a court can unseal previously sealed court records.

Justice King’s dissent is long, detailed, and vociferous, criticizing the majority opinion on just about every point, and sets out in detail the terms of the agreement and the enormous financial obligations it imposes on Carl, some of which are indeterminate and likely to expand substantially in the future. For example, Carl agrees that when the child is old enough to drive, he will buy her a car with no cap on the price or input on his part to its selection. He is also obligated for all of the child’s college expenses, including any post-graduate or professional degrees, “to be selected by Carl, Lisa, and the child, by majority rule.” He was required to make monthly deposits into a designated college fund for the child, provide all insurance and cover all deductibles, maintain a life insurance policy on the child with Lisa as trustee until the child completes her education, making Lisa the primary beneficiary of all his pension plans and retirement savings with the child as secondary beneficiary, bear full liability for all his own debts and for all Lisa’s medical school debts . . . It goes on and on, including that, contrary to usual custom, his alimony obligation would continue even if Lisa remarried and would be an asset of her estate if she died before he did. She got the marital house and almost everything in it, and sole custody of the child; if Lisa died before the child’s majority, custody would go to Lisa’s parents. “The contract provisions wholly deprive Carl of seeing his daughter but require him to almost completely financially support his daughter,” wrote King. In other words, Lisa really took Carl to the cleaners, getting him to agree to things that went far beyond what a court was likely to order in a litigated divorce case.

Justice King commented, “The circumstances of this case by definition are extraordinary and compelling. Carl clearly has demonstrated good cause

for not filing his motion sooner. At the time of his divorce, Carl had HIV, was homosexual without the knowledge of his family, had not disclosed his HIV-positive status to the state [medical] licensing board, had engaged in homosexual extramarital affairs, and was in a precarious situation of possibly losing his means to support himself and also losing complete contact with his child. Given the totality of the circumstances in this case, Carl’s hesitation to contest the property-settlement agreement was reasonable and was for good cause. Thus, I cannot agree with the majority’s conclusion that the chancellor had not erred in finding that Carl’s filing was untimely. I also cannot agree that Carl’s motion lacked merit.”

Justice King noted facts conveniently left out of Justice Maxwell’s opinion for the court, bearing on the unconscionability issue beyond just the content of the agreement. “Even though Carl admitted feeling guilty for his actions,” wrote King, “I cannot find that mere guilt coerced Carl into signing an agreement that gave complete custody and decision-making authority over Carl’s minor child to Lisa, along with extraordinary and oppressive financial obligations. Lisa had access to Carl’s email accounts and forwarded Carl emails that were private as well as potentially detrimental to his future medical career. Carl alleged that Lisa had threatened to reveal his homosexuality and had threatened not only criminal prosecution, but medical licensure revocation or suspension, disclosure of his HIV diagnosis, embarrassment, and humiliation. Carl testified that Lisa had threatened exposure if he hired an attorney to represent him in the divorce or told any family members or friends about what was occurring. Yet Lisa had two attorneys and drafted the agreement to provide Carl only with the minimal amount he would need to live on per month. He had not been able to see or read the contract until minutes immediately before he signed it. In addition, Carl stated that Lisa had threatened exposure if he rented an apartment or hotel room before the

divorce was finalized. Consequently, Carl had lived in his car for several months. Carl had no bargaining power, had a lack of opportunity to study the contract, and had no input in drafting the agreement. Accordingly, I would find that the contract, too, was procedurally unconscionable.”

Chiding his colleagues in the majority, King wrote: “The majority makes much of the clearness of the agreement’s terms. With respect, I believe that the majority downplays the totality of Carl’s position. Lisa did not have the upper hand; she had the only hand.” He also objected to the court’s decision to remand to the chancellor on the issue of sealing the record. “If this Court has public health and safety concerns,” he wrote, “I believe the appropriate method to allay those concerns would be to report to the relevant governmental authority. Those relevant authorities must pursue the matter as they see fit. The trial court in this case agreed with the parties that the record should be sealed. Because unsealing the record would do little to remedy any public health and safety concerns, I fail to see the public benefit gained by unsealing the record.”

In a separate brief dissent, Justice Kitchens quotes from some of the incriminating emails, and implies that the majority is biased against Carl because he is gay. Or at least, that seems to be the import of his closing remarks: “Carl’s position is further supported by the majority’s use of the word ‘salacious’ to describe his extramarital affairs. The word salacious connotes indecency, obscenity, or lewdness. I dare say that the majority would not have chosen that particular term had Carl chosen to engage in heterosexual affairs. A search of the term ‘salacious’ in opinions reveals the term’s use in criminal cases involving pedophilia,” citing *Shaffer v. State*, 72 So. 3d 1090, 1098 (Miss. Ct. App. 2010); *Wade v. State*, 583 So. 2d 965, 968 (Miss. 1991). Notably, there are no allegations that Carl actually engaged in sexual conduct with minors, just that some of the emails he exchanged with other men referred to the subject

“Carl” is represented on appeal by William Abram Orlansky and Susan Latham Steffey. ■

## New York Appellate Division Revives Gay Police Officer’s Discrimination & Retaliation Case Against NYPD

By Arthur S. Leonard

While hesitant to accuse the New York City Police Department, New York City Law Department, and a Supreme Court Justice of bizarre thinking, that is the only conclusion we can draw from *Harrington v. City of New York*, 2018 WL 503144, 2018 N.Y. App. Div. LEXIS 392 (N.Y. App. Div., 1st Dept., Jan. 23, 2018), where a unanimous five-judge panel of the Appellate Division, 1st Department, reversed a decision by Justice James E. d’Auguste from October 13, 2016, in which he reiterated a prior decision entered on November 12, 2015, to dismiss sexual orientation discrimination and retaliation claims by Michael Harrington, a former NYPD auxiliary police officer.

Harrington worked as an auxiliary police officer from 2002 until 2009, then resigned to take a police officer position in California. Evidently unhappy away from NYC, he sought to be reinstated as a police officer with NYPD in June 2009, passing a psychological exam. After his request for reinstatement was denied, he filed a new application, passing the written exam in 2010. While his application was pending, he accepted law enforcement positions with sheriff’s departments in Arizona and Missouri, passing a psychological evaluation for both of those positions. In September 2013, he began working as a corrections officer for the NYC Department of Correction, passing yet another psychological evaluation, and he continues to serve in that position while pursuing his goal of joining the NYPD.

While employed as an auxiliary, he filed a sexual orientation discrimination complaint with the Department in 2007, which was eventually settled at the end of 2013 with a payment to him of \$185,000. Assuming the City does not throw large sums of money at discrimination grievances if it believes there is no merit to their claims, one can reasonably infer that he had a decent

case. After he had signed the settlement agreement and waiver on December 12, 2013, he was instructed to proceed with his then-pending 2010 application to join the NYPD, submitted to another psychological evaluation, and waited. He was told his application was “being held on a psychological review” which lasted more than a year. Finally, he was told that the NYPD found him not psychologically fit to be a police officer, based on the police psychologist’s conclusion that he “relied chiefly on litigation to resolve issues,” citing his 2007 discrimination claim as evidence of his “poor stress tolerance.” Evidently, in the opinion of this psychologist, implicitly adopted by the Department, police officers who complain about discrimination against them have “poor stress tolerance” and if they pursue their claims in a legal forum, that indicates psychological unfitness to be a cop. Stated otherwise, the unwritten policy of the NYPD is that police officers who encounter discrimination in the Department should just suck it up, and those who don’t are unfit for the force. Wow!

Harrington got an independent psychologist to do an evaluation, and this produced the same result as the numerous other evaluations he has gone through, finding him fit to be a police officer. He also found evidence that the Department’s psychologist had omitted from his report the data showing that Harrington “met or exceeded requirements in every area of the ‘Job Suitability Snapshot,’” and omitted the psychologist’s own notes showing that Harrington’s “thought processes were ‘coherent’” and within normal limits. His internal appeal of this rejection of his application was turned down and he filed this lawsuit, seeking damages and an order that the NYPD hire him.

Justice d’Auguste granted a motion to dismiss Harrington’s sexual orientation discrimination and retaliation claims. Reversing the trial judge, the Appellate

Division panel (Justices Gische, Webber, Oing, Singh, and Moulton) concluded that his factual allegations were, rather obviously, sufficient to state claims for discrimination and retaliation. After reciting the factual allegations now on the record, the court said that “the foregoing, taken together, and affording plaintiff the benefit of every favorable inference, establishes prima facie that defendants discriminated against plaintiff on account of his sexual orientation in finding him psychologically unfit to serve.”

It was also clear that the basis for the NYPD’s action was sufficient to ground a retaliation claim. “Plaintiff alleges that in retaliation for his having commenced the 2007 action against defendants, they placed a psychological hold on his present application for employment in 2014, and ultimately found him psychologically unfit for the position.” After finding that the settlement agreement he had signed in 2013 did not bar the present action, because the release he signed applied only to claims arising up to that time, the court stated the obvious: “In finding plaintiff psychologically unfit, defendants’ police psychologist relied on plaintiff’s 2007 action against defendants. Specifically, the police psychologist’s report stated that plaintiff had ‘poor stress tolerance’ and relied ‘chiefly on litigation to resolve issues.’ The 2007 litigation serving as the psychological disqualifier is sufficient to plead the causal connection between the protected activity and the adverse action in this case.”

The court rejected the defendants’ disingenuous argument that the 2007 action was “not sufficiently temporally proximate to the alleged adverse action to support the causal connection” for a retaliation claim. “Plaintiffs’ allegations are sufficient to permit the inference that the reason plaintiff was found psychologically unfit to serve was because he brought the 2007 action against defendants. This, along with the extensive history of having been found psychologically fit to serve as a police officer and in similar positions, supports an inference that the disqualification was retaliation for bringing the 2007 action.” Time for a new settlement offer from the City Law Department?

Harrington is represented by Naved Amed of Amed Marzano & Sediva PLLC. ■

## New York Appellate Division Rules against Sperm Donor Seeking Paternity Determination and Custody

By Arthur S. Leonard

In a case showing the pressing need for revision and updating of New York’s Domestic Relations Law to reflect modern-day family realities and effectively take account of the existence of the New York Marriage Equality Act, the Appellate Division, 3rd Department, ruled that a sperm donor to a lesbian married couple was “equitably estopped” from seeking a paternity determination regarding the child conceived using his sperm, and countermanded a ruling by Chemung County Family Court Judge Mary Tarantelli that genetic testing be done to confirm the plaintiff’s biological

who had known one another for a short time through family, had discussed respondents’ desire to have a child together, and petitioner volunteered to donate his sperm for this purpose. The parties agree that petitioner, with his partner present, knowingly provided his sperm to assist respondents in having a child, and that the wife performed the insemination. Prior to the insemination, the parties had entered into a written agreement drafted by petitioner that was signed by respondents and petitioner in the presence of his partner. Pursuant to that written agreement, which was

**“This case shows the pressing need for revision and updating of New York’s Domestic Relations Law to reflect modern-day family realities and effectively take account of the existence of the New York Marriage Equality Act . . .”**

fatherhood. *Christopher YY v. Jessica ZZ and Nichole ZZ*, 2018 WL 541768, 2018 N.Y. App. Div. LEXIS 489, 2018 NY Slip Op 00495 (App. Div., 3rd Dept., Jan. 25, 2018). There was no dispute between the parties that the child in question was conceived using his sperm. The court found it was in the best interest of the child to dismiss this lawsuit.

Jessica and Nichole, the respondents in this case, were married before Jessica gave birth to their child in August 2014. Justice Robert C. Mulvey described the circumstances of the child’s conception: “It is undisputed that the child was conceived, on the second attempt, through an informal artificial insemination process performed in respondents’ home using sperm donated by petitioner. The parties,

entered into without formalities or the benefit of legal advice, petitioner volunteered to donate his sperm so that respondents could have a child together, expressly waived any claims to paternity with regard to any child conceived from his donated sperm and further waived any right to custody or visitation, and respondents, in turn, waived any claim for child support from petitioner.” The court noted that Christopher, the petitioner, denied the existence of such a written agreement, but the court found that the testimony by respondents and petitioner’s partner provided a basis for the Family Court’s determination that it did exist.

After the child was born, the parties “disagreed on petitioner’s access to the child, and his partner subsequently admitted in sworn testimony that she

had destroyed the only copy of that agreement,” but the court decided that the agreement was only being considered for the purpose of determining the parties’ “understanding, intent and expectations at the time that petitioner donated his sperm and the wife impregnated the mother,” and not as a legally enforceable contract, so its destruction was not critical in this case. The court stated that the respondents lived together with the child as a family, and the petitioner did not see the child until she was one or two months old.

Family Court Judge Tarantelli rejected the mother’s motion to dismiss the proceeding, and, over opposition, granted the petitioner’s request for genetic testing, but agreed to stay the testing order while the mother appealed the ruling. The Appellate Division allowed a direct appeal of the Family Court’s order.

Mulvey wrote, “addressing whether the presumption has been rebutted, to a child born to a same-gender married couple is inherently problematic, as it is not currently scientifically possible for same-gender couples to produce a child that is biologically ‘the product of the marriage.’ . . . . If the presumption of legitimacy turns primarily upon biology, as some earlier cases indicate, rather than legal status, it may be automatically rebutted in cases involving same-gender married parents. This result would seem to conflict with this state’s ‘strong policy in favor of legitimacy,’ which has been described as ‘one of the strongest and most persuasive known to the law.’ Summarily extinguishing the presumption of legitimacy for children born to same-gender married parents would seem to violate the dictates of the Marriage Equality Act,” noting that law’s requirement that married

in this case has not “established, by clear and convincing evidence, that the child is not entitled to the legal status as ‘the product of the marriage,’” and thus the presumption is not rebutted and, even if it was because there was no disagreement that petitioner was the only sperm donor, “we find, for reasons to be explained, that the doctrine of equitable estoppel applies to the circumstances here and that it is not in the child’s best interests to grant petitioner’s request for a paternity test.”

The court rejected any argument that because the respondents had proceeded informally and not complied with statutory provisions governing donor insemination in New York, they were precluded from achieving legal recognition for their family. Actually, in past cases the New York courts have not formalistically insisted that parental presumptions don’t apply if the parties failed to follow the donor insemination law to the letter. As to the application of equitable estoppel to block Christopher’s paternity action, the court cited earlier cases holding that the doctrine “is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another [person].” This is done to “protect the status interests of a child in an already recognized and operative parent-child relationship.” In other words, the court is not going to let Christopher interfere in the established relationship that Nichole has with the child her wife bore.

Relating this back to the facts of the case, Mulvey found that the conduct of the parties support blocking Christopher from the paternity action. “He was not involved in the child’s prenatal care or present at her birth,” wrote Mulvey, “did not know her birth date, never attended doctor appointments and did not see her for at least one or two months after her birth. He was employed, but never paid child support, and provided no financial support . . . . By his own admission, he donated sperm as a ‘humanitarian’ gesture, to give respondents ‘the gift of life’ and expected only ‘contact’ with

## The presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents.

Justice Mulvey reviewed the basic family law principles under which the spouse of a woman who bears a child is presumed to be the child’s legal parent, the child being characterized as a “product of the marriage.” The statutes provide that this presumption can be rebutted through a proceeding establishing that another man than the mother’s husband is the biological father of the child, so that the child is not, literally speaking, a “product of the marriage.” But, he pointed out, the tests in our antiquated statutes don’t really account for the modern phenomenon of same-sex couples having children through donor insemination, as the donor insemination statute focuses on the legal parental status of a husband who gives written permission for his wife to receive a sperm donation from another man.

“Application of existing case law involving different-gender spouses,”

same-sex couples have the same “legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage” as different-sex couples have. “As the common-law and statutory presumptions of legitimacy predate the Marriage Equality Act,” Mulvey commented, “they will need to be reconsidered.”

While pointing out that “a workable rubric has not yet been developed to afford children the same protection regardless of the gender composition of their parents’ marriage, and the Legislature has not addressed this dilemma, we believe that it must be true that a child born to a same-gender married couple is presumed to be their child and, further, that the presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents.” The court decided, biology aside, that the petition

the child as a ‘godparent’ by providing her mothers with ‘a break’ or ‘help.’ He never signed an acknowledgement of paternity or asked to do so, and no aspect of his testimony or conduct supports the conclusion that he donated sperm with the expectation that he would have a parental role of any kind in the child’s life, and he never had or attempted to assert such a role.” On the other hand, the testimony fully supported Nichole’s role as a mother to the child. The court also pointed out that Christopher didn’t file his petition until the child was seven months old, and was “in an already recognized and operative parent-child relationship” with her birth mother, Jessica, and with her other mother, Nichole.

The court concluded that authorizing genetic testing and allowing the case to proceed was not in the child’s best interest, in light of the existing relationship of the child and her parents.

The court related that a new attorney had been appointed to represent the child in this appeal. She had favored the genetic testing, mainly because of events that have occurred since the Family Court hearing. It seems that the child has been in foster care, and there are neglect petitions pending against the mothers, although the lawyers appearing at the hearing in the Appellate Division did not know the details. “However,” wrote Mulvey, “we find that the subsequent events, on which we take no position, do not alter our conclusion that respondents established at the [Family Court] hearing that petitioner should be equitably estopped from asserting paternity under the circumstances known to the Family Court at the time of the hearing,” and allowing new matters to be raised at this point “should not be permitted. Doing so would continue to invite challenges to the then-established family unit into which the child was born, creating instability and uncertainty.”

Jessica is represented by Ouida F. Binnie-Francis of Elmira, N.Y., and Nicholde is represented by Lisa A. Natoli of Norwich. The child is represented by Michelle E. Stone of Vestal. Christopher is represented by Pamela B. Bleiwas of Ithaca. ■

## Federal Court in Massachusetts Finds Sexual Orientation Discrimination Actionable Under Title IX

By Timothy Ramos

Being a teenager is especially difficult for boys and girls coming to terms with their homosexuality. The nickname, “Gross-y Josie,” only seems like the worst thing in the world until bullies start using “fag” or “dyke.” This is what Noelle-Marie Harrington (“Noelle”) dealt with between the 7th and 10th grade, until she left Attleboro High School (AHS) to pursue a G.E.D. instead. Afterwards, Noelle and her mother filed a lawsuit against the city and school administrators for peer-on-peer sexual harassment in violation of Title IX of the Education Amendments

(BMS), two brothers in her class asked her out on a date. After Noelle declined and explained that she did not like boys, they called her a “dyke” and “fag.” Although BMS school administrators knew of this and other incidents, Assistant Principal Patricia Knox simply told Noelle to ignore it. As the rest of Noelle’s classmates found out about her sexual orientation, other students began harassing her. Notably, a classmate identified as Tommy C. punched and tripped Noelle on multiple instances, bruising her and spraining her wrist. Following an investigation into one

The case exemplifies how courts are willing to refer to Title VII cases like *Hively* to support their interpretations of Title IX.

of 1972. On January 17, 2018, the U.S. District Court for the District of Massachusetts denied the defendants’ motion for summary judgment. *Harrington v. City of Attleboro*, 2018 U.S. Dist. LEXIS 7828, 2018 WL 475000 (D. Mass. Jan. 17, 2018). In doing so, the court held that Title IX’s prohibition against sex discrimination includes sex-stereotyping discrimination, and sexual orientation can form the basis of a sex-stereotyping discrimination claim. Additionally, the court held that a reasonable jury may find a school deliberately indifferent to peer-on-peer sexual harassment if the school failed to take additional reasonable measures after it learned that its initial remedies were ineffective.

U.S. District Judge Denise J. Casper recounted Noelle’s history of harassment. When Noelle was a seventh grader at Brennan Middle School

punching incident, Knox referred the two students to the school psychologist for peer-to-peer mediation. Ultimately, BMS changed Noelle’s schedule so that she no longer had classes with Tommy C.; however, the boy was never disciplined. His harassment of Noelle was also never discussed by BMS and AHS officials during a meeting to discuss the transition from middle school to high school. Consequently, AHS placed Noelle and Tommy C. in the same 9th grade classroom, where Tommy C. resumed to poke and whisper slurs to Noelle until a teacher moved him to another seat.

By the 10th grade, Noelle was also harassed by another student, Andrew M., and suffered panic attacks as a result of sitting next to him in class. Andrew M. and other students repeatedly called Noelle “dumb,” “nerd,” “ugly,” “stupid,” “fat,” “dyke,” and “fag.” Although

Noelle reported this to AHS Assistant Principal Elizabeth York, York did not follow her usual investigation procedure, and stopped after interviewing Noelle and Andrew M. Because Noelle began refusing to attend school by January 2012, AHS implemented a safety plan focusing on the bullying Noelle experienced in the hallways. However, Noelle was still harassed in class by Andrew M., who shined a laser pointer in her eyes. Because the harassment continued, Noelle published a Facebook post on February 24, 2012, in which she contemplated suicide. Thus, she was treated on an outpatient basis at a crisis center for eight days, and left AHS for good.

Judge Casper's analysis first addressed whether harassment relating to sexual orientation is actionable as sex discrimination under Title IX. Title IX provides that no person in the United States shall be subjected to discrimination on the basis of sex under any education program receiving federal financial assistance. Under 1st Circuit precedent, a claim for sex discrimination can be based on sex stereotypes. *See, e.g., Lipssett v. Univ. of Puerto Rico*, 864 F.2d 881, 909 (1st Cir. 1988). Thus, Judge Casper rejected the defendants' contention that the harassment relating to Noelle's sexual orientation could not be used as the basis for a sex-stereotyping discrimination claim under Title IX. Specifically, the judge noted that stereotypes about sexuality stem from a person's views about men and women's gender roles and the relationships between them. Therefore, discrimination based on a perceived failure to conform to those gender stereotypes falls within the gambit of Title IX's prohibition against sex discrimination. To support the court's reasoning, Judge Casper also applied the "comparative method" used by the 7th Circuit in *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017) for Title VII sex discrimination claims; the 7th Circuit then applied *Hively* to Title IX sex discrimination claims in *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir.

2017). The comparative method asks: holding all other things constant and changing only the plaintiff's sex, would the plaintiff have endured the same harassment? Applied to Noelle's case, had she been a boy, she obviously would not have been harassed for her interest in dating girls.

Because the court concluded that sex-stereotyping based on sexual orientation can support a Title IX sex discrimination claim, Judge Casper then addressed the defendants' contention that the plaintiffs failed to state two of the five elements of a peer-on-peer sexual harassment claim. To state a Title IX claim for peer-on-peer sexual harassment, a plaintiff must show: (1) that he or she was subject to severe, pervasive, and objectively offensive sexual harassment by a school peer; (2) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits; (3) the funding recipient (the school) knew of the harassment; (4) the harassment took place in a school program or activity; and (5) the school was deliberately indifferent to the harassment such that its response (or lack thereof) was clearly unreasonable in light of the known circumstances. *Porto v. Town of Tewksbury*, 488 F.3d 67, 72–73 (1st Cir. 2007). In Noelle's case, the defendants claimed that they were entitled to summary judgment because the plaintiffs did not show that: (i) Noelle suffered from severe, pervasive, and objective offensive sexual harassment; or (ii) that the school administrators were deliberately indifferent.

The defendants erroneously contended that Noelle's incidents of harassment—including those arising to physical assault—were not sex-based if not directly accompanied by the appropriate slurs. Citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998), Judge Casper held that the defendants' distinction was improper because the question of whether gender-oriented conduct rises to the level of actionable harassment depends on a "constellation of surrounding circumstances, expectations, and relationships." In

Noelle's case, the bullying she endured related to her weight and appearance cannot be separated from the bullying she endured related to her sexual orientation; in both cases, the same tormenters carried out the bullying. In sum, a reasonable jury could find that Noelle suffered from severe, pervasive, and objectively offensive sexual harassment due to the derogatory names and physical assaults she endured from her classmates.

Lastly, Judge Casper found that Noelle raised a genuine issue of material fact as to whether school administrators were deliberately indifferent to peer-on-peer sexual harassment. Even if a school enacted measures that were timely and reasonable, those measures can still be deemed deliberately indifferent. Though BMS and AHS took some remedial steps after some instances of harassment, a reasonable jury could find that the schools' responses were inconsistent or insufficient in light of known circumstances. Judge Casper specifically pointed out that Knox told Noelle to ignore the bullying while Noelle was at BMS, and the school did not punish Noelle's bullies with the three-day suspension or expulsion recommended in the school's code of conduct. School administrators also testified that they did not always meet with Noelle when they were required to do so. Additionally, AHS's safety plan failed to address the bullying Noelle received in classrooms and as soon as she left school grounds.

Again, the court's decision only allows Noelle to bring her claim for peer-on-peer sexual harassment to trial, but is significant in that this is one of the first times a court has deemed sexual orientation harassment actionable under Title IX. Furthermore, the case exemplifies how courts are willing to refer to Title VII cases like *Hively* to support their interpretations of Title IX. Whether it takes place in the workplace or at school, sexual harassment is still harassment and should therefore be intolerable. ■

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



# Two Lawsuits Challenge State Department's Refusal to Recognize Same-Sex Marriages

By Arthur S. Leonard

Immigration Equality and cooperating attorneys from Sullivan & Cromwell LLP have filed two lawsuits against the U.S. State Department, challenging the Department's refusal to recognize the birthright citizenship of two youngsters who are children of dual-nation married same-sex couples. The complicated cases turn on interpretation of a federal statute, Section 301(g) of the Immigration and Nationality Act (referred to as the INA), which establishes the citizenship status of persons born abroad to married U.S. citizens. *Blixt v. U.S. Department of State*, Case 1:18-cv-00124 (D.D.C., filed Jan. 22, 2018); *Dvash-Banks v. U.S. Department of State*, Case 2:18-cv-00523 (C.D. Cal., filed Jan. 22, 2018).

The Constitution provides in the 14th Amendment that every person born in the United States is a citizen of the U.S.A. and of the state in which they were born. In the INA, Congress addressed the question whether people born overseas would also be treated as citizens if their parents are U.S. citizens. The statute provides that a person born abroad will be treated as a U.S. citizen at birth if at least one of the person's married parents is a U.S. citizen, and as long as the U.S. citizen parent had been "physically present" in the U.S. for at least 5 years after their 14th birthday.

One of the lawsuits, filed in a U.S. District Court in the Central District of California (whose main courthouse is in Los Angeles), concerns Andrew Mason Dvash-Banks and Elad Dvash-Banks, a married couple, and their twin children, Ethan and Aiden. Andrew is a U.S. citizen, born in California in 1981, who lived continuously in the U.S. until 2005, when he moved to Israel and subsequently enrolled in a graduate program at Tel Aviv University. There he met Elad Dvash in 2008. Elad was born in Israel in 1985 and had lived

there his entire life before meeting Andrew. The two men went to Toronto, Canada, and were married there in a civil ceremony on August 19, 2010.

An act of the Canadian parliament, responding to rulings by various Canadian courts, established same-sex marriage in that country several years earlier. After marrying, Andrew and Elad moved to California, where they decided to raise a family. Because the federal Defense of Marriage Act precluded any recognition of their marriage by the U.S. government, Elad could not obtain permanent residence in the U.S. as Andrew's legally recognized

After the children were born, their parents took them to the U.S. Consulate in Toronto to apply for their "Consular Reports of Birth Abroad" and to obtain U.S. passports for them. Because Andrew is a U.S. citizen and the children were born in 2016 within his legal marriage to Elad, he contends, both boys are entitled under Section 301(g) to be treated as U.S. citizens at birth. But the officials with whom they dealt in Toronto didn't see things that way. They insisted that only Aiden, who was conceived using Andrew's sperm, would be considered a U.S. citizen. Ethan, who was conceived using Elad's

**The complicated cases challenge the Department's refusal to recognize the birthright citizenship of two youngsters who are children of dual-nation married same-sex couples.**

spouse, so they decided to move back to Toronto, where they could live together as a legally recognized married couple and start their family.

They decided to have twins using one surrogate who carried two embryos through to delivery of their sons. Each of the men is the biological father of one of the twins, who were born in Ontario in September, 2016. Their Canadian birth certificates list both men as the fathers of each of the children, Ethan and Aiden. The U.S. Defense of Marriage Act was declared unconstitutional by the Supreme Court in 2013, so at the time the twins were born there was no legal impediment to their Canadian marriage being recognized by the U.S. government in the same way any other legally valid marriage between a U.S. citizen and a non-citizen conducted abroad would normally be recognized.

sperm, would not, because as far as the State Department was concerned, he had no genetic tie to a U.S. citizen, which the State Department decided was necessary for him to be treated as a U.S. citizen, relying on a different section of the law dealing with children born outside the United States out of wedlock.

In effect, the State Department was treating the marriage of Andrew and Elad as having no legal significance in determining Ethan's citizenship.

This appears, on its face, inconsistent with the Supreme Court's decisions in *Obergefell v. Hodges* (2015) and *Pavan v. Smith* (2017), which make clear that same-sex marriages are to be treated the same as different-sex marriages for all purposes of U.S. law. It also seems inconsistent with *U.S. v. Windsor*, which ruled that the U.S. government

is required to recognize lawfully contracted same-sex marriages.

The other lawsuit, filed in Washington, D.C., presents a variation on the same story, involving Allison Dawn Blixt, who was born and raised in the United States, and her Italian wife, Stefania Zaccari, and their two sons, Lucas and Massi.

Allison lived in the U.S. continuously from her birth until 2008. She is a lawyer who began practicing at a law firm in New York beginning in 2005. Stefania, born in Italy, met Allison in 2006 when Stefania was visiting New York on vacation. After Stefania returned home, the women's relationship continued at a distance. Wanting to live together as a married couple, they moved to London, where Allison worked in the London office of her law firm and Stefania could freely relocate from Italy because of the freedom of movement within the

under U.S. law their British marriage would be entitled to recognition.

After each child was born, they went to the U.S. Embassy in London to apply for a Consular Report of Birth Abroad and a U.S. passport for their sons. In 2015 they were told they couldn't apply for Lucas, the first-born, because he was not biologically related to Allison, the U.S. citizen of the couple.

They returned to the Embassy after Massi was born in 2017, seeking to apply on behalf of both boys. Massi's application was granted based on Allison's U.S. citizenship, but Lucas's application was denied. In a letter communicating the denial, the State Department said: "It has been determined that there is not a biological relationship between the U.S. citizen mother and child, through either a genetic parental relationship or a gestational relationship, as required

to be listed on the birth certificate and treated as the child's legal father. The Supreme Court, quoting from its early decision in *Obergefell*, said that married same-sex couples are entitled to the same "constellation" of rights as married different-sex couples. And, of course, in *U.S. v. Windsor*, the Court made clear that legally married same-sex couples are entitled to have their marriages recognized on the same basis as the marriages of different-sex couples by the U.S. government.

That includes, these two new lawsuits argue, having their marriages recognized under Section 301(g), and thus conferring on their children U.S. citizenship, regardless which of the parents is their biological father or mother.

This is not just a new Trump Administration move. The Dvash-Banks family encountered their problem with the State Department in 2016, during the last year of the Obama Administration, and the Blixt family's attempt to get a passport for Lucas was rebuffed in 2015. What these cases will require is for the courts to be faithful to the broad rulings in *Obergefell*, *Pavan* and *Windsor*, and to treat these boys as U.S. citizens since they were born to married couples, each of which included one spouse who is a U.S. citizen and who clearly fulfills the residency requirements established in Section 301(g). Treating them as children born "out of wedlock" is a failure of their rights to equal protection and due process of law under the 5th Amendment, argues the complaint.

Both complaints seek a declaratory judgment stating that the State Department's application of its policies in these cases is unconstitutional and that each of the boys in question is a U.S. citizen. The complaints seek injunctions ordering the State Department to cease discriminating against married same-sex couples by classifying their children as being "born out of wedlock." Of course, if the courts grant the requested relief, the plaintiffs are also seeking an award of attorneys' fees and reasonable litigation costs. ■

## What these cases will require is for the courts to be faithful to the broad rulings in *Obergefell*, *Pavan* and *Windsor*.

European Union. The women entered a civil partnership in England in 2009. After the U.K. legislated for marriage equality, they took the necessary steps to convert their civil partnership into a legal marriage in 2015, retroactive to 2009 as allowed under British law.

Meanwhile, they decided to have children. Stefania gave birth to their first son, Lucas, conceived with sperm from an anonymous donor, in January 2015, a few weeks after they had converted their civil partnership into a marriage, and both women were listed on the birth certificate as parents. They had another child in 2017, Massi, with Allison as the birth mother using sperm from the same anonymous donor, so that the boys would be biological half-brothers. Massi's birth certificate lists both women as his parents. Both sons were born when their mothers were legally married, and at a time when

under the provisions of Section 309(c) of the Immigration and Nationality Act." Section 309(c) is, however, irrelevant, because it deals with children born "out of wedlock," that is, to unmarried parents. But Allison and Stefania are married, and they have a constitutional right to recognition of their marriage by the U.S. government.

In essence, the State Department is flouting the Supreme Court's decisions. *Pavan v. Smith* was a dispute about Arkansas's refusal to issue birth certificates showing both mothers of children born to married lesbian couples who conceived their children using donated sperm. The Court said that Arkansas had to apply the same rule it used when different-sex married couples had children through donor insemination. Although the father in such a case is not biologically related to the child, nonetheless he is entitled

# Gay Indian National Facing Persecution at Home is Given another Chance at Asylum by Australia's Full Federal Court

By Matthew Goodwin

**O**n January 15, 2018, the full Federal Court of Australia ruled that a lower court judge, Sandy Street, erred when he rejected the appeal of a gay Indian man who sought to avoid deportation back to India and to remain Australia. *DAO16 v. Minister for Immigration and Border Protection*, [2017] FCCA 616.

The Indian man [hereinafter "Appellant"] claimed that he would be at risk of harm if he were required to return to India on account of his homosexuality. The dispute in the case centered on the determinations of the administrative tribunal and Judge Street that the Appellant failed to prove he was gay. How an individual proves they are gay is a recurring and vexing problem in asylum law presently. (See the article in *International Notes*, below, about a European Court of Justice ruling on a similar case arising from a gay Nigerian's asylum application in Hungary.) The full Federal Court, analogous to a United States Federal Court of Appeals, found the lower court decisions evinced "extreme illogicality" and lacked "an intelligible foundation."

The Appellant's parents in India are religious Sikhs who "banished" the Appellant from India "... due to the shame and stigma he would bring to his family." The Appellant entered Australia on a student visa in 2007 and was granted a further student visa which terminated in 2012.

In support of his application, the Appellant presented the following evidence of his homosexuality: (1) testimony regarding a romantic relationship he had with a neighbor in India, the discovery of which caused his parents to send him to Australia to "make [Appellant] normal[.];" (2) evidence from 16 witnesses, including one Mr. R with whom Appellant claimed to have a long-standing sexual relationship; (3) a subscription with AussieMen Team; membership cards for certain gay clubs in Sydney, Australia; (4) text messages; (5) a copy of

Appellant's drivers license with Mr. R's address; (6) records showing Appellant used Mr. R's address for a bank account; (7) Appellant's profile on a gay website, Aussiemens.com; (8) invitations to Appellant from Manhunt and Midnight Shift Promotions, gay-focused websites; (9) copies of Appellant's chat history from Grindr, a gay social networking application. Four of the 16 witnesses presented by Appellant said they met Appellant online and had casual sex with him.

Despite the evidence, the administrative tribunal rejected the Appellant's claim that he was homosexual, and Judge Street, upon review, accepted the tribunal's

truly been homosexual he would have engaged in sexual relationships with a larger number of men."

Much of the full Federal Court's opinion centered on the administrative tribunal and Judge Street's rejection, without sufficient reason, of testimony of four witnesses who the full Federal Court assessed as "independent" and could ascertain no basis on which to have found their testimony false.

The Federal Court also took issue with the dearth of "evidence which might explain why Mr. R and 15 other witnesses might wish to assist the [appellant] to remain in Australia if the [appellant] is not in fact homosexual . . ." and found irrational the tribunal's position that "the

**The Indian man claimed that he would be at risk of harm if he were required to return to India.**

conclusions. The administrative tribunal doubted that Appellant would "pursue a homosexual lifestyle upon his return to India" and deemed Appellant's purported three-year relationship with Mr. R "fabricated" and "contrived." The tribunal determined that Appellant visited some gay locations and accepted he had some homosexual experiences with men but opined that this only proved "his preparedness to do anything he considers necessary in order to achieve a favorable immigration outcome." The tribunal appeared to believe that the true nature of Mr. R and the Appellant's relationship was conspiratorial and in furtherance of Appellant's attempts to secure asylum in Australia.

The full Federal Court found Judge Street's acceptance of the tribunal's conclusions to be "legally unreasonable" because, among other things, the tribunal and Street based their decisions on "an unwarranted assumption that if the appellant had

[Appellant's] preparedness to engage in some sexual experiences with men" did not establish that he was homosexual but "[established] only his preparedness to do anything he considers necessary in order to achieve a favorable immigration outcome."

The Federal Court found illogical, and therefore reversible error, the rejection by the tribunal and Judge Street of the Appellant's subscription to a gay newsletter on the basis that they found Mr. R's testimony fabricated. Indeed, the Federal Court pointed out that the subscription date preceded the Appellant's association with Mr. R.

The matter was remitted to the administrative tribunal, differently constituted, to be re-heard and determined. ■

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

# CIVIL LITIGATION *notes*

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## CIVIL LITIGATION NOTES

By Arthur S. Leonard

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

**U.S. SUPREME COURT** – The losing party in *McLaughlin v. Jones*, 401 P.3d 492 (Ariz. Sept. 19, 2017), a lesbian custody dispute, filed a cert petition in January. The Arizona Supreme Court ruled that the statutory family law presumption, which provides that the husband of a woman who gives birth to a child after undergoing donor insemination with the husband's consent is a legal parent of the child, must extend equally to the wife of a woman who gives birth to a child after undergoing anonymous donor insemination with her wife's consent. The birth mother is arguing that she alone has the constitutional status of a parent with the right to exclude anybody who is not the legal or biological parent of her child.

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**9TH U.S. CIRCUIT COURT OF APPEALS** – Affirming a ruling by District Judge Jeffrey S. White (N.D. Calif.), a 9th Circuit panel ruling in *Erotic Service Provider Legal Education and Research Project v. Gascon*, 2018 WL 445461, 2017 U.S. App. LEXIS 1120 (January 17, 2018), rejected a constitutional challenge to California's criminal law against prostitution, Calif. Penal Code Sec. 647(b). The challenged statute prohibits agreeing to engage in an act of prostitution, actually engaging in an act of prostitution, and soliciting anybody to engage in such an act, and defines prostitution as "any lewd act between persons for money or other consideration." In his dissent in *Lawrence v. Texas* in 2003, Justice Antonin Scalia complained that the logic underlying Justice Anthony Kennedy's opinion for the Court, discounting

conventional morality as a justification for sodomy laws, would endanger the constitutionality of prostitution laws, which Scalia argued are based primarily on moral condemnation. The majority opinion in *Lawrence* did not address the validity of prostitution laws directly, and in its penultimate paragraph stating the holding of the case, observed that the facts before the Court did not involve prostitution. Since *Lawrence*, litigants in several jurisdictions have channeled Justice Scalia's analysis, asking courts to invalidate prosecutions or to declare that prostitution laws are facially unconstitutional, but always without success. The result is no different here. Judge Jane A. Restani of the U.S. Court of International Trade, sitting on the panel by designation, explains that the right of intimate association protected under *Lawrence* does not, in the view of the 9th Circuit, extend to commercial sexual relationships. She seizes upon Justice Kennedy's somewhat flowery language ("when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring") and suggests that this does not describe the relationship between a prostitute and a customer, since the relationship is for money, not for personal attraction (at least on the part of the prostitute in many cases, one suspects). The plaintiffs raised substantive due process and intimate association liberty claims, asserted the right to earn a living, and free speech claims aimed at the anti-solicitation provision, all of which the court rejected based on its conclusion that the state easily meets the requirements of rationality review. Having determined that no fundamental rights are involved in the practice of prostitution, the court easily dismissed the claims, but without any sort of considered analysis that would distinguish between different kinds of prostitution (men, women, one-time transactions versus continuing relationships between prostitutes and

customers over time), particularly in relation to the "right to earn a living" case law. In that part of the opinion, the reason is particularly circular: The court observes that precedents on the right to earn a living should rather be characterized as the right to engage in a "lawful occupation," and since prostitution is outlawed completely in 49 states and partially in the 50th (Nevada, which restricts it to licensed brothels authorized by county governments), it immediately fails the test of a "lawful occupation." In rejecting the substantive due process liberty arguments, the court cites studies linking prostitution to trafficking in women and children, sexual violence against women (a high percentage of female prostitutes report being physically assaulted, threatened with a weapon, or raped by their customers), illegal drug use, and the spread of sexually-transmitted disease, and finds that these provide a rational basis for outlawing the practice entirely. The decision is not surprising in light of the unanimity of prior rulings, but the case did draw a lengthy list of amicus parties in support of the plaintiffs, who were represented by several law firms. Prominent among the amici were major LGBT rights organizations, including National Center for Transgender Equality, Transgender Law Center, Lambda Legal, various branches of the ACLU and other civil liberties groups. Arrayed on the other side in support of the government defenders were the National Center on Sexual Exploitation and organizations concerned about trafficking in women and children. The court did not apparently give any consideration to the contention that states might more effectively deal with the unwanted side-effects of prostitution by narrowly legislating to address the side effects, rather than a broadside condemnation that has never proven successful in ending the practice. The other members of the panel were Circuit Judges Consuelo M. Callahan and Carlos T. Bea.

# CIVIL LITIGATION *notes*

**CALIFORNIA**—A self-identified African-American Muslim heterosexual woman asserted a religion, race and sexual orientation discrimination claim in connection with her discharge by a public employer, relying on the California Fair Employment and Housing Act (which bans sexual orientation discrimination), the Unruh Civil Rights Act, Title VII, and the 13 and 14th Amendments of the U.S. Constitution. *Ali v. Cooper*, 2018 U.S. Dist. LEXIS 14989, 2018 WL 620187 (N.D. Cal., Jan. 30, 2018). The sexual orientation portion of her claim asserts that two supervisors whom she charges with discrimination against her are “of an LGBT orientation.” According to U.S. District Judge Edward M. Chen, the plaintiff claims that “they discriminated against her as a heterosexual employee by requiring her to take a sexual harassment sensitivity course that had nothing to do with the alleged racial remark she had made.” However, “Other than the required training, Plaintiff does not allege anything suggesting that Defendants treated her differently because of her sexual orientation.” The “racial remark” in question? She “apparently called” one of the defendants, an African-American woman, an “overseer” at a work session. One of the defendants decided that the comment was “racially insensitive,” suspended the plaintiff without pay for four days, and required her to take a “sexual harassment sensitivity course.” The court granted a motion to dismiss the sexual orientation claim under the FEHA against individual named employees, on the ground that FEHA imposes liability only on the employer entity, not an individuals. As to the sexual orientation claim against the agency, the court found that the plaintiff failed to exhaust administrative remedies by not referring to sex or sexual orientation in the administrative charges she filed as a prerequisite to the law suit. Even if she had, wrote Judge Chen, “the Court would dismiss because Plaintiff failed to plausibly plead that her supervisors

were motivated by anti-heterosexual animus simply because they identify as LGBT persons. Again there is no allegation of a pattern of discrimination against heterosexuals or examples of disparate treatment of others who were otherwise similarly situated.” The court ruled that it would accept an amended complaint on this claim only if plaintiff met two conditions: “demonstrate she in fact filed an administrative charge addressing sexual orientation discrimination *and* provide a factual basis to infer that Defendants required her to take the training course because of her heterosexual status.”

**CALIFORNIA** – U.S. District Judge Cathy Ann Bencivengo granted a *pro se* petition for a writ of habeas corpus on behalf of a native of Mexico who has been held for more than eight months in federal immigration detention while her attempts to stay in the United States are working their way through the convoluted administrative system governing refugee decisions. *Martinez-Lopez v. Sessions*, 2018 WL 490748, 2018 U.S. Dist. LEXIS 9022 (S.D. Cal., Jan. 19, 2018). The petitioner was brought into the U.S. by a parent when 5 years old in 1992, grew up and was educated in the U.S., but has never had any legal immigration status in the country. She was arrested in 2009 and placed in removal proceedings, and applied for asylum, withholding of Removal, and protection under the Convention against Torture based on her identification as a lesbian. The Immigration Judge (IJ) denied her applications, based on a “finding” that “the treatment of gays and lesbians in Mexico had changed significantly in recent years,” such that the petitioner “could not show a clear probability of persecution in the future” if removed to her native country. The Board of Immigration Appeals (BIA) agreed, and she was removed in August 2010, but she reentered the U.S. in May 2012, was apprehended by border

security and placed in “reinstatement proceedings.” She again expressed fear of returning to Mexico, not only due to her sexual orientation, but her recently embraced transgender identity. The asylum officer found her fears genuine, and the case was referred to an IJ, but the IJ denied her applications and the BIA dismissed her appeal. However, the 9th Circuit reversed and remanded, on the authority of *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015), in which the court had recognized a critical distinction between gay and transgender people, finding that the legal progress of gay people in Mexico “may do little to protect a transgender woman like Avendano-Hernandez from discrimination, police harassment, and violent attacks in daily life.” The BIA remanded to the IJ, who expressed bewilderment about what the BIA expected on remand. Petitioner testified that she had also contracted HIV since her previous asylum petition was denied, but the IJ found that this did not affect her eligibility for relief, and denied her applications, leading to a new BIA appeal. The BIA sent the case back to the IJ, with instructions to re-evaluate the claim in light of 9th Circuit precedents, and a hearing before the IJ was scheduled for January 9, 2018. Petitioner had been released on an order of supervision from May 2013 until April 2017, but was transferred to ICE custody after pleading guilty to a California Penal Code Sec. 415 (disturbing the peace) charge. After six months in detention, she requested a bond hearing before an IJ so she could be released pending her appeals, but the IJ denied the request, claiming lack of jurisdiction. During her prolonged detention, she “continues to suffer from numerous health issues as a result of her HIV status,” wrote the court, which observed that her “immigration case will not be resolved anytime in the near future,” and even if the IJ rendered a decision at the January 9 hearing, her case would likely continue at the BIA and 9th Circuit,

# CIVIL LITIGATION *notes*

so she might languish in immigration custody for “several months or years.” Under these circumstances, overruling various jurisdictional objections raised by the government and concluding that requiring Petitioner to exhaust more administrative remedies “may lead to irreparable harm” – mainly due to evidence of inadequate care for an HIV-positive person in immigration detention – the court concluded that she *is* entitled to a bond hearing. Judge Bencivengo ordered that a hearing before an IJ take place within 14 days of her order, “in which the government bears the burden to demonstrate that Petitioner is either a flight risk or a danger to society,” and, “If the government fails to show that Petitioner poses either a danger or a flight risk, the IJ shall set a reasonable bond for Petitioner’s release pending the conclusion of her withholding of removal and CAT case.”

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**CALIFORNIA** – The 2nd District Court of Appeal has revived a discrimination suit against Tinder, Inc., the internet dating app, for charging older members higher fees. *Candelore v. Tinder, Inc.*, 2018 Cal. App. LEXIS 71 (Jan. 29, 2018). The suit goes to a premium service that Tinder introduced in March 2015, called Tinder Plus, which allows users to access additional features for a monthly fee, which is higher for consumers age 30 or older. Plaintiff Allan Candelore sued for age discrimination under the Unruh Civil Rights Act, which prohibits discrimination by business, and the Unfair Competition Law. The Superior Court rejected his claims, but the appellate court revives them, pointing out the obvious age discrimination in play here. Just because Tinder considers younger customers more valuable is not legitimate justification for charging older customers less to benefit from the full service, argues the plaintiff, and now he will get a change to pursue his claim. Candelore is represented by The Kralowec Law Group.

**CALIFORNIA** – Incompetence in the Veterans’ Administration is unfortunately not a new story. In this case, such incompetence inflicted severe emotional distress on an HIV-positive military veteran. *Ricks v. United States*, 2018 U.S. Dist. LEXIS 7626, 2018 WL 454455 (S.D. Cal., Jan. 17, 2018). In January 2010 Raphael Ricks applied to a county agency for food stamps, and was told that the Department of Veterans Affairs (VA) would have to verify his veteran disability status. The county agency contacted a local VA nurse, who faxed the agency Ricks’ medical and private information (which was beyond the scope of the county agency’s request just to verify his status). The information included an incorrect diagnosis of AIDS that the nurse had rendered, which the county agency relayed to Ricks, telling him that he had a few months to live. This was horrifying news to Ricks, who had never previously been told by the VA that he had been diagnosed with AIDS. Ricks immediately called the VA and left a voicemail, but received no response for several days. “Believing his life was going to end in a few months,” he alleged in his complaint, Ricks suffered extreme emotional distress. Finally the VA returned his phone call and told him the AIDS diagnosis was incorrect. On February 4, 2010, the VA followed up with a “corrected letter of diagnosis removed the AIDS diagnosis from his medical records.” Ricks then filed a claim with the VA in February 2010 for damages for his emotional distress, which claim disappeared into the administrative black hole that is apparently characteristic of that agency. Ricks repeatedly contacted the agency to follow up, and was told that his claim was received and they were “working” on it, but nothing was decided for years. In January 2015, he was told to resubmit his claim, because it had been “lost or misplaced.” He promptly resubmitted it, and receipt was acknowledged on March 3, 2015. The VA denied the claim on January 11, 2016, and denied

reconsideration on November 18, 2016. VA concluded that the claim was time-barred. (Bizarre, since he first filed it immediately after the incident!) Wrote District Judge Marilyn L. Huff, “Although the VA concluded in its denial that Plaintiff’s claim was time-barred, the VA admitted to Plaintiff’s allegations. More specifically, the VA determined that Plaintiff had not given written consent for the release of his medical records on January 10, 2010, and that there had in fact been a breach. The VA also noted a VA privacy officer’s conclusion that a breach occurred in January 2010.” Ricks filed suit in May 2017 under the Federal Tort Claims Act, charging the VA with “negligently, carelessly and recklessly releasing medical records with the incorrect diagnosis, to wit, AIDS as opposed to HIV,” and that VA “failed in its duty to release medical records which are accurate.” VA moved to dismiss for lack of jurisdiction and failure to state a claim. In this ruling, Judge Huff concluded that the court has subject matter jurisdiction of the FTCA claim “to the extent that Plaintiff alleges Defendant committed operational error,” but that some Privacy Act claims he sought to add by amending his complaint were time-barred. She also noted, responding to his motion for further leave to amend, that he could well reframe his claim as a medical malpractice claim. She also noted that Ricks might be able to revive his Privacy Act claims with an argument for equitable tolling (which he failed to make in opposition to the government’s motion to dismiss). The upshot is that part of his case is dismissed, but with fast action he can revive portions of his case by repleading. The court gave him until February 16 to do so. He is represented by counsel: Barry A. Pasternack of San Diego.

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**FLORIDA** – U.S. District Judge Timothy J. Corrigan issued an order on January 17 in *Carver Middle School*

# CIVIL LITIGATION *notes*

*Gay-Straight Alliance v. School Board of Lake County*, 2018 U.S. Dist. LEXIS 7334 (M.D. Fla.). Amazingly, given the litigation track record on the issue, there are still school board (and attorneys for school boards) that somehow think they will be the ones to persuade a court that the Equal Access Act (EAA) does not require them to recognize an LGBT student group or gay-straight alliance when they have recognized numerous other non-curricular student clubs in their schools. The battles used to be all at the high school level. As teens have been coming out at earlier ages, the battles are now in middle schools and junior high schools. Expanding application of the EAA to middle schools has required some persuading, and this case has a long history. On March 6, 2014, District Judge William Perrell Hodges denied the student's application for a preliminary injunction, finding they did not have a substantial likelihood of success on the merits, 2 F. Supp. 3d 1277 (M.D. Fla), and on August 19, 2015, Judge Hodges dismissed the case on various grounds, including his conclusion that the EAA did not apply to Florida middle schools, 124 F. Supp. 3d 1254 (M.D. Fla.) This ruling was reversed by the 11th Circuit on December 6, 2016, 842 F.3d 1324, which rejected the various jurisdictional and procedure rulings of the trial court and held that the middle school was subject to the EAA. On remand, Judge Hodges held that the plaintiffs were prevailing parties, granting partial summary judgment, although denying their request for injunctive relief and holding that nominal damages were an available remedy. In this new ruling by a different judge, the Florida- and New York-based ACLU attorneys who successfully represented the student group were concededly entitled to fees and expenses for representing the prevailing parties. They sought a total of \$225,704 in fees and \$6,600.73 in documented litigation expenses. The school board, "somewhat confusingly" according to Judge Corrigan, argued that "a reasonable

attorney's fee award would range between \$98,100 and \$135,250, and any award in excess of \$128,500 would be unreasonable and excessive. Judge Corrigan concluded that the hourly rates sought by plaintiffs' counsel were a bit high by local standards, so he adjusted them down by \$50 an hour for each of the three attorneys, but he pointed out that counsel had already substantially written down their actual hours before submitting their fee application, so he concluded that the claimed hours were "appropriate given the nature of the litigation" and calculated a fee award of \$195,300, and granted counsel's request for \$6,600.73 in "non-taxable litigation expenses in both the district and appellate court."

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**HAWAII** – Perhaps we should not be surprised, in light of what has surfaced over recent months on the issue of sexual harassment in America's workplaces, to read the bizarre-sounding allegations in *Sirois v. East West Partners, Inc.*, 2018 U.S. Dist. LEXIS 2575, 2018 WL 310127 (D. Haw., Jan. 5, 2018), in which a lesbian who was discharged from employment by a national luxury real estate development firm sues under Title VII (hostile environment sex discrimination) and the Hawaii Employment Practices Act (hostile environment sex and sexual orientation discrimination), as well as the Fair Labor Standards Act (failure to pay overtime by misclassifying employee as exempt). She also sues three individual management employees for aiding and abetting, in violation of the Hawaii statute. Alexandra Sirois was employed in the company's Hawaii office as Assistant Project Manager whose job was basically providing support to the only other employee in the office, Andrew Sutton, EWP's Managing Partner in Hawaii. Sirois's complaint recites a long litany of improper, scandalous and salacious allegations about Sutton, who from Sirois's description is a misogynist

without moral boundaries who "by his demeanor, words, and actions . . . made clear that he had no respect for women in a professional work environment," and "regularly directed hostility towards [Sirois] because she was an openly gay female." When Sirois complained to the company's Human Resources Director, Nicole Greener, who worked in the corporate headquarters in Colorado, Greener failed to investigate or take any remedial action. When Sirois then directly contacted the company's CEO, Colorado-based Harry H. Frampton III, Frampton "abruptly terminated my employment, stating that it was clear to him that I could no longer work together with Sutton," but he also offered her a few weeks of severance pay for being a "nice lady." Don't believe it: the termination letter she subsequently received stated that her termination was based on her "uncorroborated allegations" that demonstrated a "lack of respect and trust for Mr. Sutton." Sirois cites the letter as "direct evidence of unlawful retaliation." U.S. District Judge Derrick K. Watson rejected the defendants' motion to strike various allegations of the complaint describing Mr. Sutton's shenanigans – including an allegation that he "pimped out" his wife and her "scantily clad friends" to win the affections of a wealthy married customer. Judge Watson found that all the allegations related to the substance of Sirois' hostile environment counts and should remain in the complaint. He also found that Sirois had alleged facts sufficient to ground her count against individual defendants – Frampton, Greener and Sutton – as well as the company, under an aiding and abetting provision of the Hawaii law, and that Greener – who was never physically present in Hawaii – was subject to the personal jurisdiction of the court as the company's national H.R. Director whose involvement in the case was sufficient to make it appropriate to require her to defend in a Colorado court. However, Sirois did slip up in one respect, failing

# CIVIL LITIGATION *notes*

to comply with Colorado rules for service of process on the individual defendants, since the complaint was left with a company official in Colorado who was not among those designated by statute to accept service on behalf of the individual defendants. The court gave Sirois thirty days to either effect proper service or provide proof that she had already done so, otherwise the individual defendants will be dropped from the case. Sirois is represented by Jonathan Landesman, Cohen Seglias Pallas Greenhall & Furman, PC, Philadelphia, PA, and Leighton M. Hara, Ota & Hara LLLC, Honolulu, HI.

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**ILLINOIS**—On January 25, Cook County Judge Thomas Allen denied a request by a transgender student for a preliminary injunction mandating girls’ locker room access for her at Palatine High School while her discrimination case is pending. The case was brought in state court under the Illinois Human Rights Act, rather than federal court under Title IX. Judge Allen ruled that state law does not require “full and equal access” to school facilities, just access, and that the school’s requirement that the student use a private stall to change clothes did not violate her state statutory rights. The school contended that it was just trying to balance her rights of access with the privacy rights of cisgender girls using the facilities. *Norridge News*, Feb. 1. Meanwhile litigation continues in a suit brought by students and parents against the school district, represented by lawyers from the Thomas More Society. The ACLU represents the student.

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**IOWA** – U.S. District Judge Stephanie M. Rose (S.D. Iowa) granted a preliminary injunction on January 23 on behalf of Business Leaders in Christ (BLC), a student organization at the University of Iowa seeking to have its registration restored by the University, after it had been cancelled because

of the organization’s exclusionary leadership policy. *Business Leaders in Christ v. University of Iowa*, Case No. 3:17-cv-00080-SMR-SBJ. BLC, which “holds itself out as a religious organization,” was allowed to register as a student organization during the fall 2014 semester by the University’s Tippie College of Business. Registration brings a long list of rights and privileges, a dozen of which the court lists in its opinion (unpublished to date). A gay business student who was a member of BLC sought to serve as the organization’s vice president and was rejected by the executive board because he refused to undertake to refrain from engaging in gay sexual conduct. He was told that he could be a member, but that in the board’s view a member who “did not share BLC’s views of the Bible and did not appear willing to confess and repent of sinful conduct” could not serve as a leader of the organization. The student filed a complaint with the University on February 20, 2017, stating: “I was denied a leadership position (Vice President) due to my being openly gay” and sought that the University enforce its non-discrimination policy or “take away their status of being a student organization affiliated with the University of Iowa.” A University official assigned to investigate rejected the organization’s attempt to draw a status/conduct distinction, and concluded that the evidence “does provide a reasonable basis to believe the Policy on Human Rights was violated.” BLC leaders met with University officials and attempted to redraft their organizational documents to signal their compliance with the Human Rights Policy, but ultimately Dr. William Nelson, the official with authority to act, concluded that BLC’s requirement that leaders of the organization sign a “Statement of Faith” committing themselves to live according to BLC’s understanding of Christian precepts, “would have the effect of disqualifying certain individuals from leadership positions

based on sexual orientation or gender identity, both of which are protected classifications under the University of Iowa Human Rights Policy.” Dr. Nelson gave BLC a few weeks to revise its Statement of Faith. BLC appealed to the Office of the Dean of Students, pointing out that Imam Mahdi, an Islamic student organization registered with the University, reserves certain membership benefits solely for members who are Shia Muslims, but Dean Lyn Redington was not persuaded, emphasizing in support of Dr. Nelson’s decision to revoke BLC’s registration that BLC’s communication to the gay student had clearly constituted sexual orientation discrimination. She did point out, however, that BLC could continue to operate on campus, just without all the perquisites of a registered organization. BLC then sued and filed a motion for preliminary injunction, which was granted after a hearing by Judge Rose. Having to get around *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), was the big potential obstacle to BLC, since the issues were virtually the same: the Supreme Court held in *Martinez* that a law school could refuse to recognize CLS because of its exclusionary membership policy. The Court said that a neutral policy outlawing discrimination, not specifically targeted at a particular group, did not violate the 1st Amendment, and rejected CLS’s attempt to push a status/conduct distinction. Judge Rose found this case distinguishable from *Martinez* because of evidence of unequal application of the policy, specifically allowing the Muslim group to maintain an exclusionary policy for full membership, and noting other student organizations that had arguably been allowed to limit membership based on particular beliefs. “In light of this selective enforcement,” she wrote, “the Court finds BLC has established the requisite fair chance of prevailing on the merits of its claims under the Free Speech Clause.” On the other factors to weigh for preliminary injunctive relief, Judge Rose noted that although an injunction



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“may not affect Defendants inasmuch as it may impact the University community by exposing members of the student body to discrimination,” nonetheless, “the likelihood of this occurring appears slim; BLinC is a small organization and one of over 500 student organizations. The Court concludes the balance of harms favors BLinC.” This way lies the slippery slope of illogical argumentation. If every “small organization” is free to discriminate because their conduct will only affect a few people, soon every small organization is free to discriminate . . . .

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**KENTUCKY** – Dismissing a sexual orientation discrimination claim asserted under Title VII in *Wimsatt v. Charter Communications*, 2018 U.S. Dist. LEXIS 11898, 2018 WL 563842 (W.D. Ky., Jan. 25, 2018), Senior U.S. District Judge Charles R. Simpson, III, rejected the plaintiff’s suggestion that the court follow the 7th Circuit’s decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017). After citing the 6th Circuit’s most recent ruling rejecting sexual orientation discrimination claims under Title VII, *Kasich v. AT&T Mobility*, 679 F.3d 464 (6th Cir. 2012), Judge Simpson wrote, “The Plaintiff’s argument to adopt the rulings of other circuits cannot succeed, as this court is required to follow the binding precedent of the Sixth Circuit . . . . The Sixth Circuit’s holding in *Kasich* that sexual orientation discrimination is not a claim of sex discrimination under Title VII is binding on this court. Therefore, Plaintiff’s sexual orientation discrimination claim will be dismissed.” The plaintiff, as stated in her complaint, is an “African American homosexual female,” suing for race and sex discrimination. The dismissal of her complaint is only partial, “to the extent that it attempts to allege a claim of sexual orientation discrimination.” Her claims of race and sex discrimination, as such, were not

the subject of this motion to dismiss. Plaintiff is represented by John Martin, Benjamin H. Duggan, Kathy Jo Cook and the KJC Law Firm, LLC.

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**LOUISIANA** – Bonnie O’Daniel, then an employee of Plant-N-Power Services (PNP), posted on her Facebook page a photo of a man wearing a dress at a Target store, and commented adversely on his ability to use the women’s restroom and/or dressing room with her daughters. The president of PNP, Cindy Huber, characterized by O’Daniel as a “member of the LGBT community,” allegedly took offense at the posting and suggested that O’Daniel be fired immediately. Tex Simoneaux, Jr., an official of the company, subsequently discharged her. *O’Daniel v. Industrial Service Solutions*, 2018 WL 265585, 2018 U.S. Dist. LEXIS 329 (M.D. La., Jan. 2, 2018). O’Daniel then filed a *pro se* federal lawsuit against PNP, its corporate parent, ISS, Huber and Simoneaux, claiming discrimination because of sex and gender, defamation, disparate treatment, intentional infliction of emotional distress, and retaliation. She subsequently amended her suit to claim a violation of constitutional privacy and free speech rights. Eventually she obtained counsel and a new amended complaint was offered, this time focusing just on Louisiana constitutional rights and Title VII. All in vain, however, for U.S. Magistrate Judge Richard L. Bourgeois, Jr., granted Defendants’ motion to dismiss with prejudice. The essence of O’Daniel’s claim was that she has a constitutionally protected right to post Facebook comments on subjects of public interest and to be immune from any adverse consequences from her private sector employer, a contention without any basis in Louisiana or federal law. She claimed the Louisiana constitution provides more protection for free speech than the federal constitution, including protection against a non-governmental employer, but the judge found no support

for that in case law. She also claimed that as a married heterosexual woman she was protected from discrimination under Title VII’s ban on sex discrimination. The judge pointed out that in the 5th Circuit sexual orientation discrimination claims are not cognizable under Title VII, but, in any event, there was no indication that O’Daniel’s status as a married heterosexual had anything to do with her discharge. It was her posting of something offensive to her employer on her Facebook page. Indeed, wrote Judge Bourgeois, “The Amended Complaint likewise makes clear that Ms. Huber and the Plaintiff ‘had a great relationship before the incident’ and that Ms. Huber was aware that Plaintiff was heterosexual, and ‘even sponsored Mrs. O’Daniel’s daughter’s softball team.’ Accordingly,” he continued, “Plaintiff’s assertion that she has a claim for retaliation based on unlawful acts regarding her sex or sexual orientation are conclusory and fail to state a claim upon which relief can be granted.” The court also observed that only the company, not individual company officials, could be held liable under Title VII, and noted in passing that she had failed to exhaust Title VII administrative remedies by filing first with an administrative agency before rushing into court. Her belatedly retained counsel is J. Arthur Smith, III, of Baton Rouge.

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**MISSISSIPPI** – Does it create a “hostile environment” in violation of Title VII for black co-workers of a white employee to call him “derogatory names” and “accuse him of being gay” after he reported to his black supervisor that productivity was down because the co-workers were under the influence of marijuana at work? Unfortunately, we will never know the court’s answer to this question, because Senior U.S. District Judge Glen H. Davidson granted the employer’s motion to dismiss the employee’s hostile environment claim on the ground that he failed to

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allege in his complaint that that he had reported this harassing conduct to the supervisor, and thus the employer could not be held liable for the alleged hostile environment. *Darnell v. Milwaukee Elec. Tool Corp.*, 2018 U.S. Dist. LEXIS 12265 (N.D. Miss., Jan. 24, 2018). Judge Davidson observed that Joshua Darnell's allegation in his opposition brief that he reported this conduct to the supervisor was insufficient, because motions to dismiss are decided based on the factual allegations in the complaint. On the other hand, Davidson denied the employer's motion to dismiss Darnell's claim that his subsequent discharge constituted "reverse discrimination" because of race, finding that he had alleged the necessary facts to give rise to an inference of race discrimination, including that he was replaced by a black employee. The court also rejected the employer's request to dismiss a supplementary state law claim, of wrongfully discharging Darnell because he reported illegal conduct by his co-workers.

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**NEVADA** – This one sounds like a good contracts exam question. Elaine Magpiong worked as the manager of a Superdry Retail store on the Las Vegas strip, having been first hired by the company in 2011. According to the opinion by U.S. District Judge Jennifer A. Dorsey in *Magpiong v. Superdry Retail LLC*, 2018 WL 475002, 2018 U.S. Dist. LEXIS 7895 (D. Nev., Jan. 17, 2018), "She excelled at her job . . . She had no disciplinary record, received positive performance reviews, and was considered a 'strong performer' by her manager." And, oh, by the way, she is a lesbian. Rozalind Stewart, head of Superdry's U.S. Retail Operations, visited Magpiong's store and met her for the first time sometime in the first half of 2015. Writes Dorsey, "Following the visit, she told Human Resources Manager Pamela Brown that she planned to fire Magpiong because she didn't like how Magpiong walked (particularly

because she 'swaggered'), she felt that Magpiong's clothing style was 'off brand,' and because Magpiong drank energy drinks." (The reference to "off brand," Dorsey notes, is that although Magpiong wore Superdry clothes, she dressed from the men's line rather than the women's line.) Stewart's intent was to have the manager of the company's other Las Vegas strip location – "a heterosexual who conformed to female stereotypes" – take over managing both stores. "Brown advised Stewart that her reasons for terminating Magpiong were illegitimate, discriminatory, and illegal. Stewart then attempted to disguise her discriminatory motives and told Brown that she would just fire the other manager as well." Brown, as directed by Stewart, fired both managers with the explanation that it was part of a "company reorganization." To get severance pay, Magpiong signed a "Separation and General Release Agreement" presented by the company, releasing the company from all liability relating to her employment and termination. She received \$2,230.77 in severance pay. When Brown returned to the New York office, she voiced concerns that the company was violating employment laws, but, writes Dorsey, "her whistleblowing was not appreciated, and she, too, was terminated." Brown sued Superdry in New York. Magpiong found out about the lawsuit and the true reason for her firing about eight months later. She filed a claim with the Nevada Equal Rights Commission and later the U.S. District Court, alleging violations of Title VII (gender stereotyping) and Nevada's anti-discrimination law, which expressly covers sexual orientation. Superdry's motion to dismiss sets up the Separation Agreement as dispositive, as well as raising a statute of limitation defense. (Employment discrimination laws tend to have very short statutes of limitations for filing claims, although equitable tolling is sometimes possible.) Magpiong claimed that she was fraudulently induced to sign the agreement because, had she known the

true reason for her discharge, she would never have agreed to it. Too bad, rules Judge Dorsey. Nevada law supports enforcement of waivers of unknown claims, and she found that under Nevada tort law, Magpiong could not allege facts supporting all the elements of a fraudulent inducement claim with regard to the agreement. The court refused to equate the company's dishonesty about the reason for the discharge with fraudulent inducement to get the employee to waive any claims she might have arising from her employment. The agreement itself was clear on its face and alerted the employee that she was agreeing to waive all claims known or unknown, and could not later bring a claim based on later-discovered facts. Wrote Dorsey, "I agree that releasing unknown claims does not, in theory, bar a plaintiff from asserting a fraudulent-inducement claim . . . the only fraudulent representation that Magpiong alleges is Superdry's purported reason for terminating her. That purported reason is not a fraud that induced Magpiong to sign the release. If Magpiong could allege a fraud that induced her to sign the agreement, i.e., that Superdry deceived her about what she was signing or that Superdry forged her signature, then she could satisfy the third fraudulent-inducement element. So, releasing unknown claims does not foreclose Magpiong from raising a fraudulent-inducement claim in theory, but, after two trips to the drawing board with this complaint [one amendment had already been allowed after the court's previous refusal to dismiss the complaint], it appears that she cannot allege facts to show that she was induced into the separation agreement by fraud." Thus, Magpiong is defeated by a technically correct, but facially unjust analysis of her legal situation, since her factual allegations, if true, would support clear and intentional violations of federal and state law in her discharge. In her final argument, she quoted from a 9th Circuit decision stating "a person cannot release a claim which he has

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no knowledge, and of existence of which he has been fraudulently kept in ignorance,” but the court pointed out that this case applied Delaware law, “which differs from Nevada law. Unlike Delaware, Nevada enforces contractual releases of unknown claims. So the fact that Magpiong released Superdry from liability for unknown claims does not render the separation agreement unenforceable.” By this ruling, the court encourages sharp practice by employers. It is quite regrettable. Magpiong is represented by Merielle R. Enriquez, Robert P. Mouglin and Travis Meltzer of Kring and Chung LLP, Las Vegas. Perhaps an appeal to the 9th Circuit is in order.

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**NEW YORK** – A second strike-out for Matthew Herrick on January 25 in his attempt to hold Grindr, LLC, liable for the harm he suffered when a former boyfriend created fake profiles on the app, inviting people to contact Herrick at his home or workplace for “fetishistic sex, bondage, role playing, and rape fantasies.” The fake profiles generated plenty of unwanted and sometimes embarrassing contacts for Herrick, and he claims Grindr did not adequately respond to his pleas for help. *Herrick v. Grindr, LLC*, 2018 WL 566457, 2018 U.S. Dist. LEXIS 12346 (S.D.N.Y., Jan. 25, 2018). U.S. District Judge Valerie Caproni had previously denied an application to renew a January 27, 2017, temporary restraining order that a state trial judge had granted Herrick, then representing himself *pro se*, on February 24, 2017. *See* 2017 WL 744605 (S.D.N.Y.). The state court had ordered Grindr to “immediately disable all impersonating profiles created under Plaintiff’s name or with identifying information relating to Plaintiff, Plaintiff’s photograph, address, phone number, email account or place of work.” Grindr removed the case to federal court on diversity grounds, and raised its immunity to suit under the federal

Communications Decency Act (CDA) as a defense to various New York state law claims asserted by Herrick. Section 230 of the CDA immunizes providers of interactive computer services from liability for materials posted by users, rejecting Herrick’s claim that Grindr was a “creator of content” and thus not immune. Since then, Herrick has acquired counsel – Carrie A. Goldberg, Frederic Beach Jennings, Tor Bernhard Ekland, and Mark Howard Jaffe. They came up with some rather ingenious arguments in opposition to Grindr’s motion to dismiss, none of which convinced Judge Caproni, who granted the motion as to all claims. “Herrick alleges 14 causes of action, the gist of which is that Grindr is a defectively designed and manufactured product because it lacks built-in safety features; that Grindr misled Herrick into believing it could interdict impersonating profiles or other unpermitted content; and that Grindr has wrongfully refused to search for and removing the impersonating profiles.” Caproni agreed with the defendant that Section 230 requires dismissal of these claims. “The CDA bars Herrick’s products liability claims and his claims that Grindr must do more to remove impersonating profiles,” she wrote. “Each of these claims depends on holding Grindr responsible for the content created by one of its users. Herrick’s misrepresentation related claims fail on their merits because Herrick has not alleged a misleading or false statement by Grindr or that Grindr’s alleged misstatement are the cause of his injury.” The court did leave open the possibility that Herrick could replead a claim of copyright infringement, based on his allegation that some of the impersonating profiles contained photos of him for which he filed copyright registration applications. Herrick did not allege that the Copyright Office had granted his applications, and Judge Caproni pointed out the “consensus” in the courts of the Southern District that an application for copyright

is not sufficient to ground a claim of infringement. If the Office has *granted* the applications, Herrick can seek to file an amended claim accordingly. The case illustrates continuing problems with the broad immunity granted ISPs under Section 230, which has proved a frustrating barrier for persons suffering harm from user abuse of interactive websites and apps which can amplify manifold that harms that might flow from old-fashioned pre-internet methods of revenge. Congress enacted the immunity when the internet was new and Congress was persuaded that the baby could be smothered in its crib by floods of litigation responding to content posted on websites. Many of the same issues are now being faced by entities such as Twitter and Facebook, attempting belatedly to cope with generators of bots and other miscreants using interactive sites to cause political and commercial disruption.

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**NEW YORK** – On December 28, 2017, the 2nd Circuit upheld a ruling by S.D.N.Y. Judge Buchwald to enforce a forum selection clause that will require Glenn DeBello to litigate his employment discrimination claims under Title VII and New York State and City Human Rights Laws in the Los Angeles County Superior Court, even though he was employed in the New York office of the corporate defendant. *DeBello v. VolumeCocomo Apparel, Inc.*, 2017 U.S. App. LEXIS 26968. DeBello was hired to be the company’s Vice President of Product Development and Private Brands with an initial three-year contract at an annual salary of \$360,000 in October 2012. The company’s U.S. offices are in New York and Los Angeles, with Los Angeles the principal headquarters office. DeBello regularly communicated with the company’s California office in carrying out his employment duties, and once travelled to California for work. He alleged that the company’s employees, including his supervisor in New York,

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Mitchell Rudnick, “repeatedly harassed and humiliated DeBello because they believe he was too feminine and because of what they perceived to be his sexual orientation,” wrote the court. “The harassment took place in New York and occurred almost daily. In February 2013, DeBello complained about his treatment to Rudnick, who ignored and dismissed his concerns. In March 2013, VolumeCocomo reduced DeBello’s annual salary by one-third, and in April 2013, VolumeCocomo fired DeBello without explanation.” Although his employment agreement stated that any dispute between the parties would be governed by California law and any litigation would be in Los Angeles Superior Court, DeBello filed a discrimination charge with the EEOC in New York, and filed suit in the Southern District of New York upon receiving his right-to-sue letter from the agency. The district court granted the defendants’ motion to dismiss under the doctrine of *forum non conveniens*, arguing that the venue provision of the employment agreement should be enforced. Affirming that ruling in a Summary Order, the 2nd Circuit acknowledged DeBello’s argument that Title VII itself expresses a preference that employees be able to bring suit in the judicial district where the alleged unlawful employment practice took place, but pointed out that the employer’s principal place of business – in this case, Los Angeles – is also deemed an appropriate venue under Title VII, and rejected his argument that a public policy exception should apply in this case to allow him to proceed in New York. “Moreover,” wrote the court, “DeBello, an experienced professional who was hired for an executive position at a relatively high salary, willingly entered into his employment agreement knowing it contained a forum selection clause, and he did so after he had the opportunity to consult with an attorney and make changes to the Agreement. VolumeCocomo is headquartered in Los Angeles and DeBello regularly

interacted with VolumeCocomo’s California-based employees.” The court said it did not foreclose the possibility that in an appropriate case a clash between Title VII’s special venue provision and a forum selection clause might be resolved otherwise, but opined that “DeBello has not made a sufficient showing here.” DeBello is represented by Valdi Licul of Vladeck, Raskin & Clark, P.C., New York.

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**OKLAHOMA** – We have previously reported on the protracted pre-trial litigation in *Tudor v. Southeastern Oklahoma State University*, in which transgender Professor Rachel Tudor ultimately won a jury verdict on her claim that her denial of tenure and discharge violated Title VII because her gender identity was a motivating factor in the decision-making process. See 2015 WL 4606079 (W.D. Okla., July 10, 2015); 2016 WL 4250482 (W.D. Okla., Aug. 10, 2016); 2017 WL 3909606 (W.D. Okla., Sept. 6, 2017); 2017 WL 4849118 (W.D. Okla., Oct. 26, 2017). The question of remedy arose upon the jury verdict, and Tudor filed a post-trial motion requesting that the court order her reinstatement and award of tenure, which was vigorously opposed by the University. Tudor argued that reinstatement was a viable remedy because the personnel involved in making the tenure denial decision were no longer in those positions, but in a ruling filed on January 29 (and not yet published in Westlaw or Lexis at this writing), District Judge Robin J. Cauthron concluded that reinstatement was not a feasible remedy in light of the trial testimony and post-trial arguments. It seems that since leaving the University Tudor had found alternative employment but had been unsuccessful due to adverse judgments on her scholarly credentials, including the failure to publish any new papers over a protracted period of years. Cauthron also noted testimony about hostility against her at the University, which could well undermine possible

successful reinstatement. Although reinstatement would be a preferred remedy under Title VII for a wrongful discharge, most plaintiffs who win at trial don’t seek it because they have secured alternative employment during the lengthy trial process, and an award of back-pay and front-pay, with any other compensatory damages, will suffice, and courts hesitate to order reinstatement if continued hostility is evident on the record. Here, the judge found “clear evidence of ongoing hostility between the parties apparent in the briefs and the evidence.” In this case, Tudor sought, as an alternative to reinstatement, an award of front-pay, and the court gave her 15 days from the filing of its Order to file any request for front-pay.

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**OREGON** – Tiffany Goldsby beat back the employer’s attempt to dispose of her discrimination and retaliation lawsuit as U.S. District Judge Marco A. Hernandez rejected most of the employer’s summary judgment motion in *Goldsby v. Safeway Inc.*, 2018 WL 297583, 2018 U.S. Dist. LEXIS 1599 (D. Or., Jan. 4, 2018). Goldsby, an African-American lesbian, asserted claims of discrimination, hostile work environment and retaliation under Title VII and the Oregon anti-discrimination law, and retaliation and/or interference with protected leave under the federal Family and Medical Leave Act and the analogous Oregon family leave statute. Goldsby began working at a Safeway store in Northeast Portland on the night crew in August, 2006, and was internally transferred four years later to become a produce clerk. On July 13, 2014, Lori Young became the Store Director, and two months later Goldsby became responsible for managing the produce department. It quickly became clear that Young was uncomfortable working with a black lesbian, as Goldsby claims that she made offensive comments and indulged in racial stereotypes, both in Goldsby’s presence and in the presence

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of other employees who submitted deposition testimony in support of Goldsby's claims. Goldsby had some attendance problems, but there was evidence that Young was stricter in administering policies with her than with other employees, and Young apparently sought to thwart Goldsby's requests for medical leave by claiming not to have received the paperwork multiple times, even after Goldsby had placed the paperwork on Young's desk by hand and had taken a picture of it to prove that it had been delivered. Once Goldsby's paperwork was found in Young's trash can, and when another employee asked her about Goldsby's leave application, Young stated "Tiffany doesn't matter." One could go on at length about the detailed factual allegations supporting Goldsby's claims. Suffice to say that when she filed her charge with the state agency, it concluded that there was substantial evidence to support her charges, and she filed suit on October 26, 2016. With the exception of two of the three retaliation claims, Judge Hernandez denied the employer's s.j. motion on all of Goldsby's claims. (Two of the retaliation claims were aimed at actions Young took before she was informed that Goldsby had filed grievances with the Human Resources Department.) Goldsby's ordeal in working at the store under Young's discriminatory management came to an end in June of 2015 when Safeway closed that store and Goldsby was transferred to another Safeway store as a manager in the frozen department, after which she immediately filed her complaint with the state agency. Judge Hernandez found at every key point in the analysis that Goldsby's allegations were sufficient to make out prima facie cases, and that there were material fact issues to be resolved before determining whether the company's proffered non-discriminatory explanations for its actions were pretexts for discrimination. This case will turn heavily on witness credibility, although given the court's lengthy dissection of

the arguments, it sounds like Safeway should be making a settlement offer to avoid a lengthy, expensive trial that may result in a verdict for the plaintiff on several – perhaps all – of her claims. Clearly, if Goldsby's allegations are proved at trial, as the court pointed out, Young's statements would constitute direct evidence of discriminatory intent due to race and sexual orientation, and because Young was the Store Director, her intent will be imputed directly to the company. The employer did save some face, perhaps, by the judge's decision to grant its motion to strike certain evidence Goldsby introduced in opposition to the summary judgment motion, although the court rejected the motion to strike handwritten notes that Goldsby kept contemporaneously with events that are at issue in the case. Goldsby is represented by Robert K. Meyer of Portland, Oregon.

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**TEXAS** – In *Baker v. Aetna Life Insurance Co. & L-3 Communications Corp.*, 2018 U.S. Dist. LEXIS 12854, 2018 WL 572907 (N.D. Tex., Jan. 26, 2018), a transgender woman suffered summary judgment against her on her claim that the short-term disability (STD) insurance policy provided by her employer, L-3, through Aetna, violated Title VII's ban on sex discrimination by failing to cover her post-surgery recovery for a breast augmentation procedure (implant surgery) to enhance her breasts beyond what had been produced through hormone therapy. She had not applied to the health insurance plan for coverage of the procedure directly. She alleged that the "Gender Reassignment Surgery" (GRS) policy contained in Aetna's insurance contract was clearly discriminatory "because the Health Plan offers coverage for female-to-male mastectomies but not for male-to-female breast augmentation," thus denying transgender women "a medically necessary procedure based solely on . . . sex/gender." The court,

which had in earlier rulings dismissed discrimination claims against both defendants under the Affordable Care Act, an alternative ERISA-based claim, and a Title VII claim against Aetna (because Title VII only applies to employers, not to insurance companies that contract with employers to provide benefits to their employees), *see* 228 F. Supp. 3d 764 (N.D. Tex. 2017) and 260 F. Supp. 3d 694 (N.D. Tex. 2017)), rejected Baker's argument that the treatment policy on its face provided direct evidence of sex discrimination. Judge Sidney Fitzwater ruled that Baker had "provided no authority or argument for why denial of a *surgical* method in particular is discriminatory when hormone replacement therapy is available." He pointed out that the Plan does include "a reconstructive surgery provision with broad language that could plausibly encompass surgical procedures to add breasts in male-to-female transgender patients, provided the surgery is not performed primarily for cosmetic or beautifying purposes." If hormone therapy is unsuccessful in producing breasts, Aetna could approve surgical implants as part of the treatment of gender dysphoria. The point is that the policy "allows Aetna the discretion to determine the line between what is a cosmetic and what is a medically necessary breast procedure." Under principles of federal employee benefits law, a Plan administrator who is given discretion to make such decisions is unlikely to be overruled by a court, provided their decision is not arbitrary. Thus, the court concluded, contrary to Baker's argument, that the Policy did not contain a blanket exclusion of coverage for surgical enhancement. The court determined that the Policy was not discriminatory on its face, and that Baker's other arguments, not detailed in the opinion, were not sufficient to avoid summary judgment. Baker is represented by Michael J. Hindman and Kasey Cathryn Krummel of Hindman/Bynum PC, Dallas.

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**TEXAS** – U.S. Magistrate Judge Andrew W. Austin issued a report and recommendation on January 2, recommending that District Judge Lee Yeakel dismiss a complaint by Cynthia Millonzi, a lesbian who was employed as a dual-status military technician working at the Texas Adjutant General's Office after two decades of military service. *Millonzi v. Adjutant General's Department of Texas*, 2018 U.S. Dist. LEXIS 739, 2018 WL 283754 (W.D. Tex.). Millonzi alleges that she began experiencing discrimination because of her sexual orientation in 2013. Following the Supreme Court's *Windsor* decision, she gave an interview to *L Style G Style* about "coming out in the Texas National Guard," in which she stated that her superiors were supportive of her decision. She claims to have suffered discrimination after this article was published, including adverse reassignment and denial of a promotion. She claims that in retaliation against her the new Chief of Staff, Col. Scott MacLeod, ordered an investigation into her alleged absences and tardiness, and that the investigator, Col. Amy Cook, had "previously discriminated against others based on their sexual orientation." The investigation concluded that Millonzi had submitted false military leave papers, and Col. MacLeod accepted a recommendation that she be terminated, which was submitted to Brigadier General Patrick M. Hamilton. Millonzi submitted an informal EEO complaint, which was dismissed, and then Hamilton accepted the recommendation, giving Millonzi the option of retiring or being terminated. She retired and filed another EEO complaint, which was dismissed but then reinstated on appeal to the Office of Federal Operations. However, the Adjutant General, exercising final authority over appeals, dismissed her complaint and she retired from the National Guard. Her claim alleges violations of Title VII, the First Amendment, the Due Process Clauses of the 5th and 14th Amendments,

and the Equal Protection Clause, but Judge Austin concluded that her case founders due to the *Feres* doctrine and binding 5th Circuit precedent that dual-status employees in her situation be treated as military personnel who cannot resort to civil litigation against the government under Title VII or her various constitutional claims. The opinion presents an extended discussion of the application of this doctrine to her facts, exploring how various courts have dealt with dual-status employees, whose position is partly civilian and partly military. In this case, it struck Judge Austin as decisive that the reason asserted for taking adverse action against Millonzi concerned false leave papers, clearly a military issue not subject to challenge in civilian courts. He also found that her constitutional claims were "merely an attempt to recast her Title VII discrimination and retaliation claims" in order to avoid the doctrines precluding her suit. She had asserted a due process claim based on the lack of a hearing in her case, but the court found that that under binding precedent there was no requirement that she be given a hearing, as the adjutant general "has the right to remove a dual-status technician for cause at any time," and Millonzi could not "point to any statutes or regulations she claims were violated during the process that would otherwise support her claim for procedural due process." Millonzi is represented by Robert Joseph Wiley of Dallas and Colin Walsh of Austin.

**VIRGINIA** – A lesbian who was dismissed from an Air Force ROTC program while she was in college in 2008 after telling the Commander of her Detachment that she was a lesbian waited too long to challenge the Air Force's recoupment action seeking repayment of the ROTC scholarship money she had received, requiring dismissal of her claim in the federal bankruptcy court that this debt should

be excused, according to a memorandum opinion issued on January 8, 2018, in *In re: Katherine Elizabeth Ruth Ayers, Debtor*, 2018 WL 550582 (W.D. Va.). The petitioner argued that when the "Don't Ask, Don't Tell" policy was adopted back in 1993, the Secretary of Defense at that time had announced a policy of not seeking recoupment of ROTC scholarship money from students who were dismissed from the program because of their sexual orientation, but that this policy had not been observed in her case, giving rise to an equal protection argument, as recoupment was waived in many similar cases. But since she had never taken a timely appeal to the courts when the Air Force had refused to back down back when she was in college, raising this issue first in her much more recent bankruptcy filing was too late. Although the bankruptcy judge, not identified in the Westlaw report of the case, rejected the government's argument that the court did not have subject matter jurisdiction to entertain Ayers' claim that the recoupment action against her violated her constitutional rights, the court found that she had far exceeded the six-year statute of limitations to contest the action, and the statute waiving sovereign immunity to allow such claims required strict observance of the statute of limitations in a claim against the government. The court also found Ayers' factual allegations concerning her current payment hardships to be inadequately pled with respect to other student loan debt she was seeking to have discharged in bankruptcy, but concluded that she should be allowed to file an amended version of that count of her bankruptcy petition if she could allege additional facts supporting her claim.

**WASHINGTON** – OutServe-SLDN and Lambda Legal, co-counsel in *Karnoski v. Trump*, have filed a motion for summary judgment, following up on the preliminary injunction they won from

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the U.S. District Court on December 29, blocking President Trump's transgender service ban from going into effect while the case is pending. The motion, filed on January 25, argues that no disputed material facts remain for trial and the case can be decided as a question purely of law, as to which the court's preliminary injunction ruling made clear that there was no rational basis for the announced transgender ban. Lambda Legal attorneys on the case include Peter Renn, Camilla B. Taylor, Tara Borelli, Natalie Nardecchia, Sasha Buchert, Kara Ingelhart, and Carl Charles. Other lawyers working on the case include OutServe-SLDN's Peter Perkowski, and pro bono counsel from Kirkland & Ellis LLP and Newman Du Wors LLP.

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## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard*

**CALIFORNIA** – Juan Navarro, 27, has been convicted of hate crimes against a transgender woman in Ventura County Superior Court, reported the *Ventura County Star* (Jan. 26). Navarro was found guilty of making criminal threats, brandishing a deadly weapon, possession of a concealed dagger and battery against a person because of gender and sexual orientation. According to the news report, the victim was walking through Oxnard when Navarra, who she did not know, began making unwanted sexual advances. Prosecutors released a statement: “After being rebuffed by the victim, Navarro realized that she was biologically male. Navarro dragged the victim into a nearby alley, where he brandished a 10-inch knife and repeatedly threatened the victim's life while using epithets directed at the victim's gender and sexual orientation.” He punched her in the face when she tried to escape and repeatedly kicked her while on the ground, but she was able to flee and call police.

**OHIO** – Stacey Lopez Barrow, 46, pleaded guilty to felonious assault for not telling a sexual partner that he is HIV-positive, reported *hio.com*, Feb. 2. Facing up to 8 years in prison, he was sentenced by Summit County Common Pleas Judge Alison Breaux to three years' probation, with the following conditions: he provide a DNA sample, undergo mental health assessments, have no contact with the woman involved, and pay her \$1,500.00 in restitution for her medical expenses. Prosecutors said that Barrow told the woman he was HIV-positive after having sex with her. \* \* \* On January 31, Lucas County Common Pleas Judge Stacy Cook sentenced Ron J. Murdock for exposing a woman to HIV and infecting her, which led to her death and his plea to involuntary manslaughter. Immediately upon conviction, she sentenced him to 8 years in prison. The prosecutor told the court that Murdock and the woman had engaged in a sexual relationship between June 1, 2011, and Oct. 1, 2016. She learned that she was HIV-positive in August 2016, and died in Feb. 5, 2017. Murdock was diagnosed as HIV-positive and counseled in 2004. He had originally been indicted for murder and faced a potential sentence of up to 11 years on his plea. *The Blade*, Toledo, Feb. 1.

**TENNESSEE** – Shelby County Criminal Court Judge James M. Lammey, Jr., missed the boat on some critical rulings at trial, resulting in the Court of Criminal Appeals' decision to vacate the jury conviction of Quantez Person on charges of criminal exposure to HIV. *State of Tennessee v. Person*, 2018 WL 447122, 2018 Tenn. Crim. App. LEXIS 32 (Jan. 16, 2018). Defendant Person, driving a Chrysler convertible, stopped and offered the female victim a ride while she was walking from her home to the home of a friend. “Although she was only two or three blocks from her destination,” wrote Judge James Curwood Witt, Jr., in the opinion for the

appeals court, “the victim accepted the offer and got into the car.” She testified that the man did not stop when reaching her destination but continued on to a secluded area where he brandished a knife and demanded that she undress, after which he forced her to engage in vaginal and oral sex, “which sex acts culminated in the man's ejaculating into the victim's mouth and vagina. According to the victim, the man released her following the sex acts, and she telephoned a friend to take her to the hospital.” Subsequent testing detected sperm in her mouth and vagina, which subsequently was confirmed to be the defendant's after the victim was able to identify him to the police. Person was indicted on a charge of rape. Prior to his rape trial, the state discovered that he had previously tested HIV-positive and been counseled against engaging in unprotected sex, and had him separately indicted for exposing the victim to HIV, but for whatever reason decided not to combine the two indictments in one trial. However, after the mistrial, the state retried defendant on the rape count and moved to join the HIV exposure count in one trial. Defendant opposed the joinder, and then moved to sever. He argued that his defense of the rape count (that the victim was a prostitute whom he had paid to have sex) would necessarily incriminate him on the HIV exposure count, as to which he planned to argue that he used a condom which, unfortunately, broke. Defendant also objected at trial to the admission of health department records concerning his testing and counseling, but Judge Lammey admitted them under the business records exception to the hearsay rule. Judge Lammey allowed the joinder and refused to sever the claims. Ultimately the jury convicted only on the HIV exposure count. The Court of Criminal Appeals found that the joinder and severance rulings were erroneous, depriving the defendant of his ability to conduct a defense, and that the jury verdict had to be vacated and

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the HIV exposure charge dismissed. The great bulk of the opinion by Judge Witt is devoted to reviewing the issue of the joinder and severance issues in Tennessee courts and attempting to come up with a unifying thread for interpretation and application of the relevant rules of criminal procedure. The appeals court approved the trial court's ruling on admission of the Health Department records, and rejected the defendant's argument that the evidence at trial was not sufficient to sustain a conviction on the HIV exposure count, as to which the court found that the state met the burden of establishing that ejaculating into the mouth and vagina of the victim presented a "significant risk of HIV transmission" as required by the statute. The opinion lacks any sophisticated discussion of state of the art information about transmissibility depending on viral load levels and the effect of medication. Person's counsel is Claiborne Ferguson of Memphis.

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**WASHINGTON** – In *State of Washington v. Whitfield*, 2018 Wash. App. LEXIS 43, 2018 WL332967 (Wash. Ct. App., Div. 2, Jan. 9, 2018), the appeals court affirmed a decision by Thurston Superior Court Judge James J. Dixon to deny the defendant's motion, many years after his conviction, for DNA testing of HIV-positive blood drawn from the five of his seventeen victims who tested positive for HIV after having unprotected sex with him. In 2004, Whitfield was convicted of 17 counts of "first degree assault with sexual motivation" for having unprotected sex with seventeen women without disclosing his HIV status. Conviction does not require proof of transmission, as the crime is exposing people to potential transmission without disclosure, thus depriving them of the opportunity for informed consent. At least five of his sexual partners subsequently tested HIV-positive. Whitfield waived his right

to a jury trial and was found guilty by the trial court on all counts. For purposes of sentencing, his convictions were divided into different categories: one comprised the five convictions where the victims tested positive, as to which the court imposed a maximum sentence *within* the standard range for the offense. The judge imposed lower sentences in connection with the other twelve victims, some of whom involved domestic violence designations. The total sentence was 2,137 months. "Notably, Whitfield received neither an exceptional sentence nor a sentence enhancement," wrote Court of Appeals Judge Lisa Worswick, who commented in a footnote that although the court found that all 17 convictions involved special allegations of sexual motivation, Whitfield did not receive a sexual motivation sentence enhancement. In 2016, Whitfield filed a motion seeking DNA testing of the women who reportedly contracted HIV, arguing that the evidence would show that they were not infected with the same strain of the virus that had infected him. The court found that a motion for post-conviction DNA testing was limited by statute, and Whitfield's reasons for seeking the testing did satisfy the statutory requirements. "RCW 10.73.170(1) provides that a convicted person who is currently serving a term of imprisonment may submit a motion requesting DNA testing." The statute requires that the petitioner's motion state the basis for the testing request, and "explain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement." In this case, the DNA evidence is not material to identifying the perpetrator, as there is no argument that Whitfield did not have sex with the women in question. He contended that because the trial judge imposed a higher sentence in connection with the five victims who later tested HIV-positive, this should be considered a sentence "enhancement," so proof that

he hadn't infected them was material to "sentence enhancement." The problem, pointed out Judge Worswick, is that the term "sentence enhancement" has a technical meaning under Washington law, and does not apply to sentences that were within the authorized range for the offense. The court rejected Whitfield's contention that a "maximum standard range sentence is a 'sentence enhancement' for purposes of the statute, which the court found to be "contrary to the statute's plain language." She wrote, "A standard range sentence, without more, does not involve the trial court adding a specific amount of time to a defendant's standard range due to the fact that the defendant committed a crime in such a way that comports with the enhancements listed in RCW 9.94A.533," and the DNA testing statute upon which Whitfield relies refers to that section on enhancements. The court also rejected arguments by Whitfield that the judge was biased against him or that misbehavior by the prosecutor tainted the proceeding. Whitfield is represented by attorney John A. Hays of Longview, WA.

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**WASHINGTON** – The Division 1 Court of Appeals reversed the second-degree murder jury conviction of Encarnacion Salas IV, who was tried on a charge of stabbing to death Jesus Lopez, his close friend. Although the court does not call this a "gay panic defense" case, it bears some of the marks of one. *State of Washington v. Salas*, 408 P.3d 383 (Jan. 8, 2018). Salas was 21 when his family moved from Texas to Washington State, where he lived in an apartment with two aunts. Lopez, about ten years older, lived with his mother in the same apartment complex, and was a co-worker of one of Salas's aunts. The two men developed a friendship, and regularly visited each other's apartments to "drink, smoke marijuana, talk, watch TV shows, cartoons," according to trial testimony. According to Salas, their relationship



# PRISONER LITIGATION *notes*

became “kind of homosexual” but had not advanced to the point of having sex. When Lopez made a pass at Salas in 2014, Salas brushed him off: “I tell him I’m uncomfortable with that, I’m not ready.” On October 24, 2014, Lopez died in his apartment from multiple stab wounds from a knife owned by Salas. The men had been drinking on the balcony and playing with Salas’s knife, and, according to Salas’s self-defense testimony, Lopez grabbed for his genitals and they got into a fight during which Lopez struck Salas with the knife and Salas, getting the knife away from him, cut and stabbed Lopez in self-defense as they struggled with each other. Lopez’s mother testified to having observed some of what happened, but her testimony was a bit vague and confused, although if credited would have supported the allegation that Salas stabbed Lopez in the neck when Lopez was already badly wounded and collapsed on the floor. When police came to arrest Salas the next morning, he required treatment for a stab wound on his arm, so they took him to a hospital before bringing him to the police station to book him. He had requested a lawyer, so there was to be no interrogation at that time. The doctor and nurse entered into conversation with him during treatment, inquiring how he got the wound, and he made some incriminating remarks while a police officer was in the room. At trial, the judge gave the jury a manslaughter charge as well as a murder charge, based on the judge’s estimation of the evidence. The police officer who was in the room during Salas’ medical treatment testified about his conversation with the nurse, who asked him how his arm was wounded. Salas answered, “I don’t know, on barbed wire or a tree.” The doctor asked Salas if he had been assaulted. The officer testified that in response, Salas “chuckled and he said – he said, no, I killed somebody.” Salas’s defense counsel failed to object to the officer’s testimony. During

closing arguments, the prosecutor used power point projections and photos that the trial judge allowed in evidence over defense objections. In appealing the jury verdict, Salas’s counsel successfully argued that admitting some of the power points was objectionable, as they were used in a way to establish the characters of the two men in a powerful visual contrast, and were prejudicial to Salas. The appeals court also found that admission of the police officer’s testimony about the conversation in the treatment room was improper, as Salas had invoked his Miranda rights and was not supposed to be questioned without his lawyer present. For purposes of this analysis, the presence of the police officer turned this into a custodial interrogation, even though the doctor and nurse were not police officials and it was a private hospital. The opinion by Judge Mary Kay Becker discusses at length how power points might be used in a prejudicial way. “A rule of thumb for using PowerPoint is ‘If you can’t say it, don’t display it,’” she wrote. “PowerPoint slides should not be used to communicate to the jury a covert message that would be improper if spoken aloud. The juxtaposition of images and captions in the first slide communicates what the prosecutor could not, and did not, argue aloud: Salas was by nature an aggressive and intimidating person, and therefore had no reason to fear Lopez, who by nature was childlike and submissive. The prosecutor in effect used the slide to prove the character of the two men ‘in order to show action in conformity therewith,’ improper under ER 404(b).” Concluding on this point, Judge Becker wrote, “We conclude there was a substantial likelihood that the visual presentation prejudiced Salas’s right to a trial in which his claim of self-defense and the alternative of manslaughter could be fairly considered. He is entitled to a new trial.” Salas’s counsel from the Washington Appellate Project is Richard W. Lechich.

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## PRISONER LITIGATION NOTES

*By William J. Rold*

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

**ARKANSAS** – U.S. Magistrate Judge Joe J. Volpe granted defendants’ unopposed motion for summary judgment in the civil rights case of *pro se* transgender inmate Lynn Stopnick in *Stopnick v. Faulkner County Detention Center*, 2017 WL 6993034 (E.D. Ark., December 28, 2017). Stopnick was in the jail for approximately 7 weeks, on a parole violation awaiting transfer back to state prison. Certain of her claims had previously been dismissed prior to this decision. The remaining claims included denial of medical care and mental health services, permission to shave regularly while in protective custody, and private showers. The jail’s chief contract physician, who was also Stopnick’s treating physician, filed an affidavit in support of summary judgment, with no discussion of compliance with F.R.C.P. 26(a)(2) – a common practice in *pro se* cases, particularly when the plaintiff apparently abandons the jail case after returning to state custody. The physician’s affidavit shows a comprehensive medical work-up of Stopnick, as well as consultation with her prior physician in California regarding her hormone therapy. While a dosage adjustment was made, Judge Volpe finds that it presented no more than an unactionable disagreement between physicians regarding drug interactions. Stopnick refused to meet with the psychologist offered by the jail, and her records showed no request for mental health services or signs of mental illness. A security officer’s affidavit said that Stopnick, who was in protective custody, had access to razors to shave monthly per policy (unless the inmate were going

# PRISONER LITIGATION *notes*

to court); but Stopnick refused to shave unless allowed to do so unsupervised, which was prohibited in protective custody. She was also offered showers in the evening away from other inmates, but she declined. Judge Volpe found no official policy or custom presenting a jury issue on which the county could be found liable. The individual defendants were entitled to qualified immunity on all claims. No clearly established law was violated, and they were not deliberately indifferent. The shaving restrictions were not deprivations of minimum standards of decency. It all seems a little “pat,” but without opposition from Stopnick, Judge Volpe’s decision was practically pre-ordained, particularly in light of Stopnick’s refusals and after the jail physician took the unusual step of consulting with Stopnick’s outside doctor.

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**CALIFORNIA** – Under Proposition 36, California prisoners can obtain consideration for resentencing based on relaxation of the state’s former “three strikes” rules. Henry Nolkemper, a transgender prisoner, sought such relief in *People v. Nolkemper*, 2018 WL 346130, 2018 Cal. App. LEXIS 232 (Cal. App., Second Dist. Div. 5, January 10, 2018). The trial court denied relief, and the Court of Appeals affirmed, in an unpublished opinion by Judge Kim Dunning (sitting by designation from Orange County Superior Court), in which Acting Chief Judge Sandy Kriegler and Judge Lamar Baker concurred. Although Nolkemper was eligible for consideration, she posed an “unreasonable risk of danger to public safety,” so her petition was denied. This was based on her pattern of prior violent offenses (multiple serious felonies, some involving weapons), and her prison record, where she had compiled an infraction score that was the highest the trial judge had seen in over 700 Proposition 36 cases. Nolkemper argued that her prison record was unfairly used

because her conduct was caused by her desire to violate rules deliberately to receive segregated protection from harm or by her engaging in self-defense. The trial judge said that he discounted infractions that appeared to be related to Nolkemper’s efforts to survive and to protect herself, but many violations remained, including refusals to take drug tests and assaults on civilians. In addition, Nolkemper made no effort according to the court to engage in rehabilitative activities, even correspondence or cell study while in segregation. Some of the decision relates to whether certain points were preserved for appeal under California state procedure, which is mentioned for those California counsel who wish to look at such preservation issues. The crux of the appeal is that transgender status alone will not inoculate bad behavior and a formidable criminal record when a prisoner seeks “three strikes” review.

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**FLORIDA** – HIV-positive inmate Max Gracia, Jr., died of sepsis from untreated dog bite wounds while in the custody of the Orange County Jail. Plaintiffs, Willine Bryant and Max Gracia, Sr., co-fiduciaries for his Estate, brought a civil rights action for deliberate indifference to his serious medical needs prior to his death in *Gracia v. Orange County*, 2018 U.S. Dist. LEXIS 2642 (M.D. Fla., January 8, 2018). U.S. District Judge Karla R. Spaulding denied a motion to dismiss for all defendants except Orange County. When Gracia arrived at the jail, he had multiple bite wounds to his hands and legs with “severe flesh involvement.” After hospital emergency room treatment, he was admitted to the jail infirmary. Nursing notes document increasing reddening of his wounds, with drainage. According to the complaint, his vital signs were abnormal on August 8th, with dizziness, vomiting, and tachycardia (abnormal heart rate). This is the first recording of his vital signs in 55 hours, despite presence in

the infirmary; and they were never taken again. By August 9th, Gracia was unresponsive and fell to the floor, which was recorded as “refused to get up for his evening medications.” Told Gracia was “faking,” officers physically moved Gracia to a cell with a recording camera, “in order to ascertain the validity of his proclaimed illnesses,” and he was given a disciplinary report. On August 10th, at 2:58 a.m., a corrections investigator tried to “interrogate” Gracia about his disciplinary report, but Gracia was “unable to reply.” Three hours later, officers informed medical that Gracia was “not breathing.” EMS was called, and Gracia was pronounced dead at 6:09 a.m., from “septic shock complicating infected dog bite wounds” with HIV as a “contributory factor.” Defendants moved to dismiss for failure to state a claim and asserted qualified immunity. Judge Spaulding found that, in this case, both grounds turned on whether the Estate had pleaded a constitutional violation. First, defendants argued that Gracia did not present a serious medical need, which Judge Spaulding summarily rejected with the understatement that the argument was “odd.” On deliberate indifference, Judge Spaulding observed: “Obviously, the success of the Plaintiffs’ claims will ultimately depend on what the Defendants knew about the Decedent’s medical condition and why they did little if anything to address it. But at this stage, the Plaintiffs do not need to persuade the Court that the Defendants acted in deliberate indifference.” It is enough if the facts “could plausibly show [it].” Judge Spaulding found that all defendants were aware of Gracia’s HIV status, his serious dog bite wounds, and his increased risk of infection. Again, understatement: “The Decedent’s deterioration cannot be described as asymptomatic.” She continues: “No one ever took his vital signs again during the short remainder of his life. Even when the Decedent was unresponsive and groaning on the floor, the primary concern was apparently

# PRISONER LITIGATION *notes*

moving him to a cell with a camera so that evidence of any malingering could be captured in support of the disciplinary report . . . It is unclear whether the Decedent was dead or alive during the interrogation attempt, but even if he was still alive, he was certainly fewer than three hours away from drawing his last breath.” Judge Spaulding examines the conduct of each defendant against the allegations and finds claims against each individual, including a supervisor who did not provide direct “care” but was allegedly aware of the obvious risks posed by Gracia’s condition in the infirmary and his last hours. Orange County conceded that the Estate had a state law claim against it, but it fought the *Monell* claim [*Monell v. Dep’t. of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978)]. Judge Spaulding found insufficient allegations of practice, policy, or training failures to retain this claim. [Note: According to PACER, the Estate has filed a Second Amended Complaint following this decision, with enhanced *Monell* pleadings]. This writer believes that the County belongs in the federal case. Again, Judge Spaulding’s concluding understatement, laced with appropriate sarcasm, says it all: “The Defendants describe this tragedy as a mere misdiagnosis. In a sense that may be correct. While the Decedent lay dying in his cell on August 10th, the camera rolled as the Defendants pursued their diagnosis of malingering. Faced with objective evidence of a serious medical need, an unfounded diagnosis of malingering is the epitome of deliberate indifference.”

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**ILLINOIS** – Last month, we reported about the protection from harm case of Deon Hampton, who found counsel and obtained a preliminary injunction hearing before U.S. District Judge Michael J. Reagan in *Hampton v. Meyer*, 2017 U.S. Dist. LEXIS 172310 (S.D. Ill., October 19, 2017) (*Law Notes*, January 2018, at page 43). We also noted that

Judge Reagan’s hearing was scheduled for January. Now, the *Canadian Press* (1/10/18) reports that Illinois corrections officials have agreed to transfer Hampton from her current male prison, where she claims brutalization by guards and inmates. According to the *Press*, the agreement does not indicate whether Hampton will be transferred to a female prison. That decision will be made within 60 days by a “gender-identity” committee, but the move will occur pending such decision, which was generated by the hearings before Judge Reagan. Hampton is represented by the MacArthur Justice Center, Chicago. The agreement is not currently on PACER, but the case can be followed at 17-cv-860 (S.D. Ill.)(MJR). Last month’s article recommended reading the Second Amended Complaint for counsel facing transgender inmate protection from harm cases.

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**ILLINOIS** – *Pro se* transgender inmate Roberta Nickie Ezell Quillman sued for violation of her civil rights in *Quillman v. Idoc*, 2018 U.S. Dist. LEXIS 13936 (S.D. Ill., January 29, 2018), alleging that she needed emergency protective custody because of public humiliation, verbal abuse, bullying, discrimination, physical and mental abuse, rape, sexual assault and beatings by staff and inmates at Illinois’ Lawrence facility. U.S. District Judge Nancy J. Rosenstengel dismissed the complaint on screening because Quillman sued only the Department of Corrections and the Lawrence Warden. The former has Eleventh Amendment immunity, and the latter had no specific allegations against him in the complaint, which referred only to “unspecified” tormentors. Judge Rosenstengel took the complaint seriously, finding it “troubling,” but she nevertheless wrote that she was compelled to dismiss because of pleading failures. There was “no basis” to find a claim for personal responsibility for the warden under *Vance v. Peters*, 97 F.3d 987, 991 (7th

Cir. 1996); or *Pacelli v. DeVito*, 972 F.2d 871, 877 (7th Cir. 1992) – except vicarious *respondeat superior*, which cannot be used to create liability under 42 U.S.C. § 1983. The warden would be an appropriate official for injunctive relief, but it cannot be granted without a theory that would entitle the plaintiff to relief, citing *Kartman v. State Farm Mut. Auto Inc. Co.*, 634 F.3d 883, 889 (7th Cir. 2011). Judge Rosenstengel denied counsel at this time, finding that Quillman (who has learning disabilities and “some” high school) could adequately state her claim for screening purposes (after just finding that she had not adequately done so). Both rulings were without prejudice. Judge Rosenstengel did order that a copy of the opinion be sent to the warden to put him on notice that the court had received the allegations. This is the kind of case where a *pro bono* committee could get started early on shaping a claim for a plaintiff who is having trouble. Still, states with large cities persist in locating their prisons in remote rural places, far from law school clinics and large bar associations.

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**NEW HAMPSHIRE** – When we left transgender inmate Christopher (“Crystal”) Beaulieu, she was in segregation (“SHU”); and U.S. Magistrate Judge Andrea K. Johnstone wrote at length about her romantic relationship with another inmate in “Federal Magistrate Recommends Denial of Preliminary Injunction Against Prison Rule Separating Romantic Inmates” – *Law Notes* (April 2017 at pages 148-9), reporting *Beaulieu v. Orlando*, 2017 WL 1075438 (D.N.H., February 23, 2017). Now, in her third attempt to pass screening, in *Beaulieu v. New Hampshire Governor*, 2017 WL 6767294 (D.N.Y., November 30, 2017), Beaulieu convinces Judge Johnstone to let her proceed on four classes of claims, while recommending dismissal without prejudice of nearly 20 others. (Discussion of each recommended dismissal is

# PRISONER LITIGATION *notes*

beyond the scope of this article). Applying rational basis scrutiny in the First Circuit, Judge Johnstone allows Beaulieu to proceed on Equal Protection claims regarding shaving in SHU (more than once/month) and possession of “feminine” personal items. The Equal Protection claim is framed as between transgender and non-transgender female inmates. Judge Johnstone also allows what the Court calls “endangerment” claims to be served, citing *Giroux v. Somerset Cty.*, 178 F.3d 28, 32 (1st Cir. 1999). These include: housing Beaulieu with another inmate known to be a sexual predator; housing Beaulieu directly beneath the cell of the same inmate after she complained about him; housing Beaulieu with a known gang member with whom Beaulieu had prior difficulties; telling other inmates that Beaulieu was a “rat”; assigning officers against whom Beaulieu had made complaints to work in “close proximity” to Beaulieu; and refusing to refer Beaulieu to mental health after she threatened suicide, telling her to “just kill [her]self.” Some of these specifications were based on the mental health distress and the risks they posed for Beaulieu, not actual assaults. Judge Johnstone also allows First Amendment retaliation claims to be served. These include: false disciplinary charges; imposing a “Keep Away” order preventing her from seeing her boyfriend; using unnecessary force, including tazing her when she was not resisting. Judge Johnstone omitted certain claims she deemed “de minimis,” including trashing her cell (twice) and spreading rumors to cause friction between Beaulieu and her boyfriend. Judge Johnstone also allowed excessive force claims, some of which overlap with retaliation claims, including: twisting Beaulieu’s handcuffs while escorting her; smashing her head against a window, a doorframe and the floor; throwing her to the ground and jumping on her while she was not resisting; and forcibly placing her in a restraint chair for four hours. Judge Johnstone rejected stand-

alone verbal harassment, but it seems clear it will be admissible evidence as part of the subjective intent to be shown in the claims to be allowed to proceed. She rejected litigation about post-parole contact with her boyfriend (who is about to be released) as premature, since it has not yet been prohibited. Judge Johnstone recommends rejection without prejudice of state law claims not intertwined with the claims that are going forward (e.g., excessive force with battery). Judge Johnstone also recommended dismissal of certain executive defendants, such as New Hampshire’s Governor and Corrections Director, against whom no specifications were made in the body of the Complaint.

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**OREGON** – In 2016, we reported at length about transgender inmate Michael (“Michelle”) Wright’s efforts to obtain medical treatment and avoid transphobic harassment in the Oregon prison system. *Wright v. Peters*, 16-cv-01998 (D. Ore., filed October 17, 2016), reported in *Law Notes* (November 2016 at pages 493-4). On January 24, 2018, the *Associated Press State News*, based on sources from *The Oregonian*, reported an agreement to transfer Wright to Oregon’s women’s prison. She is the first pre-surgery transgender inmate to achieve such a transfer through litigation, to this writer’s knowledge. No other reporting service has picked up the settlement as of this writing, but it may be found on PACER at the above case number, Docket # 35 (Dec. 27, 2017). Correctional records now list Wright as female, and the determination of initial surgery – an orchiectomy (surgical procedure to remove her testicles) – will be made after further hormone treatment and presentation of the case to a committee. The detailed settlement addresses many issues and it is the most far-reaching this writer has seen for transgender inmates. It includes: establishing medical and mental health committees; staff training; staff

discipline for failure to treat transgender inmates in a “respectful, inclusive manner,” including use of preferred names and pronouns; establishment of peer support groups; and availability of feminizing items in the canteen and for grooming and apparel. Wright will receive a substantial monetary settlement as part of the agreement, as well as her attorneys’ fees. She can remain at the women’s prison, subject to good behavior and legitimate security concerns, which cannot include “her biological sex or the presence of genitalia.” The court (U.S. District Judge Michael J. McShane, a gay man who recently published some growing-up reminiscences in an essay in *The Advocate*) is keeping continuing jurisdiction over the case. Wright is represented by the Law Firm of Stoel Rives, LLP, and the ACLU Foundation of Oregon, Portland.

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**WASHINGTON** – This is a first for this writer. Transgender *pro se* inmate Nathan Robert Goninan, a/k/a Nonnie M. Lotusflower, *pro se*, filed a motion to proceed without exhausting administrative remedies; and the Washington State Attorney General’s Office consented, thereby waiving exhaustion under the Prison Litigation Reform Act. U. S. Magistrate Judge J. Richard Creatura granted the motion in *Goninan v. Wash. Dep’t of Corr.*, 2018 U.S. Dist. LEXIS 4632, 2018 U.S. Dist. LEXIS 4632 (W.D. Wash., January 9, 2018). Goninan, a recent transfer from Oregon Corrections to Washington Corrections at Walla Walla, seeks continuation of her treatment and “gender affirming therapies,” including transition towards sex reassignment surgery, which she was receiving in Oregon. Judge Creatura denied appointment of counsel at this time, without prejudice. This is one to watch.

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**WISCONSIN** – In *Balsewicz v. Bartow*, 2017 U.S. Dist. LEXIS 89698, (E.D.

# PRISONER LITIGATION *notes*

Wisc., June 12, 2017), U.S. District Judge Joseph P. Stadtmueller screened the *pro se* complaint of transgender inmate John H. Balsewicz and allowed her to proceed on two claims of deliberate indifference under the Eighth Amendment: failure to treat her gender dysphoria; and failure to treat her suicidal tendencies arising from her untreated condition, reported in *Law Notes* (Summer 2017 at page 279). The state has answered, and Balsewicz has filed an amended complaint, which the state demanded also be screened. Now, in *Balsewicz v. Blumer*, 2017 U.S. Dist. LEXIS 213176, 2017 WL 6731499 (E.D. Wisc., December 29, 2017), Judge Stadtmueller allows the same claims (with elaboration) to proceed, and he permits Balsewicz to add a defendant and to raise a claim of retaliation. It seems that, despite being on notice that a federal judge was allowing Balsewicz to proceed on claims that her needs were ignored, the state continued to ignore them. The amended complaint adds a defendant who received a referral to Wisconsin's transgender committee but refused to pass it along for months, with consequent additional delay in treatment. Defendants also retaliated against Balsewicz by reducing her treatment for bringing this litigation and after she filed a Prison Rape Elimination Act [PREA] complaint against a staff member. Judge Stadtmueller found that retaliation for the litigation and the PREA complaint plead "a chronology of events from which retaliation may plausibly be inferred," quoting *Zimmerman v. Tribble*, 226 F.3d 568, 573 (7th Cir. 2000). Balsewicz also filed a motion for a preliminary injunction against defendants destroying documents relevant to her case. Judge Stadtmueller denied it without prejudice as premature, but he indicated it would be addressed under the rules of civil procedure at a conference for a Scheduling Order. Presumably, defendants would not be so foolish, but, given their behavior so far, who knows?

**WISCONSIN** – Transgender inmate Roy Mitchell is a frequent litigator. Much of her history is reported in *Law Notes*, "Wisconsin Transgender Inmate Who Waited Over a Year for Evaluation for Hormones Loses Summary Judgment on Failure to Treat Damages Claims" (October 2016 at pages 424-5). One of the key problems she has faced is her movement between state custody, county jails, parole, and homelessness in fairly rapid succession, given the pace of litigation. A prior attempt to obtain transgender health services while on parole was dismissed without prejudice by the Seventh Circuit on mootness grounds because she was reincarcerated. See *Mitchell v. Wall*, 2015 WL 9309923 (7th Cir., December 23, 2015), reported in *Law Notes* (January 2016 at page 34). In *Mitchell v. Wasserberg*, 2018 U.S. Dist. LEXIS 12870 (W.D. Wisc., January 23, 2018), still *pro se*, she tries to obtain services again while on parole, and U.S. District Judge William M. Conley allows her to proceed. Screening her complaint under 28 U.S.C. § 1915A, Judge Conley finds that Mitchell has stated claims under the First, Eighth, and Fourteenth Amendments but has failed to plead a state law tort for defamation. Mitchell is currently on parole on "community supervision" and living in a hotel/motel when she is not homeless. She had previously been placed in a homeless shelter for men, which she alleges a state administrative judge had ruled to be unsafe for transgender women. Apparently, defendants directed her to stay at the City-County Building after 10:00 p.m., which left her on the steps outside, which she said was unsafe and resulted in her assault and robbery. According to the complaint, defendants took no action to address her living situation. During meetings with defendants, they discussed her prior lawsuit about conditions on parole, after which Mitchell was harassed, including being listed as having the first name "Thang" in her records. Defendants

provide one week of motel coverage, when regulations authorized renewable periods of one month. Defendants told her she was a "deviant" and an "outcast." Judge Conley found sufficient allegations of retaliation for exercising her right to sue to sustain screening of Mitchell's First Amendment claim. She had engaged in protected activity, defendants knew of it, and there was more than "temporal proximity" between their knowledge and the adverse action under *Lang v. Ill. Dept. of Children and Family Servs.*, 361 F.3d 416, 419 (7th Cir. 2004). Judge Conley found that the Eighth Amendment protects against unconstitutional conditions of parole, citing *Hankins v. Lowe*, 786 F.3d 603, 605 (7th Cir. 2015), and that Mitchell presented allegations that defendants were "aware that she was being subjected to a substantial risk of serious harm and consciously refused to take reasonable measures to prevent the harm," citing *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). Judge Conley found that Mitchell's housing situation constituted an "emergency" and that defendants' "failure to take available steps to assure plaintiff safe, available housing permit[s] an inference that [they] knowingly and repeatedly put plaintiff at risk of serious physical harm." Relying on *Whitaker by Whitaker v. Kenosha Unified Sch. Dis. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017), Judge Conley found sufficient pleading of a sex-based classification and sex-stereotyping to sustain screening: "[H]ad plaintiff presented biologically as a woman, she never would have been assigned to a men's homeless shelter. Instead, as a transgender woman, she was assigned to a men's homeless shelter, sexually assaulted, and then only provided with a short, one-week stay in a motel . . . . [T]hese allegations are sufficient for plaintiff to go forward on an equal protection claim, at least past the screening stage." Finally, Judge Conley found that calling Mitchell "Thang

# LEGISLATIVE & ADMINISTRATIVE *notes*

Mitchell” failed to meet the strictures of Wisconsin defamation law because Mitchell did not present any evidence that anyone other than herself and the defendants saw the entry and therefore the statement was not shown to harm Mitchell’s reputation in the community. What emerges from Mitchell’s cases is that she is less a criminal than a person without support doing what she must to survive, which repeatedly lands her in the criminal justice system – which then does little to keep the cycle from repeating – or by its indifference perpetuates the recidivism.

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## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES** – The Department’s Office of Civil Rights issued a proposed rule, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” on January 19, after it had been announced at a press conference earlier in the week. The Department created a new unit, called the “Conscience and Religious Freedom Unit,” which is intended to take action to protect health care workers who refuse to perform procedures or provide care because of the workers’ religious or moral objections. Reports about the rule singled out abortion, birth control, and gender-confirmation surgery as examples of the kinds of procedures the health care workers with religious or moral objections would be able to refuse to perform. Workers will also be protected if they refuse to make referrals to other providers who are willing to provide the requested care. The rule would protect against sanctions of health care providers who engage in “conversion therapy,” which is prohibited by law in several states and municipalities. Presumably, the argument will be made that this rule

would preempt state and local bans on providing such “therapy,” which major health care professional organizations have denounced as dangerous quackery. The rule proposes to protect health care providers from loss of federal funding and accreditation even though laws prohibiting discrimination and medical ethical rules would be countermanded by its operation. This proposed rule is likely to provoke litigation and clashes over the authority of HHS to adopt it. It raises clear issues under the Establishment Clause and the Equal Protection Clause, as well as administrative law questions about the jurisdiction of an agency to adopt exceptions to statutory anti-discrimination laws through the rule-making process. It is presented as a method of implementing President Trump’s directive last spring that federal agencies adopt rules and procedures that would provide maximum protection for religious freedom, which is the prime directive of a very loyal segment of the president’s political base.

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**ALABAMA** – The Senate approved a measure sponsored by Sen. Greg Albritton (R-Range) which would eliminate the process of obtaining marriage licenses and substitute a method of registering marriages after they have been performed. The measure would end the role of Probate Judges in issuing the licenses, which became a flashpoint after the *Obergefell* decision and active steps by then-Chief Justice Roy Moore to direct the judges not to issue licenses to same-sex couples, based on Moore’s view that the U.S. Supreme Court decision striking down same-sex marriage bans in four cases from the 6th Circuit did not invalidate Alabama’s ban. Moore was subsequently suspended from office, mainly for his actions in response to the *Obergefell* case, and then defeated for election to the U.S. Senate seat that was vacated by Jeff Sessions when he became Attorney General of the United States. Albritton,

an opponent of the *Obergefell* decision, said that the bill “is intended to bring the state into compliance with [*Obergefell*] and eliminate the discretion of probate judges on whether to issue a license. It requires that the form that’s presented to be recorded must be accepted,” he said. Some probate judges had stopped issuing marriage licenses entirely to avoid having to make such discretionary decisions. *AL.com*, Jan. 23, 2018.

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**CONNECTICUT** – Stamford’s Board of Representatives voted early in January to remove gender pronouns from its written rules, reports *AP State News*, Jan. 10, 2018. The measure passed unanimously, but with one abstention. The action was taken in response to the presence on the board of Raven Matherne, the state’s first openly transgender elected official, who commented that this would not change the way that rules are followed by is “an act to acknowledge the members of the board, just as in each of our districts and the city at large, cannot always be described as he or she.”

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**FLORIDA** – The Broward County Commission has enacted a ban on licensed health care providers performing conversion therapy on minors, following the lead of Palm Beach County Commissioners, who passed a similar policy in December. The county ban has a fine of \$250 for a first violation and a \$500 fine for each subsequent violation. More than ten Florida communities have enacted similar bans, in default of any action on this subject by the state legislature. *Sun Sentinel*, Jan. 10, 2018.

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**ILLINOIS** – Glenbrook High Schools District 225 Board of Education has approved the district’s first transgender student policy on January 22. The policy states that its purpose “is to ensure that all individuals who identify their gender

# LAW & SOCIETY *notes*

differently from their sex assigned at birth do not encounter discrimination based on that identification,” reported *Northbrook Star* on Jan. 25. Students are authorized to use restroom and locker room facilities with their “consistently expressed gender identity,” which some opponents described as unduly vague. Opponents suggested that the district hold off on adopting a policy until pending lawsuits in other places are all resolved, but the board decided to go ahead. The District Commissioner, Jennifer Roberts, supports the policy and rejected the idea that it would bring expensive litigation fees, commenting, “Is it too expensive to be on the right side of fairness and dignity? I am asking you to be on the right side of fairness and dignity.”

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**INDIANA** – Indiana remains one of only five states that lacks a hate crime bill, as Senate Corrections and Criminal Law Committee Chair Michael Young (R-Indianapolis) cancelled a scheduled vote on a pending bill, claiming that a consensus could not be reached over its wording. *Tribune-Star*, Terre Haute, Jan. 31. Although Republican legislative leaders have voiced support for adopting a hate crimes bill, “social conservatives” have mounted fierce opposition, presumably because it would crimp their style if they wanted to go out on a fag-bashing expedition. (Sorry, we couldn’t resist that one . . . .)

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**KENTUCKY** – The Paducah City Commission voted 4-1 to become the ninth city (population 25,145) in the state to adopt an anti-discrimination ordinance that forbids sexual orientation and gender identity discrimination. The measure also added age discrimination to the list of prohibited grounds under the existing law, and covers employment, housing and public accommodations. In common with many other states, Kentucky has a state legislature that

has proved resistant to LGBT rights proposals, but many municipalities in which local LGBT rights advocacy has borne fruit. *AP State News*, Jan. 10, 2018.

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**NEW HAMPSHIRE** – The House of Representatives narrowly defeated two measures on January 9 that would have banned licensed health care workers from performing conversion therapy on minors. *AP State News*, Jan. 9, 2018), reported that Republican House Speaker Gene Chandler cast tie-breaking votes to defeat both measures. However, the House will vote again in February on a motion for reconsideration in light of the close votes. *New Hampshire Union Leader*, Jan. 14.

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**VIRGINIA** – The Virginia Senate has passed bills to ban LGBT-related discrimination in housing (S.B. 523) and public employment (S.B.202). The employment bill would codify an existing executive order covering state employees and extend protection to local government workers, including employees of public schools. Virginia statutory law does not presently protect LGBT people from discrimination in any form. The bills now go to the House of Delegates and an uncertain fate. \* \* \* However, the Senate Republicans stuck together to narrowly defeat a measure that would have banned the performance of conversion therapy on minors in the state. \* \* \* Upon taking office, Governor Ralph Northam signed his Executive Order No. 1 – Equal Opportunity, which reaffirms the executive branch policy to ensure equal opportunity “in all facets of state government,” specifically mentioning sexual orientation and gender identity or expression as prohibited grounds of discrimination within the government. This Order supersedes and rescinds a similar order that was issued by outgoing Governor Terry McAuliffe when he took office in 2014.

**WISCONSIN** – Republican leaders in the state legislature have proposed a bill to “standardize employment law” across the state by barring local governments from adopting and maintaining their own anti-discrimination laws. This would have the effect of ending protection against employment discrimination for transgender people, who are now protected by half a dozen local laws but not the existing state anti-discrimination law. Wisconsin was the first state, back in 1982, to include sexual orientation in its state antidiscrimination law, so passage of the proposed bill would, at least theoretically, not adversely affect lesbians, gay men and bisexuals in the state. *University Wire*, Jan. 31, 2018. An emerging consensus in the federal courts that Title VII of the Civil Rights Act of 1964 protects transgender people from employment discrimination would still be available, applicable to employers with fifteen or more employees. Although the 7th Circuit has not yet ruled on this issue, its rulings on sexual orientation in *Hively* and gender identity under Title IX in *Whitaker* would support the argument that federal courts in Wisconsin should be open to gender identity discrimination claims under Title VII, since many federal courts routinely find precedents interpreting sex discrimination under the two laws as essentially interchangeable. That would still deprive transgender people from protection against discrimination by small businesses, unless Wisconsin courts can be persuaded to follow the federal gender identity discrimination precedents.

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

**CONVERSION THERAPY** – The Williams Institute at UCLA Law School published startling research on the amount of conversion “therapy” practiced in the U.S., attempting

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to change an individual's sexual orientation or gender identity. The practice assumes that being LGBT is a medical abnormality that can be "cured," but research has shown that such "cures" are illusory and being subjected to the practice can have adverse psychological consequences, including suicidal ideation, since one aspect of the "therapy" involves convincing the individual that they are suffering from a curable abnormality. The study suggests that about 20,000 LGBT children in the U.S. are subjected to conversion therapy each year, and at that nearly 700,000 LGBT adults age 18 or over have received such therapy. At present nine states ban licensed health care providers from performing such therapy on minors. *Daily Mail Online*, Jan. 29, 2018.

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## INTERNATIONAL NOTES

*By Arthur S. Leonard*

**EUROPEAN COURT OF HUMAN RIGHTS** – A three-judge panel ruled January 28 in *Hallier and others v. France*, Application No. 46386/10, that France's paternity leave law does not violate the anti-discrimination and respect for private and family life provisions of the Convention in a case brought by a lesbian civil partner in France whose application for paternity leave after her partner gave birth was denied on the ground that the statute made leave available only to fathers. This was not a marriage equality case. Same-sex partners have been allowed to marry for several years in France, and the question was not whether a lesbian spouse was entitled to parental leave. The court pointed out that since 2012 amendments to the law have created a provision under which a mother's civil partner could get leave as a "carer" for the child, equal benefits are now available in such a situation. The opinion is in French only, but an

English-language press release on the court's website summarizes the ruling.

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**EUROPEAN COURT OF JUSTICE** – In an opinion overlaid with bureaucratic language but, ultimately, coming to a decisive point, Chamber 3 of the European Court of Justice ruled on January 25 in response to a referral from the Administrative and Labor Court in Szeged, Hungary, that asylum authorities in that country should not have denied an asylum petition by a man from Nigeria who identifies as gay, solely based on an "expert psychological report" that concluded, based on various interpretive personality tests, that the man is not a homosexual. *In Case C-473/16*. The court found a potential violation of the European Convention on Human Rights, Article 8(1) (Respect for private life), in that a psychologically invasive test scheme is being involuntarily imposed). Although refraining from pronouncing on the accuracy of psychological personality tests to determine an individual's sexual orientation, the court noted, in paragraph 69 of its opinion, that "the conclusions of such an expert's report are only capable of giving an indication of that sexual orientation. Accordingly, those conclusions are, in any event, approximate in nature and are therefore of only limited interest for the purpose of assessing the statements of an applicant for international protection, in particular where, as in the case at issue in the main proceedings, those statements are not contradictory." In other words, although this applicant gave a coherent account of his life and fear of persecution in his home country, without any contradiction casting a shadow on his veracity, nonetheless, the Hungarian authorities referred him to an "expert" psychologist for evaluation and then gave controlling weight to the psychologist's report, which the court found to be a violation of his rights. In its conclusion, the court stated: "Article 4 of Direction

2011/95, reading in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant." What is frustrating in reading this opinion is that now, in 2018, anyone would give credence to "diagnostic" techniques concerning sexual orientation using psychological personality tests, the accuracy of which was forcibly disproven by the studies conducted by Dr. Evelyn Hooker in the U.S. during the 1950s, which led the American Psychological Association to conclude that homosexuality was not a mental disorder and should be removed from the profession's Diagnostic and Statistical Manual (DSM). Such tests trade on stereotypes about gay people and are of no use in making accurate statements about an individual's sexual orientation. The court noted that asylum authorities can seek out expert opinions, but the expertise is usually related to establishing the conditions confront LGBT people in the country they left seeking refuge, not in trying to verify the individual's claim to being gay.

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**AUSTRALIA** – *ABC Premium News* (Jan. 19) reports that a transgender sex worker has been found guilty in Western Australia's District Court of causing grievous bodily harm to a client by failing to disclose her HIV-positive status and infecting him with HIV. The sex worker, practicing under the name "Sienna Fox" stood trial as C.J. Palmer. Palmer had been told by a nurse that she tested positive about two months before the client responded to her online advertisement for sexual services, and had unprotected sex with her multiple



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times. Reports the news service, “It was the prosecution’s case Ms. Palmer, who identified as a female but had male genitals, was criminally negligent because she was in control of bodily fluids that could endanger the health of another and she did not take precautions when she engaged in penetrative sex with him.” Palmer’s defense was ignorance; she claimed that the nurse did not tell her that she had HIV, and that the client may have contracted the virus from somebody else. Palmer will be sentenced next month. Meanwhile, she is being held in a men’s prison, where she has been kept in a high security Special Handling Unit in cell by herself for security purposes. Sentencing was to take place February 16.

**CANADA** – The Canadian government’s prison system has announced that it will place prisoners in men’s or women’s facilities based on how they self-identify their gender. Under new policies, correctional staff must address transgender inmates by their preferred name and pronoun, and offenders will be allowed to purchase both men’s or women’s items from the approved catalogue, regardless of their anatomy or the gender on their official identification documents, reports *Postmedia News* (Jan. 31, 2018). The Correctional Service of Canada is responding to the federal government’s addition of “gender identity and expression” to the list of prohibited grounds of discrimination in the Canadian Human Rights Act last year.

**CHILE** – The Chamber of Deputies Human Rights committee has approved a bill that would allow transgender people to change the gender indication on official documents based on self-identification without need for formal documentation of surgical transition. Approval was pending in the full chamber.

**ECUADOR** – A marriage equality case is pending before the Constitutional Court, which has taken no action on it for more than a year. The plaintiffs have stated that if the court does not rule in the wake of the recent Inter-American Court ruling, they will take their case to the Inter-American court.

**EL SALVADOR** – The *Associated Press* (Jan. 31) reports that the Supreme Court is “putting the brakes” on a proposed constitutional ban on same-sex marriage. The Legislative Assembly voted in April 2015 to adopt a constitutional definition of marriage limited to being between “a man and a woman ‘born that way’” and prohibiting same-sex couples from adopting children. For final enactment it would be required to gain a supermajority vote from the current assembly. According to the AP report, “The Supreme Court ruled there were procedural missteps as it was fast-tracked through the assembly and voted on ‘urgently’ with just days left in the session. The court said that was improper for a constitutional change and there was no opportunity for the public to be informed and weigh in.”

**GERMANY** – Germany’s Federal Court of Justice ruled that a transgender woman who donated sperm before becoming a woman cannot be deemed the mother of the child conceived with that sperm, because by definition the mother is the person who gives birth to the child and the person whose sperm was used to conceive the child is the biological father (even though no longer a woman when the child was born). The plaintiff was listed as a woman in a 2012 same-sex marriage, and her wife conceived the child with the frozen sperm donation. Now the sperm-donor wife wants to be listed as the child’s second mother rather than father, but the trial court has balked at this, and the appellate court affirmed. An appeal is

been filed with the Constitutional Court. Perhaps we need some new vocabulary to describe the plaintiff’s status, but we fear that in German the result may be a ten-syllable word! *www.d2.com*, Jan. 5.

**INDIA** – It can take a long time for an English version of an Indian Supreme Court decision to be available on the Court’s website. Finally, last summer’s important privacy decision, in which several judges took issue with how the Court dealt with the sodomy law in an earlier case, has been posted. *Puttaswamy v. Union of India*, Writ Petition (Civil) No. 494 of 2012 (Aug. 24, 2017). [http://supremecourtindia.nic.in/supremecourt/2012/35071/35071\\_2012/Judgement\\_24-Aug-2017.pdf](http://supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012/Judgement_24-Aug-2017.pdf). It is well over 500 pages in length. Courtesy of Robert Wintemute of King’s College School of Law in London, here are where you can find key passages dealing with sexual orientation and the sodomy law: Lead judgment of 4 of 9 judges: pages 121-125 (paras. 124-128), page 244 (para. 169), page 253 (para. 178), page 263 (para. F); Judgment of 5th judge: pages 539-542 (paras. 78, 80-81).

**INDONESIA** – A recent court ruling rejecting a petition by conservative religious forces to construe that nation’s criminal laws to ban gay sex has unfortunately energized conservative legislators to accomplish through new legislation what the court was unwilling to do through interpretation of existing law. A new Penal Code will that would criminalize gay sex is now seen as having a good chance of passage, a major backwards step.

**ISRAEL** – Ministry of Health and Magen David Adom (Israel’s counterpart to the American Red Cross) announced on January 10 that gay men will be allowed to donate blood in Israel, as the country is adopting a one-year deferral policy,

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similar to that adopted in the U.S. and many European countries, in place of the existing life-time ban on donations by men who have had sex with men. The *Jerusalem Post* reported, “Donations will be accepted on condition that 12 months have passed since they last had sexual relations. Upon donation, plasma units from gay donors will be separated and frozen in quarantine for four months and only approved for use after a second clearance test at the end of the four-month period. The donors will be tested for infectious diseases that may be transmitted during transfusion.” Magen David Adom’s Director General, Eli Bin, stated: “Donation of blood is a right and duty common to all civilians of Israel.”

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**JERSEY** – The State of Jersey, a British Overseas Dependency, passed marriage equality legislation by a vote of 42-1, and rejected a proposed clause that would have allowed businesses to refuse to serve same-sex couples if it was deemed incompatible with the business owner’s religious beliefs. *itv.com* (Feb. 1) reports that the proposal was pending for two years, and that with this action Jersey will fall into line with Guernsey, Alderney, and the Isle of Man.

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**KENYA** – Litigation is ongoing challenging the country’s criminal law against consensual same-sex contact. A three-judge bench is hearing expert testimony from psychiatrists to explain sexual orientation and why the State should not impose criminal penalties for private consensual activity. The court has pending a motion to strike down selected provisions of the Penal Code governing “carnal knowledge against the order of nature” and “acts of indecency.” The plaintiffs have emphasized that they are not seeking a ruling on same-sex marriage, just sex crimes laws. *AllAfrica.com*, Jan. 19.

**MEXICO** – Keeping up with marriage equality developments in Mexico is a full-time job, as the issue is developing state-by-state. The marriage bureau in Tijuana turned away a lesbian couple seeking a license, which brought forth adverse comment from the Baja California State Human Rights Commission, which issued a “recommendation” to the state executive branch to fall into line with constitutional requirements. The Supreme Court has ruled numerous times for marriage equality now, but under the country’s system of jurisprudence, this is not enough to be automatically binding on every state. The Human Rights Commission’s “recommendation” notes that Article 1 of Mexico’s Constitution expressly bans “all discrimination motivated by . . . sexual preferences.” To be current on the situation in Mexico, readers are advised to consult Rex Wockner’s blog, *wockner.blogspot.com*, which maintains a current list of states that have marriage equality and reports on new developments as they happen. Mexico has 31 states plus the federal entity, Mexico City. As of mid-January, 13 states and Mexico City formally have marriage equality, although in some states there is not total uniformity among municipalities on how applications for marriage licenses are treated. Further developments may be affected by the recent ruling by the Inter-American Court of Human Rights in response to a request for a ruling from Costa Rica.

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**PANAMA** – Vice President Isabel de Saint Malo stated that the Inter-American Court marriage equality ruling is binding in Panama.

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**PARAGUAY** – In light of the Inter-American Court marriage equality ruling, activists are presenting two cases to the Supreme Court of Justice seeking a marriage equality ruling.

**PERU** – The situation for marriage equality is in flux in light of the recent Inter-American Court of Human Rights ruling. The President of the Supreme Court, Duberli Rodriguez, told a reporter, “Peru is part of the Inter-American system, and the organism that defends and protects these right is the Inter-American Court of Human Rights and . . . if the court has taken a decision, I believe that all the parties are called to respect that decision.” A marriage recognition case is now on appeal before the Fourth Civil Chamber of the Lima Superior Court of Justice, brought by veteran LGBT activist Oscar Ugarteche to get the National Registry to recognize his Mexico City marriage to Fidel Aroche. A lower court ruled in their favor. The Justice Committee of the Congress is still sitting on a 2017 marriage equality bill.

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**RUSSIA** – The Supreme Court ruled on Jan. 24 to quash a lower court’s order to deport a gay independent journalist, Khudoberdi Nurmatov, to Uzbekistan, where he claims to have been tortured in the past by government security services. He writes under a pen name for *Novaya Gazeta*, and was arrested and ordered deported for violating immigration laws. The Supreme Court found due process problems and ordered that his case be retried. He had attempted suicide after the deportation ruling, having testified in court that he would face “a slow torturous death” in Uzbekistan. *Agence France Presse English Wire*, Jan. 24. \* \* \* A same-sex couple married in Denmark, Eugene Wojciechowski and Pavel Stotzko, returned to Russia and claimed that their marital status had been validated by a border control officer, even though Russia does not formally recognize same-sex marriages of its citizens. They should not have talked to the press. The story quickly went viral, they encountered difficulties with law enforcement, and have reportedly fled

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the country. The border control officer has lost his job.

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## **TAIWAN (REPUBLIC OF CHINA)**

– The full text of the Constitutional Court’s ruling from last May on marriage equality is now available in English on the court’s website: [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=748](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=748). It is identified as No. 748 [Same-Sex Marriage Case] (May 24, 2017). The court held that civil code provisions limiting the right to marry to different-sex couples violates Article 7 (right to equality) and Article 22 (freedom to marry) of the Constitution, and gave the government two years to revise the necessary laws to make marriage equality available. Latest reports suggest that the necessary legislation may be forthcoming during 2018.

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## **UNITED KINGDOM**

– On January 29, the issue of Bermuda’s Domestic Partnership Law was debated briefly in the House of Commons. Bermuda is largely autonomous of the U.K., but the British government appoints a governor whose assent is required before legislation becomes law, and who acts on instructions from the government in London. Last spring, the Bermuda Supreme Court ruled that denying marriage to same-sex couples violated the nation’s Human Rights Act, which bans sexual orientation discrimination. Several marriages took place subsequent to that ruling. But a new government was elected in a campaign in which opposition to same-sex marriage was an issue, and the legislature late last year approved a Domestic Partnership Law that will purport to override the court decision and provide registered partnerships with rights and benefits similar to marriage for same-sex couples. Normally the governor would promptly give royal assent to new legislation,

but Governor John Rankin decided to await instructions from London, where the government continues to study the matter, which involves delicate issues of the relationships between the U.K. and its Overseas Territories. These issues were aired in the debate, with the government representative indicating that the matter was still being studied. *parliament.uk*, House of Commons Hansard, Vol. 635, Col. 647.

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## **VENEZUELA**

– A marriage equality case has been pending before the Constitutional Chamber of the Supreme Tribunal of Justice for years. Venezuelan activists announced their belief that an opinion is “imminent” in light of the Inter-American Court ruling.

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## **PROFESSIONAL NOTES**

*By Arthur S. Leonard*

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## **CONNECTICUT**

– Governor Dannel P. Malloy has nominated Connecticut Supreme Court Justice Andrew J. McDonald to succeed Chief Justice Chase Rogers upon his retirement in February. McDonald, who is openly gay, is a former state representative who has served on the state’s highest court as an associate justice since 2013. He will be the first openly gay state chief justice. A Connecticut newspaper reported that the first openly gay chief justice in any U.S. jurisdiction is Maite Oronoz Rodriguez, Chief Justice of Puerto Rico since February 2016.

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## **TRANSGENDER LEGAL DEFENSE & EDUCATION FUND**

has announced that Jillian Weiss, who has been Executive Director of the organization since 2016, has resigned, effective February 1. The organization’s board has appointed Dolph Ward Goldenburg as Interim Executive Director as they

launch a search for a new director. Under Weiss’s leadership TLDEF has secured victories in several significant cases, including EEOC determinations against Walmart for anti-trans discrimination in Florida and North Carolina. For full details about the ED search, check the organization’s website: [transgenderlegal.org](http://transgenderlegal.org).

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## **TRANSGENDER EQUALITY**

announces a staff opening for a Policy Counsel/Policy Associate to work at the National Center for Transgender Equality. Although a law degree is a preferred qualification, no specific degree is required. The position will be in the organization’s Washington, D.C., office. For full details, check their website: <https://transequality.org/about/jobs/policy-counselpolicy-associate>.

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## **NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR)**

is seeking a new Director of Finance and Operations, who will be responsible for the agency’s finances, human resources, and operational management functions, as well as providing administrative and other support for the board of directors. People with relevant educational credentials and experience for these functions at a national non-profit movement organization are invited to apply. For a full job description, consult the NCLR’s website, [NCLRights.org](http://NCLRights.org). Resumes and cover letters may be sent to <https://nclr.bamboohr.com/jobs/view.php?id=22>.

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## **THE AMERICAN CIVIL LIBERTIES UNION REPRODUCTIVE FREEDOM PROJECT**

announces a two-year staff attorney position in the organization’s national office in New York. For details, see: <https://www.aclu.org/careers/staff-attorney-rfp-23-acluf-reproductive-freedom-project-ny>.

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### EDITOR'S NOTES

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

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