

L G B T  
LAW NOTES

June 2016

# BATHROOM BROUHAHA

*Competing Federal Court Lawsuits Pile Up Over Whether Transgender Individuals Are Protected Under Federal Law to Use Restrooms Consistent With Their Gender Identity*

## EXECUTIVE SUMMARY

- 221 **Transgender Rights Controversy Generates Litigation, Legislation, Regulation**
- 226 **At Long Last, Italy Moves to Comply With European Human Rights Imperative to Recognize Same-Sex Partners**
- 229 **Retroactivity of Marriage Rights Continues to Occupy Courts**
- 231 **9th Circuit Ruling Shows Limits of Refugee Protection for HIV-Positive Gay Men**
- 232 **Sixth Circuit Rejects Gay Ukrainian's Appeal of Board of Immigration Appeals Ruling**
- 233 **Missouri Supreme Court Rejects Constitutional Challenge to HIV Exposure Statute**
- 234 **Virginia Federal Court Rejects Sexual Orientation Discrimination Claim under Title VII**
- 235 **Virginia Supreme Court Rules That Former Spouses Cohabiting with Same-Sex Partners Can Trigger Statutory Loss of Alimony**
- 236 **Ohio Appeals Court Also Rejects Challenge to HIV Exposure Law**

237 Notes    262 Citations

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# Transgender Rights Controversy Generates Litigation, Legislation, Regulation

The Spring of 2016 may well be remembered as a time when furious debates about transgender rights, focused mainly (but not exclusively) on the issue of access by transgender persons to sex-designated bathrooms consistent with their gender identity, reached a tipping point in the public conversation, generating multiple lawsuits, administrative actions, and legislative proposals, as well as daily coverage in the mainstream media. Momentum was building toward this eruption for many years, as federal courts began to accept arguments that gender identity discrimination could be challenged under federal sex discrimination laws, the Equal Employment Opportunity Commission

or female, which is stated on a person's birth certificate," was consistent with the sex-designation of the facility.

H.B. 2 was adopted in the course of a single day during a special "emergency" session summoned by legislative leaders in response to the city of Charlotte's enactment of a non-discrimination ordinance that banned gender identity discrimination in places of public accommodation, including public restrooms. The statute's enactment prompted a firestorm of public controversy, as governors and mayors from other jurisdictions limited official travel to the state, employers, convention planners, sports leagues, and celebrity performers announced boycotts, and politicians reacted with

accommodations for more than a decade without any record of such problems occurring, or that existing criminal laws could be invoked against any man who would misrepresent himself as transgender for such a purpose.

Within days of the enactment of H.B. 2, the American Civil Liberties Union for North Carolina Legal Foundation, collaborating with the national ACLU and Lambda Legal, filed suit in the U.S. District Court for the Middle District of North Carolina challenging the provisions that had stripped localities of the ability to protect LGBT people from discrimination, as well as those restricting bathroom access for transgender people. *Carcano v. McCrory*, No. 1:16-cv-236-TDS-

## Things came to a head as public interest groups, corporations, non-profits, government leaders, and executive agencies responded to North Carolina's enactment late in March 2016 of H.B. 2.

(EEOC) changed its long-time position and embraced the view that gender identity discrimination is a form of sex discrimination and targeted the issue as a litigation priority, and the Obama Administration, through administrative actions and public pronouncements by the Education and Justice Departments, enlisted in the battle to achieve full participation by transgender people in the economic and social life of the nation. But things came to a head as public interest groups, corporations, non-profits, government leaders, and executive agencies responded to North Carolina's enactment late in March 2016 of H.B. 2, a measure that amended the state's statutory code by incorporating a directive that access to government-operated "single-sex multiple occupancy bathroom and changing facilities" be strictly limited to persons whose "biological sex," defined as "the physical condition of being male

copycat bills (or discouragement of same). In addition to the restroom restrictions, H.B. 2 preempted local anti-discrimination ordinances, adopted a state anti-discrimination provision that pointedly limited "sex" discrimination to discrimination because of a person's biological sex as identified on their birth certificate, and barred individuals from recourse to the state courts for their discrimination claims under the state law. It also, in a totally unrelated move, sharply restricted the ability of local governments to legislate in the area of public contracting and minimum wages. Some proponents of the measure argued that it was necessary to protect the safety of women and children, who could be threatened by men "posing" as transgender in order to gain illegitimate restroom access for nefarious purposes. They were not fazed by the fact that numerous jurisdictions have banned gender identity discrimination in public

JEP (filed March 28, 2016). But this lawsuit was just a first shot. The Justice Department notified North Carolina Governor Pat McCrory as well as administrators of the state university on May 4 that North Carolina's bathroom provisions violated Title VII of the Civil Rights Act of 1964 (banning employment discrimination because of sex), to the extent that they impeded facilities access for transgender employees, and Title IX of the Education Amendments Act of 1972 (banning sex discrimination by educational institutions that receive federal funding), to the extent that they impeded facilities access for students and staff of the state's educational institutions. The governor's response was to file suit in a different federal district on May 9 seeking a declaration that the state's laws did not violate federal law, which provoked an emotional public statement by U.S. Attorney General

Loretta Lynch vowing to protect the rights of transgender people, and the filing of a federal countersuit against North Carolina. (The state subsequently filed a motion to have these federal suits consolidated before the same judge.) Republican state legislative leaders in North Carolina filed their own lawsuits against the federal government as well, and Alliance Defending Freedom, having already filed a lawsuit (on behalf of objecting parents and students) challenging the settlement of a Title IX case in Illinois, filed a similar suit in federal court in North Carolina on behalf of some parents and students, identifying their plaintiffs as “North Carolinians for Privacy.” Plaintiffs in *Carcano* filed a motion for preliminary injunction on May 16, arguing that irreparable injury in terms of violation of constitutional and statutory rights was being inflicted on the plaintiffs and other transgender people in North Carolina as long as H.B. 2 was in effect.

Governor McCrory, attempting to refute the widespread criticism that the enactment of H.B. 2 signaled hostility on his part against LGBT people, issued an executive order banning sexual orientation and gender identity discrimination within the state government, but at the same time reiterating the bathroom access restrictions of H.B. 2, which he insisted were not discriminatory. McCrory also noted in his Order that private businesses were free to establish their own policies, and suggested that the legislature consider repealing the portion of H.B. 2 that prohibited individuals from suing for discrimination in the state courts.

The North Carolina controversy quickly spread as the Obama Administration doubled down by transmitting a joint letter from the Justice and Education Departments on May 13 to the nation’s schools, informing them of the Administration’s interpretation of Title IX to require all schools receiving federal funding to desist from discriminating against transgender students and to afford equal access to school facilities consistent with a student’s gender identity. The Administration’s position, boiled down to its essence, was that somebody who is a transgender male is entitled to the

same facilities access as a cisgender male, and similarly for transgender and cisgender females. This position provoked a wide range of responses, including ferocious public opposition from some Republican elected officials who questioned the proposition that transgender men are really men and transgender women are really women (a point expressly made in a new Mississippi statute, “protecting” those who denied the reality of transgender identity as inconsistent with their religious beliefs, which attracted an immediate lawsuit asserting, among other things, a violation of the 1st Amendment Establishment Clause), numerous school board debates, and policy resolutions.

It also led to the filing of a lawsuit against the federal government in the U.S. District Court for the Northern District of Texas in Wichita Falls by the Texas Attorney General, Ken Paxton. Paxton searched for a northern Texas school district willing to adopt a bathroom policy, apparently to be able to file suit before U.S. District Judge Reed C. O’Connor in Wichita, who in the past had ruled in favor of the state against Obama Administration policy-making on the rights of same-sex couples under the Family & Medical Leave Act. The Wichita Fall schools would not cooperate, but he succeeded in recruiting the tiny Heber-Overgaard Unified School District to be a co-plaintiff and enlisted numerous other states to join as co-plaintiffs (some of which signed on after the original complaint was filed), challenging the Obama Administration’s interpretation of Title IX. *Wichita Falls Times Record*, June 2. This suit, grandly and defiantly captioned *State of Texas et al. v. United States of America et al.*, sought to premise the plaintiffs’ standing on the implicit threat in the Administration’s “guidance” to school districts that federal funding could be lost through non-compliance with the Administration’s interpretation of Title IX, but there were serious questions whether the plaintiffs had Article III standing to seek what would be, in effect, a declaration that the Administration had misinterpreted federal law without the context of an actual enforcement

action against any of the plaintiffs. The Administration’s indication that no federal funding would be suspended without appropriate due process and a judicial determination that the law was violated served to undercut the plaintiffs’ standing, rendering the controversy probably not sufficiently “ripe” for judicial resolution, at least with respect to these parties, unlike, perhaps, Governor McCrory, who had after all received a letter from federal officials accusing his state of violating the law and threatening to take action. (One press commentary observed that the tiny plaintiff Texas school district had no transgender students and thus was unlikely to incur any sort of federal enforcement action in response to its formal adoption of a “policy” against transgender bathroom access.) Texas government officials actively encouraged other school districts not to comply with the Administration’s “ruling,” perhaps hoping to provoke an enforcement action, and Attorney General Paxton denounced one school administrator in Fort Worth in particular for unilaterally adopting a policy of allowing transgender students to access bathrooms consistent with their gender identity. The same media source condemned Paxton for mailing a fund-raising letter immediately after filing suit, accusing him of sinking “low” by trying to raise money encouraging discrimination against transgender students.) See *Corpus Christi Caller Times*, June 1. And some parents of transgender children, arguing that the state’s position was placing their offspring in danger by encouraging harassment of transgender children attempting to use school restrooms, criticized Lt. Gov. Dan Patrick, another outspoken opponent of the Obama Administration’s interpretation of Title IX, as using transgender kids as a vehicle to make political points. *Houston Chronicle*, June 1.

The lawsuits resisting the Administration’s position advanced a variety of theories. One was “executive overreach,” contending that the Administration was improperly legislating by adopting interpretations of Title IX (and Title VII) that went beyond the intent of the enacting

federal legislators of decades ago, who would undoubtedly have been surprised to learn that their handiwork compelled transgender access to public restrooms in schools and government buildings. Federal administrators and courts had rejected the argument that gender identity claims were covered under these laws in their interpretations adopted during the early period after their enactment. A variant of this argument, first advanced in the Alliance Defending Freedom lawsuits and then taken up in the Texas suit, argued that the Administration had violated the Administrative Procedure Act by failing to embody this “new” interpretation in a proposed regulation, published for public comment, which could then be challenged directly in the federal circuit courts after final publication.

What these lawsuits conveniently ignored was that the Administration’s interpretation was built upon a series of federal court decisions, including by several courts of appeals, which had accepted arguments that gender identity discrimination could be actionable as sex discrimination in a variety of contexts. The developing case law was described in detail by the EEOC in its decisions finding gender identity discrimination actionable under Title VII in 2012 and then holding in 2015 that excluding transgender people from workplace restrooms consistent with their gender identity was forbidden by Title VII. See *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012); *Lusardi v. McHugh*, 2015 WL 1607756 (EEOC, April 1, 2015). The circuit court decisions, construing sex discrimination provisions in the Violence against Women Act, the Fair Credit Act, and Title VII, emanating from the 9th, 1st, and 6th Circuits, premised their rulings on a logical extension of the Supreme Court’s 1989 *Price Waterhouse v. Hopkins* decision, which found that adverse treatment of an employee because of her failure to conform to “sex stereotypes” violated the ban on sex discrimination. Similarly, the 11th Circuit had ruled in an equal protection state government employment case that a transgender plaintiff could assert a sex discrimination claim that would receive heightened scrutiny under the

14th Amendment. These more recent decisions found in particular cases that anti-transgender discrimination was based on the defendants’ view that transgender people fail to conform to sex stereotypes. The EEOC had taken this theory the next step, finding that gender identity discrimination is, on its face, discrimination “because of sex,” without any need to invoke the stereotyping theory, although the EEOC continued to posit this as an alternative theory as its litigation strategy unfolded in new lawsuits and amicus briefs. (The EEOC reached a similar conclusion regarding sexual orientation discrimination in a decision issued during 2015, and has posted on its website a fact sheet titled “Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964.”)

A major breakthrough came when a panel of the 4th Circuit Court of Appeals

be upheld if it was well-reasoned and not a clearly-erroneous interpretation of the statutory and regulatory language. The school board had premised its defense on the regulatory authorization to schools to maintain sex-segregated restroom facilities, but the court found that the Education Department’s interpretation was not inconsistent with this, and also was not inconsistent with the Department’s prior articulation of the view that a school district could accommodate a transgender student by providing a gender-neutral single-occupancy restroom if the student did not desire to use a restroom designated for men or for women. The issue was not whether restrooms could be designated exclusively for male or female users; rather, it was how transgender people should be classified for purposes of these access rules. In light of current understandings, the court found that it was permissible for

## On May 31, the 4th Circuit announced that the school district’s petition for *en banc* reconsideration had been denied.

ruled 2-1 in *G.G. v. Gloucester County School Board*, 2016 U.S. App. LEXIS 7026, 2016 WL 1567467 (April 19, 2016), a case brought by a transgender high school student in Virginia, that the Education Department’s interpretation of Title IX (relying mainly on Title VII precedents) was not clearly erroneous and thus was entitled to deference from the federal courts under *Auer v. Robbins*, 519 U.S. 452 (1997), and other Supreme Court cases discussing the conditions under which courts should defer to administrative interpretations of statutory language. The 4th Circuit panel majority concluded that the statutory ban on sex discrimination and the existing regulations implementing it were ambiguous when it came to determining how to apply them to the situation of a transgender student seeking restroom access under Title IX, and thus the agency’s interpretation should

the agency to require that transgender men be classified as men, transgender women be classified as women, and their restroom access determined accordingly. This ruling reversed the trial court’s grant of summary judgment against the student’s Title IX claim, and remanded the case for consistent proceedings. The trial judge had opined that the regulations were not ambiguous and thus that the agency’s interpretation was not entitled to deference. (The trial judge had refused to grant summary judgment against the student’s 14th Amendment Equal Protection claim, reserving that for further litigation.) On May 31, the 4th Circuit announced that the school district’s petition for *en banc* reconsideration had been denied, over a dissent by Circuit Judge Paul Niemeyer, who had been the dissenting member of the panel. See *G.G. v. Gloucester County School Board*, 2016 WL

3080263, 2016 U.S. App. LEXIS 9909, with Judge Niemeyer urging in his new dissenting opinion that the school district promptly seek Supreme Court review.

Judge Niemeyer's dissent recurred to another argument developed in the Alliance Defending Freedom lawsuits: that the 14th Amendment Due Process Clause's protection of liberty includes a fundamental right of "bodily privacy." ADF argued that the "fundamental right" of cisgender students to "bodily privacy" would be improperly impaired by allowing transgender students to use bathroom and changing room facilities consistent with their gender identity, by requiring cisgender students to "expose" themselves to the view of persons of the opposite "biological" sex. Niemeyer's dissent echoed the ADF complaints by describing a historic tradition of respecting individual privacy by maintaining sexual segregation of public restroom facilities, conveniently overlooking earlier periods when public facilities were racially segregated and men and women of color were sometimes required to "share" facilities in some parts of the country.

Interestingly, press inquiries to law enforcement officials in North Carolina revealed that there was little interest in "enforcing" the restroom provisions of H.B. 2. The legislation did not mention any form of enforcement, did not specify penalties for violations, and did not make clear whether the institutions operating the restrooms in question would suffer any adverse consequences from the state for failing to bar transgender people from using the "wrong" restrooms. Some law enforcement officials speculated that if somebody summoned a police officer to respond to a report that a transgender person was using the "wrong" restroom and the person was still there when the officer arrived, the officer would request them to leave and, if they refused, might arrest them for trespassing. Nobody suggested that people seeking to use public restrooms should routinely carry copies of their birth certificates in order to be able to prove their right of access when challenged.

Among the numerous developments during May the following were reported:

**ALABAMA** – On May 4, the city council of Oxford, Alabama, convened a special meeting to vote 3-2 to recall an ordinance that had been approved the previous week restricting the use of public restrooms by transgender people. The action came after the ACLU and the Southern Poverty Law Center sent the city council a letter threatening to sue under the 14th Amendment and federal civil rights laws. *BuzzFeed.com*, May 4.

**ALASKA** – The Alaska School Activities Association announced that it should be up to school districts to decide which team a transgender student could play on, and that the Association, which normally resolves disputes that arise out of interscholastic athletic competition in the state, would not hear appeals for anyone objecting to a school allowing students to compete on teams based on their gender identity, rather than their "biological sex." The ASAA said it would accept whatever policy is in place at the student's school. *Alaska Dispatch News*, May 5.

**DISTRICT OF COLUMBIA** – The District of Columbia police classified as a "suspected hate crime" the action of a store security guard who told a woman that she could not use a grocery store restroom in Northeast Washington. The female security officer apparently suspected that the customer was transgender. The guard, employed by a security contractor of the Giant Foods supermarket chain, who allegedly used a homophobic slur while "pushing" the customer, was charged with a misdemeanor assault, and was ordered to appear for a July 21 hearing. The store called the guard's action "inappropriate," and described a customer's choice of restrooms as "a personal matter." *Washington Post*, May 19.

**ILLINOIS** – The Chicago Public Schools have adopted a comprehensive set of guidelines regarding "the Support of Transgender and Gender Nonconforming Students" in line with

the interpretation of Title IX by the U.S. Department of Education, including providing access to restrooms and other gender-labelled facilities consistent with a student's gender identity. The policy also addresses issues of confidentiality, freedom of speech, discrimination, dress codes, names and pronouns, and other issues that might arise. \* \* \* The ACLU, which represented a transgender student in the ongoing dispute in Palatine Township High School District 211, announced that it would seek to intervene on behalf of the student to defend the negotiated settlement in that case, which is being challenged in a lawsuit filed by Alliance Defending Freedom. The lawsuit, which names as defendants the U.S. Department of Education, the U.S. Justice Department, and District 211, alleges that the settlement agreement, by which the ACLU's client will be able to use school facilities consistent with her gender identity, violates the constitutional right of "bodily privacy" of other students by creating an "intimidating and hostile environment." *Barrington Courier-Review*, May 12.

**INDIANA** – The New Albany-Floyd County Consolidated School Corporation's board of trustees voted unanimously on May 11 to adopt language for its handbook protecting transgender students and employees from discrimination, in line with the Title IX interpretation by the U.S. Department of Education's Office of Civil Rights. *AP State News*, May 11, summarizing local news reports.

**KANSAS** – On the last day of its legislative session, June 1, the legislature proved unable or unwilling to meet a pressing deadline on a school funding measure, but the Senate had time to pass a resolution condemning the Obama Administration's interpretation of Title IX, and Attorney General Derek Schmidt announced that Kansas would sign on as a co-plaintiff to the lawsuit filed by Texas Attorney General Ken Paxton. Schmidt said that "the bottom

line is that Kansas will challenge the Obama administration's attempt to unilaterally rewrite Title IX in an unprecedented way that further expands federal power." Schmidt insisted that the authority to make restroom access rules for the state's schools should reside with "state or local authorities, including school boards." *Topeka Capital Journal*, June 2.

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**KENTUCKY** – The City Council in Flatwoods, Kentucky, approved an ordinance to restrict public restroom use in that city by transgender individuals, but Mayor Ron Fields vetoed the measure on June 1, stating that it would have exposed the city to expensive litigation. "The financial ramifications would break us up," said the mayor. "We need to protect the city and its money." *Ashland, Kentucky, Daily Independent*, June 2. \* \* \* On May 27, Governor Matt Bevin announced that Kentucky would join as a co-plaintiff in the Texas lawsuit challenging the Obama Administration's interpretation of Title IX. "The federal government has no authority to dictate local school districts' bathroom and locker room policies," proclaimed Begin. "The Obama Administration's transgender policy 'guidelines' are an absurd federal overreach into a local issue." However, since the state's Attorney General, Andy Beshear, was unwilling to file suit against the federal government, Bevin said, his administration would join the Texas case. "We are committed to protecting the Tenth Amendment and fighting federal overreach into state and local issues."

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**LOUISIANA** – U.S. Representative Ralph Abraham (R-Alto) has introduced House Resolution 5307, which would amend Title IX by "clarifying" that "the term 'sex' means with respect to an individual the biological sex of such individual." He claimed that this would remove any "ambiguity" in the law "to ensure that Title IX's true intent is respected." *Alexandria Daily Town Talk*, May 25.

**MARYLAND** – Baltimore Mayor Stephanie Rawlings-Blake suspended all city-sponsored travel to North Carolina and Mississippi in response to those state's laws authorizing discrimination against transgender individuals and, in Mississippi's case, allowing workers to cite their religious beliefs as a basis to deny services to LGBT people. *AP National News*, May 11.

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**MASSACHUSETTS** – Both houses of the legislature approved bills to amend the state's Law against Discrimination to add "gender identity" to the prohibition on discrimination in places of public accommodation. "Gender identity" was added to the state's anti-discrimination law years ago, but controversy over the "bathroom" issue led to a legislative compromise under which the "gender identity" provision would not apply to public accommodations. Several attempts to fill that gap were unsuccessful, but after the Senate voted to approve a new bill, pressure on Governor Charlie Baker (a Republican) to take a position led him to state that if the legislature sent him the bill then pending before the House, he would sign it. The House bill, which passed by a comfortable bipartisan majority on June 1, had some amendments not in the Senate version, so a conference committee was expected to meet during June to work out differences. A notable feature of the House bill, responding to the argument by some Republican legislators that the measure would endanger the safety of women and children using public restrooms, was a provision requiring the attorney general to adopt prosecution guidelines for cases in which cisgender men, falsely declaring themselves to be women, gained access to women's public restrooms for improper purposes. *Boston Globe, New York Times*, June 2.

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**MICHIGAN** – A funeral home is claiming a religious exemption from non-discrimination requirements in its attempt to avoid liability under Title VII for discharging a transgender woman. The ACLU, which represents Aimee

Stephens, helped the EEOC to beat back a motion to dismiss, persuading the federal district court that the case could be brought under Title VII. The funeral home responded with a new motion, arguing that requiring it to employ a transgender funeral director violates its rights under the First Amendment Free Exercise Clause and the Religious Freedom Restoration Act. R.G. and G.R. Harris Funeral Homes seek to invoke the Supreme Court's *Hobby Lobby* ruling in support of its claim that requiring it to employ Stephens would unduly burden the religious beliefs of the Homes' owners. Their 1st Amendment argument apparently ignores the well-established federal precedent that defendants cannot assert free exercise claims to evade complying with state laws of general application. The *Hobby Lobby* decision was premised solely on an interpretation of the federal Religious Freedom Restoration Act, not the 1st Amendment. *ACLU Press Release*, reported online in *US Official News*, May 7.

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**NEW JERSEY** – The Highland Park School District Board of Education voted unanimously on May 23 to adopt a transgender policy that substantially complies with the interpretation of Title IX articulated by the Obama Administration. U.S. Representative Frank Pallone, Jr. (D.N.J.), voicing support for the district's policy, described it as the "strongest policy statement that is supportive of transgender students of any school district in the state if not in the country" and praised Highland Park for taking a "stand on a civil rights issue in the forefront of progressive action." *Courier News, Bridgewater, N.J.*, May 25.

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**NEW YORK** – Governor Andrew Cuomo announced that New York State would file an amicus brief in the lawsuit filed by Equality North Carolina, ACLU, and Lambda Legal challenging North Carolina's H.B. 2. This followed up on the governor's previously announced ban on state-funded travel to North Carolina. *AP National News*, May 7.

**OKLAHOMA** – The leadership in the Oklahoma State House of Representatives announced on May 24 that S.B. 1619, which would bar transgender students from using school restrooms consistent with their gender identity, was being shelved for the current legislative session, according to a press release issued by *Freedom Oklahoma*, an LGBT-rights political group.

**OREGON** – On May 5, the Oregon Department of Education issued guidelines providing that transgender students in public schools in the state should be able to use whatever names, bathrooms, and pronouns they want, according to an *Associated Press* report of May 6. “A student who says she is a girl and wishes to be regarded that way throughout the school day should be respected and treated like any other girl,” says the guidelines document. “So too with a student who says he is a boy.” The guidelines were issued after Dallas School District Superintendent reached out to Governor Kate Brown for help in response to a controversy in the District involving a high school principal’s decision to let a transgender boy use the boys’ locker room, inciting protests from parents and students. Other states that have issued similar guidelines include Connecticut, Massachusetts, and New York.

**PENNSYLVANIA** – Philadelphia Mayor Jim Kenney should be added to the list of mayors who have curtailed travel by city employees to states that officially restrict the restroom access rights of transgender people. *Daily Pennsylvanian*, June 2.

**TENNESSEE** – A transgender girl in the Summer County school system had been using the girls’ bathroom without incident until January, when school officials told her she would be disciplined if she continued to do so. The ACLU of Tennessee asked the U.S. Department of Education to intervene. The school district insisted that it was complying with federal law by providing “alternative, private, unisex restrooms and changing facilities.” *AP National News*, May 19.

## At Long Last, Italy Moves to Comply With European Human Rights Imperative to Recognize Same-Sex Partners

As the last and 27th European country to legislate on same-sex couples, on May 20, 2016, Italy has eventually passed the *Act on Same-Sex Civil Unions and De Facto Partnerships* (Law No. 71/2016, *Official Journal* No. 118 of May 21, 2016). Given that the only legally recognized union so far was the nuclear family based on different-sex marriage, Italian scholars unanimously marked this Act as “a legal revolution in Italian law.”

The very first draft on the matter dates back to 1983, when some women affiliated to the then-Communist Party introduced a bill on cohabiting couples regardless of their sex. While several other bills have been filed throughout the decades by all parties, including coalitions traditionally hostile to LGBT rights, none of them had been extensively discussed in any legislative chamber or commission.

Perhaps the most significant antecedent occurred in 2007, when a bill drafted and approved by the government, at the time supported by a center-left coalition led by Prime Minister Romano Prodi, would have recognized for all couples a few rights such as registration, inheritance (but only after 9 years of cohabitation), and health and social security services (but under further regulations to be passed). Registration, however, was supposed to take place not through a ceremony in front of a government official, as usually happens in the event of a civil marriage, but simply with the filing by the partners of two separate statements declaring the beginning of the cohabitation. The idea of unilateral instead of joint declarations reflects the fear of the ritual getting too close to a civil marriage.

Moreover, compared to other nations such as France or Germany, where laws recognizing and protecting same-sex couples are in force, respectively, since 1999 and 2001, and as Spain, Belgium or the Netherlands, where same-sex

couples were already permitted to marry, the 2007 Italian bill contained a very minimal regime that was the alleged result of a compromise with the powerful Roman Catholic component of the governing coalition. Such a component, however, was able to target the bill anyway because of its recognition, although negligible, of gay and lesbian couples. After putting strong pressure over the national press and lobbying conservative politicians to delay and interfere with the bill’s path towards a proper discussion, the Catholic activists, many of whom were present in the government itself, scheduled a “Family Day” in May, 2007, gathering 300,000 people in Rome specifically protesting against the legal recognition of homosexual couples. The Catholic Church not only embraced the protest, but also officially expressed harsh criticism towards the government for its move in favor of same-sex couples, even if the bill covered also straight couples. As a result, after losing most of its Catholic component the government had to relinquish any support for the bill so that the Justice Commission of the Chamber of Deputies could quickly bury it under its already overloaded dockets. A few months later, the issue was politically deployed once again to drain the remaining support for Prodi’s government, which ultimately lost a confidence vote in the Senate in January 2008, paving the way to the victory of the center-right and the subsequent freezing of the matter for the following five-year term.

In 2010, however, the general issue of LGBT rights gained new momentum. On April 15, 2010, the Constitutional Court rendered a judgment in favor of same-sex unions establishing that, even if they were not entitled to marry under the Constitution, same-sex partners had a right “to freely live their condition as a couple” and to obtain due recognition from the Parliament.



In the court's language, marriage was not precluded among the envisageable statutory solutions, but the court was clear in affirming that the law had to cover "rights and duties of the union" in a possibly all-comprehensive fashion. The court also reserved to intervene in the event of an unequal treatment of same-sex unions compared to married couples.

Two years later, the Supreme Court of Cassation (*Corte Suprema di Cassazione*) stated that same-sex couples were entitled to legal recognition from the Parliament but, in the silence of the latter, they could access the courts to claim specific rights of equal treatment compared to married couples (No. 4184 of March 15, 2012, *Garullo & Ottocento v. Comune di Latina et al.*, on which see the note, *Italy's High Court Rules on Recognition Claim by Same-Sex Couple Married in the Netherlands*, 2012 L.G.L.N. 108). In so stating, the Supreme Court used the jurisprudence of the European Court of Human Rights which acknowledged same-sex couples' "right to respect for private and family life" (ECtHR, *Case of Schalk & Kopf v. Austria*, June 24, 2010, App. No. 30141/04, part. para. 94). Several courts used a combination of the rulings of both the Constitutional and the Supreme Court to recognize individual rights, for example under refugee, immigration, and parental relationship law.

In the latter field, in particular, several courts throughout the country established the petitioners' right to adopt the same-sex partner's biological child (see for instance the note *An Italian Tribunal Established Second-Parent Adoption in Same-Sex Family*, 2014 L.G.L.N. 425). Although Italian law does not recognize step-parent adoptions, it provides for the possibility of "adoption in particular circumstances", which courts have made available both to same-sex and opposite-sex couples. The judicial recognition of same-sex families was perhaps the most powerful argument in the public debate in favor of a law on same-sex couples that included families with children.

Through all these years, the Parliament ignored every court call, with the number of filed bills multiplying from both coalitions. Some bills were discussed, but with no concrete results, in the Justice Commission of the Senate. And yet, on July 21, 2015, the European Court of Human Rights released a ruling against Italy in *Oliari et al.*, stating that the absence of regulation for same-sex couples infringed the petitioners' right to respect of their private and family life under Article 8 of the European Convention on Human Rights (ECtHR, *Case of Oliari v. Italy*, App. No. 18766/11 and 36030/11, see *European Court of Human Rights Rules European Convention for Protection of Human Rights Requires Italy to Enact Either Civil Union or Marriage Law for Same-Sex Couples*, 2015 L.G.L.N. 347).

**The court was clear in requiring Italy to enact not a weak statute such as the one proposed in 2007, but a proper statute that grants gay and lesbian people the "opportunity to enter into a civil union or registered partnership."**

Moreover, in its judgment the court urged the Council of Europe to monitor Italy as to the enactment of proper legislation to remedy the existing breach of her international obligations. Finally, the court was clear in requiring Italy to enact not a weak statute such as the one proposed in 2007, but a proper statute that grants gay and lesbian people the "opportunity to enter into a civil union or registered partnership" (*ibid.*, par. 164).

On October 21, 2015, the ruling became final and in view of this event a few days earlier the Democratic Party (*Partito Democratico*), the majority party of Prime Minister Matteo Renzi's center-left coalition, had a bill directly sponsored in the Senate (No. S. 2081). The direct presentation aimed at circumventing the ostracism and

filibustering by religiously oriented oppositions in the Justice Commission, where all bills were stalled. Bill S. 2081 contained two parts. The first one created a civil union for same-sex couples only; the second addressed simple partners regardless of their sex, entitling them to a few rights (especially in guardianship and tort law). For civil unions, the law provided the same rights currently granted to married couples (reciprocal support, inheritance, alimony, health services etc.), and even additional ones (such as the common family name and an expedited procedure for partnership termination), including stepparent adoption (but not joint adoption). Its main model was the *Lebenspartnerschaft* (Life Civil Union law) enacted in Germany in 2001, combined with the reference

to marriage law that is typical of the Scandinavian domestic partnership model (now replaced with marriage everywhere in that region).

Opposition, however, grew stronger. Another "Family Day" was immediately organized in Rome but failed to attract the same people as in 2007, mainly for the lack of official support by the Catholic Church (probably because the organizers had attracted some neofascist elements inside their ranks or because the Church understood that such protests have finally become obsolete and irritating to Italian society). On the other hand, in more than one hundred cities on January 23, 2016, LGBTI associations and activists were able to gather almost one million citizens protesting against the government and the Parliament for their continued



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reticence in legislating on LGBT rights. Gay and lesbian families with children had a prominent role in this protest and for the first time they were interviewed by the press and appeared on the media. Under pressure the government finally pushed the bill to be discussed and approved quickly.

The bill's passing, however, required the sponsors to get the votes of the main opposition party, the *Movimento 5 Stelle*, which initially declared itself available to vote for the entire text. Yet, in a subsequent moment it retracted its position, in turn constraining the Democratic Party to seek the help of its governmental allies, especially the New Center-Right (*Nuovo Centro Destra*), an appendix of Silvio Berlusconi's former rightist coalition that had governed in the previous term. As a result, when the negotiations with *Movimento 5 Stelle* ultimately failed, the government announced a motion of confidence in the Senate in mid-February 2016. The use of a confidence motion is frequent in Italy and indeed has become ordinary in the case of financial and budgetary bills. In this instance, it was justified by the need not only to comply with the *Oliari* ruling, but also to bypass the obstructionism of the opposition, which had filed more than 1,400 amendments.

Resorting to the confidence vote meant that the process was inevitably accelerated but that, at the same time, the conservatives of the New Center-Right could have a word on the bill's final text. Their main concern was to cancel any possibility of recognition of same-sex parents and to get the substantial regime the further possible from marriage. As a result, stepparent adoption disappeared from the bill, a list of rights replaced the general reference to marriage and a final clause was added establishing that referring to provisions on marriage was possible only with the aim of reinforcing the listed rights but not to expand them. In spite of these amendments, the bill still granted same-sex registered couples almost the same regime as married couples and the advantages, ensured to registered unions only, of the common

family name and the expedited procedure for partnership termination remained untouched.

The bill was approved with 171-71 votes in the Senate on February 25, 2016, and 372-51 in the Chamber on May 11, 2016. It reflects the typical structure of a governmental confidence proposal, *i.e.* one section only with 69 paragraphs deprived of any title or reference. While regulating both same-sex registered partnerships and simple partnerships (both of same and opposite sex), the Act will have a major impact on the lives of thousands of gay and lesbian couples, but will be useless for couples with children, who will have to continue to resort to courts in order to access stepparent adoption as before the Act. This explains the disappointment of the major LGBT associations and activists who refused to celebrate the new statute, even if today registered same-sex couples have almost the same rights, if not more, as married couples.

The delay with which Italy approved the law also explains this disappointment. With Italy's major geopolitical and cultural neighbors such as Spain and France having adopted laws on same-sex marriage (respectively in 2005 and 2013), discussing a bill on civil partnership in 2016 may have sounded totally out of time to activists and also to politically-engaged LGBT people. However, the stability of the new law must still face the future challenges of supranational law and, above all, of European Union law, in particular the one of married same-sex couples moving from their countries to Italy (and the opposite): for them, being simply downgraded to an Italian domestic partnership would seem at odds with their status under their national laws. What is certain is that, upon these premises, the new law will not empty the courtroom, but rather the contrary: further litigation will follow very soon. – *Matteo M. Winkler*

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# Retroactivity of Marriage Rights Continues to Occupy Courts

In two recent decisions courts – *Jiwungkul v. Director, Division of Taxation*, 2016 N.J. Tax Unpub. LEXIS 28, 2016 WL 2996871 (N.J. Tax Ct., May 11, 2016), and *Hard v. Attorney General*, 2016 WL 1579015 (U.S. Ct. App., 11th Cir., April 20, 2016) – courts confronted cases raising the question whether marriage rights for same-sex couples, declared by the U.S. Supreme Court on June 26, 2015 in *Obergefell v. Hodges*, should be projected backwards in time in determining the rights of surviving same-sex partners of gay men. In one, the surviving partner received the spousal benefit he sought, proceeds from a wrongful death lawsuit, although the court ended up not ruling directly on the retroactivity claim. In the other, the surviving partner was unsuccessful because his partner died seven months after same-sex marriage became available in their state, New Jersey, but just days before they were scheduled to marry.

First, the hard-luck timing story from New Jersey: Rucksapol Jiwungkul and Maurice R. Connolly, Jr., began their relationship in 1983 and it continued until Connolly's death on June 2, 2014. On July 10, 2004, the date that New Jersey's Domestic Partnership Law went into effect, the men registered as domestic partners. At that time a lawsuit was pending in the New Jersey courts seeking marriage equality, but the plaintiffs in that case had suffered an initial setback before the Superior Court and the case was on appeal.

On October 25, 2006, the New Jersey Supreme Court ruled in *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (N.J. 2006), that same-sex couples were entitled to have some form of legal recognition from the state that would provide all the rights and benefits of marriage, but that the state could meet this constitutional requirement by enacting a civil union law if the legislature was not inclined to simply amend the marriage law to let same-sex couples marry. The legislature took the civil union route, and that statute went into effect on Feb. 19, 2007.

Jiwungkul and Connolly decided not to register as civil union partners, and they were very public about their decision. Connolly was quoted in an article in *The Philadelphia Inquirer* on December 8, 2006, shortly after the legislature passed the Civil Union Law, describing himself as “furious” that the legislature did not opt for marriage, and explaining that they decided not to enter into a civil union because it “was not equivalent to marriage.”

After the U.S. Supreme Court ruled on June 26, 2013, in *United States v. Windsor*, that the Defense of Marriage Act was unconstitutional, a lawsuit previously filed by Garden State Equality seeking to reopen the marriage equality question in New Jersey suddenly sprang to life. Within

the wedding would take place on June 8, and the license was issued. Tragically, Connolly died suddenly and unexpectedly on June 2, leaving Jiwungkul as his surviving domestic partner, executor, and principal beneficiary of his estate.

Connolly's bequests to Jiwungkul were not subject to the New Jersey transfer inheritance tax, because the Domestic Partnership Law specifically exempts surviving domestic partners from having to pay a tax on an inheritance from their domestic partner. But Connolly's estate was required to pay New Jersey estate tax of \$101,041.00, as the Domestic Partnership Law had made no change to the estate tax law. Jiwungkul filed the appropriate estate tax return but

**Tragically, Connolly died suddenly and unexpectedly on June 2, leaving Jiwungkul as his surviving domestic partner, executor, and principal beneficiary of his estate.**

months the court had ruled that in light of *Windsor*, same-sex couples in New Jersey should be entitled to marry. When the New Jersey Supreme Court upheld the trial judge's refusal to stay her ruling, Governor Chris Christie dropped the state's appeal and the ruling went into effect on October 21, 2013. See *Garden State Equality v. Dow*, 2013 WL 6153269 (N.J. Superior Ct., September 27, 2013), stay denied, 79 A.3d 479 (N.J. Superior Ct., Mercer Co., Oct. 10, 2013), stay denied, 216 N.J. 314, 79 A.3d 1036 (N.J. Supreme Ct., October 28, 2013).

Jiwungkul and Connolly sprang into action, starting to make arrangement for a June wedding. In anticipation of the wedding, they applied for a marriage license on May 27, 2014. Their application stated that

then filed an amended return claiming the spousal deduction, requesting a refund of the entire \$101,041.00.

The New Jersey Department of Taxation rejected his refund claim, pointing out that the Domestic Partnership Law did not provide the marital deduction for estate tax purposes for domestic partners. Had the men registered for a New Jersey civil union, the marital deduction would have been available, since the New Jersey Supreme Court's decision in *Lewis v. Harris*, required that state civil unions provide the same rights as marriage. And, of course, had the men married promptly after *Garden State Equality* went into effect, as many N.J. domestic partners and civil union partners did, Jiwungkul would have been a surviving spouse at the time

of Connolly's death, so the estate could claim the spousal deduction, which would have wiped out any obligation to pay state estate tax in this case.

Jiwungkul filed suit in the New Jersey Tax Court, challenging the denial of his refund, claiming that as a result of the developments in judicial decisions, it would be appropriate to treat him as a surviving spouse and allow the marital deduction to the estate. The Presiding Judge of the Tax Court, Patrick DeAlmeida, denied his claim. DeAlmeida pointed out that the men could have entered into a civil union, qualifying their estates for the spousal deduction, as early as February 2007, but they made a conscious choice not to do so. Furthermore, they could have married beginning on October 21, 2013. "There is longstanding policy in this State," he wrote, "of not according statutory rights to couples who have not fulfilled the statutory requirements for a government-sanctioned relationship. He rejected the argument that because the right to marry has the status of a constitutional right, the Domestic Partnership Law of 2004 should be retroactively interpreted to provide the spousal deduction for estates of same-sex partners, whose only legally recognized status at the time of death was being domestic partners.

This couple, however, delayed marrying when they could have done so. "They are, of course, free to order their affairs in any manner they see fit," wrote the judge. "They must, however, accept the legal consequences, including the ramifications of the tax laws, of their decisions. Had they entered into a civil union during the many years it was available to them, or married sooner after the decision in *Garden State Equality*, decedent's unexpected passing would not have resulted in the tax liability contested in this case. Plaintiff and decedent suffered from a tragic turn of events, the tax consequences of which could have been avoided."

This ruling can be appealed to the Appellate Division of the Superior Court. Jiwungkul, as executor of Connolly's estate, is represented by Robyne D. LaGrotta of Parsippany.

The other case, from Alabama, turned out more favorably for the surviving partner. Paul Hard and David Fancher, Alabama residents, went to Massachusetts to marry on May 20, 2011. At that time Alabama did not recognize their marriage. Shortly after they returned home, Fancher died when the car he was driving on the interstate collided with a United Parcel Service tractor trailer. Because Alabama did not recognize the marriage, the death certificate stated that he was "never married" and Hard was not listed as his surviving spouse. The court appointed an administrator for Fancher's estate, who filed a wrongful death lawsuit against United Parcel. Under Alabama law, estates have to distribute the proceeds from wrongful death actions to the legal heirs of the decedent, according to the intestate succession statute, even if the decedent left a will. If a person is survived by a spouse but no children, but there is at least one surviving parent, the surviving spouse receives the first \$100,000 plus one half of the balance, the other half of the balance going to any surviving parents. If there is no surviving spouse but there are surviving parents, all the proceeds go to the surviving parents. Fancher was survived by his mother, Pat Fancher.

While the wrongful death case was pending, Hard filed a lawsuit against Alabama officials and the administrator of Fancher's estate. He sought three things: a declaration that Alabama's refusal to recognize his marriage to Fancher violated the constitution, an injunction requiring Alabama to issue a new death certificate taking account of the marriage, and an injunction ordering the estate to distribute to him the spousal share of any recovery in the wrongful death suit. Pat Fancher filed a motion to intervene in the case, arguing that she was entitled to the full proceeds of any wrongful death action because Alabama did not recognizing the marriage so there was no "surviving spouse" as far as Alabama was concerned. Chief U.S. District Judge William Keith Watkins let her intervene. The administrator of

Fancher's estate agreed to set aside in trust the spousal share of any amount that would be recovered until such time as this lawsuit was resolved.

The Estate reach a substantial settlement with United Parcel several months later, and the estate administrator paid Pat Fancher the portion of the proceeds that she would be entitled to receive even if the marriage was recognized (half the balance over \$100,000), putting the rest, about half a million dollars, in a trust account pending the resolution of Hard's case. Meanwhile, litigation was proceeding separately challenging Alabama's refusal to recognize same-sex marriages, and U.S. District Judge Callie Granade ruled in *Searcy v. Strange*, 81 F.Supp.3d 1285 (S.D. Ala., January 23, 2015), that the ban was unconstitutional and out-of-state same-sex marriages must be recognized. When Judge Granade refused to stay her ruling, the Alabama State Registrar of Vital Statistics issued a new death certificate for Fancher recognizing the Hard-Fancher marriage, and the judge in Hard's case allowed the administrator of the estate to intervene to pay over the balance of the trust money into the court's registry. District Judge Watkins then stayed the case, pending the U.S. Supreme Court's decision in *Obergefell v. Hodges*, which was expected by the end of June.

When the Supreme Court ruled in *Obergefell*, Hard moved to lift the stay and disburse the remaining money to him. At the same time, Alabama Attorney General Luther Strange moved to have Hard's case against the state dismissed as moot, arguing that because the state was required to recognize the marriage under Judge Granade's injunction, the Supreme Court had struck down the ban on same-sex marriage, and Hard had obtained the substitute death certificate, there was nothing left for the court to decide and the case was moot. The court granted Hard's motion to release the funds to him and dismissed the case as moot on July 15, 2015.

Pat Fancher quickly filed a motion to set aside the dismissal order and block payment of the funds to Hard. She argued that unless the *Obergefell* ruling applied retroactively, the amended death certificate was invalid because at the time her son died he was not legally married to Hard under the Alabama law then in effect. The district court denied her motion and ordered the clerk of court to distribute the money, about \$500,000, to Hard. Pat Fancher appealed to the 11th Circuit, which denied her appeal on April 20, 2016. The court pointedly refrained from deciding whether *Obergefell* applies retroactively. Rather, it focused on the failure of Fancher's motion to argue that the case was not moot, which would be the only valid ground to challenge the trial court's decision to dismiss the case. The 11th Circuit pointed out that as Hard had obtained all the relief he was seeking, there was no "live controversy" before the district court.

As to Fancher's challenge to the district court's order to the clerk to pay the remaining money to Hard, the court said, "We conclude there was no abuse of discretion because the district court properly applied Alabama law of intestate succession pertaining to surviving spouses. Simply put, once the State of Alabama recognized Hard as the surviving spouse and the district court dismissed the case as moot, the court committed no abuse of discretion by disbursing the funds accordingly." Since the state complied quickly with the spirit of Judge Granade's January 2015 ruling, at least to the extent of issuing the new death certificate, there was no need to consider the application of *Obergefell* as the state's action provided a basis for the district court to pay out the money to Hard.

Hard is represented by Montgomery attorneys David Dinielli, Scott Daniel McCoy, and Samuel Eugene Wolfe. Pat Fancher is represented by Matthew Thomas Kidd, also of Montgomery. The 11th Circuit opinion was issued *per curiam* by a panel consisting of Judges Adalberto Jordan, Julie Carnes and Jill Pryor. ■

## 9th Circuit Ruling Shows Limits of Refugee Protection for HIV-Positive Gay Men

The U.S. Court of Appeals for the 9th Circuit has frequently shown particular empathy for gay and transgender men seeking asylum or withholding of removal in the United States, but its ruling on May 11 in *Fajardo v. Lynch*, 2016 WL 2731941, 2016 U.S. App. LEXIS 8669, showed the limits of such empathy, especially in evaluating claims arising from a country where rampant gang activity may undercoat the assertion that an individual was targeted mainly because of his sexual orientation. Of course, part of his problem may be that Petitioner Fajardo ran into an unusually conservative three-judge panel for the

harm if he were returned to Honduras. The asylum officer who interviewed him agreed that he had a reasonable fear of persecution in Honduras, and the Service referred his case to the Immigration Court for a ruling on withholding. However, the Immigration Judge denied his application because, as to the specific incidents and dangers Fajardo cited, the Judge found neither would fall strictly within the category of dangers that will qualify somebody as a political refugee.

In essence, the law requires that an individual have a reasonable fear of persecution or face the likelihood of torture or serious physical injury

**Part of his problem may be that Petitioner Fajardo ran into an unusually conservative three-judge panel for the 9th Circuit.**

9th Circuit, on which the George W. Bush-appointed chief judge of the 10th Circuit, Timothy Tymkovich, was sitting by designation and another George W. Bush appointee, Milan Smith, made up the majority of the panel. However, Fajardo also lost the vote of a Carter appointee, Senior Judge Joseph Farris.

The petitioner, a native of Honduras, entered the U.S. as a lawful permanent resident in 2000, but was charged with removability by the Homeland Security Department in 2011 after he was convicted of an "aggravated felony." (The opinion does not specify what his crime was.) He was ordered removed, and was deported, but unlawfully re-entered the United States in 2013. The Border Patrol subsequently apprehended him and reinstated the 2011 removal order, but Fajardo responded expressing fear of serious

because of their membership in a particular social group that is categorically the target of persecution or torture. Fajardo's evidence was that he had been beaten by his former boyfriend when the boyfriend discovered that Fajardo had infected him with HIV. The boyfriend is politically well connected, and Fajardo fears that if he returns to Honduras, he will be tracked down to exact revenge for his boyfriend. Fajardo also testified that he had been beaten by gangs whose members used anti-gay slurs during the attacks.

The Immigration Judge was not impressed. For one thing, the ex-boyfriend's vendetta against Fajardo was inspired by a desire for personal revenge, which the IJ found was not a motivation relevant to a refugee claim. For another, the evidence was that Fajardo came from a family of

prosperous merchants, and that the gangs were targeting him for economic reasons, not primarily because he is gay but rather to extort money.

The court pointed out that under the statute, “the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.” In the two instances cited by Fajardo, the court concluded, the central reason that he faced potential harm was neither his HIV-status nor his sexual orientation, but rather his ex-boyfriend’s desire for revenge and the gangs’ desire to extract money from his family. Wrote the court: “The IJ found that the gangs targeted Fajardo not because he was gay, but because they believed he was a vulnerable victim. Honduran gangs target ‘persons from every walk of life, gay, straight, religious, irreligious, persons of every race.’ And even though the gang members used anti-gay slurs in extorting Fajardo, the IJ determined, ‘it does not appear to me that [sexual orientation] is one of the central reasons for his mistreatment.’” The court also said that Fajardo had failed to show that the Honduran government engages in the torture of people because they are gay, or acquiesces in such torture.

As noted above, this ruling illustrates the narrow, stingy focus of American refugee law. Even if a petition proves that they are likely to face serious harm if deported to their home country, they will not qualify for refugee status unless the anticipated perpetrators of the harm have particular motivations targeted by the law’s concern for political refugees. Earlier rulings finding that in particular countries LGBT and/or HIV-positive people may qualify as members of particular social groups that are subjected to mistreatment by the government or with its acquiescence are very much focused on the facts of those cases, and do not automatically establish a broad precedent for extending protection to the members of a group that faces social stigma and economic oppression at the hand of private citizens and businesses. ■

## Sixth Circuit Rejects Gay Ukrainian’s Appeal of Board of Immigration Appeals Ruling

A gay Ukrainian man seeking asylum and refugee status in the United States failed in his attempt to get an adverse ruling by the Board of Immigration Appeals reversed in *Zavada v. Lynch*, 2016 U.S. App. LEXIS 9324, 2016 FED App. 0274N, 2016 WL 2946392 (6th Cir., May 20, 2016). The case illustrates some of the pitfalls that refugee applicants face in try to establish their qualifications to remain in the United States.

The petitioner arrived at Chicago’s O’Hare Airport on July 25, 2004, and was found to have a fake passport, which he conceded to the Immigration Service agent who interviewed him, subsequently also conceding removability after telling the Service that he did not fear being sent back to Ukraine.

While in detention awaiting removal, he obtained counsel and filed an asylum petition on October 21, 2004, in which he said for the first time that he was gay and was afraid for his well-being if he was sent back to Ukraine because he “must go into the military for two years” and because the Ukrainian “military hates homosexuals and engages in patterns of torture, beatings, humiliation, prison and death against any known homosexuals.”

Two years later, as his asylum case was still pending due to the huge hearing backlog of the understaffed Immigration Judge corps, and now represented by different counsel, he filed a supplement to his original asylum application, asserting for the first time that he suffered beatings because he was gay both while a high school student and while a college student in Ukraine, at the hands of individuals who made clear that they were beating him because he was gay and threatened to continue doing so in the future. He said he did not report these incidents to the police because he feared the police would beat him up as well. He alleged that his mother had borrowed money and false documents to assist him in

going to the United States, which was why he showed up at O’Hare with a fake passport.

At his asylum hearing, the petitioner was asked why he did not mention having been beaten for being gay in his original asylum application. He claimed that his attorney at that time had suggested the fear of military service in addition to being gay as the best way for him to quickly get out of Immigration Prison. Actually, his mother had also secured fake medical documents for him that would have gotten him out of serving in the military, he said, so the story given with his original asylum petition was not true.

The Immigration Judge scheduled a follow-up hearing to give the petitioner a chance to provide evidence to corroborate his new story. At this hearing, he explained that misunderstandings with his first counsel had led to the allegations of his original asylum application, and that the military story was actually his counsel’s idea. He also presented two new witnesses, gay American friends who testified that he was gay and that one of them was his ex-boyfriend. Both of them testified that he had mentioned to them having been beaten in Ukraine.

The IJ rejected petitioner’s application for asylum, withholding of removal or protection under the Convention Against Torture (CAT), stating that petitioner “has told so many inconsistencies and his claim has shifted so much that the Court finds that the respondent has not proffered any credible evidence to, in fact, demonstrate that he is gay.” And even if he had, continued the judge, “there are so many inconsistencies with respect to the development of his story that the respondent has not demonstrated that he has ever suffered in the Ukraine because of any sexual orientation.” The IJ concluded that petitioner had “made up each and every one of these beatings out of a plot” and that his asylum application was “frivolous.”

The Board of Immigration Appeals affirmed the denial of petitioner's application, but reversed the IJ's conclusion that the application was "frivolous." While finding that the variety of different stories supported the IJ's conclusion that petitioner was not credible, on the other hand the BIA rejected the IJ's "wholly unfounded skepticism towards [petitioner's] status as a homosexual."

The 6th Circuit concluded that the IJ's credibility determination was supported by the record, and rejected all of petitioner's claims on appeal of the BIA decision, finding that the BIA's adoption of the IJ's credibility determination was not clearly erroneous. Circuit Judge Karen Nelson Moore, writing for the panel, found that "the inconsistencies between his two applications go to the heart of [petitioner's] claim of persecution, and under our deferential standard of review, we cannot say that the BIA erred in relying on these differences to determine that the record as a whole supported an adverse credibility determination." The court observed that the standard for awarding withholding of removal to those denied asylum was even more demanding than the standard for asylum, proof that they are "more likely than not" to be subjected to persecution because of their membership in a particular social group, and the same credibility determination placed such a conclusion out of reach for petitioner in this case. Finally, Judge Moore observed, the petitioner "has failed to present additional evidence that establishes that 'it is more likely than not that he would be tortured if removed to the Ukraine,' which would be required to claim protection under the Convention against Torture. Such evidence might be based on State Department documentation, for example, that gay people are subject to torture or serious harm at the hands of the government or private actors in whose conduct the government acquiesces or refuses to curb, but evidently the petitioner did not provide such evidence to the IJ.

The petitioner was represented on this appeal by Herman S. Dhade of Dhade & Associates, West Bloomfield, Michigan. ■

## Missouri Supreme Court Rejects Constitutional Challenge to HIV Exposure Statute

The Missouri Supreme Court, sitting en banc, ruled that the state's law making it a felony for a person to "act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV. . . through contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal sexual intercourse" did not violate the 1st and 14th Amendment rights of the defendant. *State of Missouri v. S.F.*, 483 S.W.3d 385 (Mo. en banc, March 15, 2016).

According to the opinion for the court by Justice Mary R. Russell, the

proceeded to trial. In response to the defendant's agreement to waive a jury trial, the prosecution agreed to reduce the charge to a class B felony, which would not require proof that the virus had been transmitted. The defendant then stipulated to the facts necessary to constitute the class B felony, which means she did *not* stipulate that transmission occurred, and she presented no evidence in her defense. The trial court convicted her and sentenced her to seven years in prison. Her appeal of the constitutionality of her conviction brought the case directly to the Missouri Supreme Court.

### The court agreed with the State's argument that any burden on free speech rights was merely incidental.

defendant was told in 2003 that she had tested positive for HIV and was counseled concerning transmissibility of the virus during sex. Several years later she engaged in sexual intercourse with a man without revealing her HIV status. The court's opinion does not describe the circumstances or the relationship of the defendant and her sexual partner, or how the matter came to the attention of law enforcement authorities. The court's opinion does not make clear whether E.F. actually infected her sexual partner, but she was initially charged with a class A felony under Sec. 191.677, the HIV statute, conviction for which would have required proof of transmission of the virus. She filed a motion to dismiss the prosecution on constitutional grounds of freedom of speech, privacy and equal protection. The trial court overruled the motion and the case

The defendant's 1st Amendment argument rested on the "compelled speech" doctrine. She contended that the statute violated her 1st Amendment right against being compelled to speak about her HIV status. The court, agreeing with Jackson County Circuit Judge W. Brent Powell, who had denied her pretrial motion, found that the statute did not regulate speech as such. "It regulates conduct," wrote Judge Russell, "specifically, conduct that exposes unknowing or nonconsenting individuals to HIV." Although in a practical sense the statute would compel disclosure, most likely through speech, by somebody who, knowing that they are HIV positive, would want to engage in sexual intercourse without violating the law, but the court agreed with the State's argument that any burden on free speech rights was merely incidental. "The statute

restricts what individuals may *do*,” wrote Russell, “now what they may *say*.” The court found this situation to be distinguishable from compelled speech cases in which the government requires an individual to “adopt or express a government-approved message,” and likened the case to *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006), in which the Supreme Court rejected a 1st Amendment compelled-speech challenge by law schools to a federal statute requiring them to allow military recruiters on campus or risk being disqualified from receiving federal financial assistance.

Turning to the defendant’s 14th Amendment “right to privacy” argument, the court rejected her contention that application of the statute violated her “fundamental right to privacy without a compelling state interest.” S.F. relied on *Lawrence v. Texas*, 539 U.S. 558 (2003), to argue that “by criminalizing her consensual, private, sexual conduct, the statute violates her Fourteenth Amendment due process rights of liberty and privacy.” The court distinguish *Lawrence* on grounds of “consent,” finding that *Lawrence* immunized from prosecution only “*consensual, non-harmful* sexual conduct.” In this case, wrote the court, the statute “regulates only sexual conduct that would expose another person to a life-jeopardizing disease when that person has not given consent to the conduct with knowledge of the risk of exposure.”

As is unfortunately typical of court opinions discussing prosecutions for this kind of conduct, the court makes no mention whether the parties used barrier contraceptives, and as noted above, avoids mentioning whether there was any proof that the defendant had actually transmitted the virus to her male sexual partner during sexual intercourse. Since the state reduced the charge to a B felony, the conviction was technically for “exposing” her sex partner, not for “infecting” him.

S.F. was represented by Jeannette L. Wopink of the Kansas City public defender’s office. ■

## Virginia Federal Court Rejects Sexual Orientation Discrimination Claim under Title VII

Some federal district courts are likely to feel constrained not to let gay plaintiffs assert Title VII sex discrimination claims if they are located in circuits where the courts of appeals had refused to allow such claims prior to the Equal Employment Opportunity Commission’s July 2015 ruling in *Baldwin v. Foxx*, 2015 WL 4397641 (EEOC, July 16, 2015). Senior U.S. District Judge Robert E. Payne made this point decisively and at length in his May 5 opinion in *Hinton v. Virginia Union University*, 2016 WL 2621967, 2016 U.S. Dist. LEXIS 60487 (E.D. Va., Richmond Div., May 5, 2016), dismissing a Title VII sex discrimination claim brought by Terry Hinton, an openly-gay administrative assistant at the University who presented direct evidence that he had been “set up” to receive unmerited written reprimands because the president of the University disapproved of his sexual orientation. The direct evidence of discriminatory intent was relayed to him by his immediate supervisor, who in a moment of “candor” told him that the reprimands were issued at the instance of the President for this reason.

Despite this allegation, wrote Judge Payne, as a district judge he was bound to follow 4th Circuit precedent derived from the case of *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996). *Wrightson* was actually a same-sex harassment case, not a sexual orientation discrimination case as such, but the opinion included *dicta* to the effect that sexual orientation discrimination was not actionable as sex discrimination under Title VII, and it has been cited as precedent on that point in subsequent 4th Circuit rulings (including one that post-dates *Baldwin* although, as Judge Payne points out, the unpublished opinion in question does not cite *Baldwin* or show any knowledge that the EEOC has adopted a contrary position) as well as circuit and district court rulings from other parts of the country. Hinton’s counsel, Richard F. Hawkins, III, of Richmond, had argued that *Wrightson* was effectively superseded by *Baldwin*, but Payne firmly rejected the

argument. “EEOC interpretations of Title VII are entitled to *Skidmore* deference at most – that is, ‘deference to the extent [that they have] the power to persuade,’” citing and ultimately relying on the U.S. Supreme Court’s ruling in *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). “The district courts that have decided Title VII claims in the wake of *Foxx* have also given the EEOC’s interpretation of Title VII deference to the extent that the EEOC’s decision is persuasive,” he wrote, citing a handful of district court cases from around the country. However, he noted, “District courts have split on whether to follow the EEOC or to follow the law of their regional circuits and their own districts,” and he cited some cases where district judges had made the point that even if they found the EEOC persuasive, they were bound to comply with circuit precedent until it was overruled.

Although *Murray v. North Carolina Department of Public Safety*, 611 F. App’x 166 (4th Cir. 2015), which postdates *Baldwin v. Foxx*, is merely a “brief *per curiam* opinion with no legal analysis of its own,” merely cites *Wrightson in dicta*, and had “shown no sign that the Fourth Circuit was even aware of the EEOC decision in *Foxx* when it issued *Murray*, nonetheless, Payne asserted, “at the margins, *Murray* makes clear that *Wrightson* is still considered to be the basis for decision in the jurisprudence of the Fourth Circuit and by district courts in this circuit.”

“More importantly,” he continued, “the reasons offered in decisions that have adopted the EEOC’s position are matters that lie within the purview of the legislature, not the judiciary. Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment. In sum, Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely-persuasive power of the EEOC’s decision.” However,



hedging his bets, Judge Payne ruled in the alternative that because the reprimands issued to Hinton did not, under 4th Circuit precedent, constitute “adverse employment actions” sufficient to trigger Title VII liability, he would have dismissed this count of the complaint even if he were to follow *Baldwin* instead of *Wrightson*.

Judge Payne did not entirely dismiss Hinton’s lawsuit, however, finding that he had met the pleading requirements to state an Equal Pay Act Claim, based on his contention that he was being paid less than comparable female administrative assistants who had about the same level of seniority and were doing effectively the same work as he was doing. Further, while striking down part of Hinton’s Title VII retaliation claim on grounds that the alleged retaliation did not meet the standard of being sufficiently severe that it would deter a reasonable person from pursuing a plausible discrimination claim, he did allow a retaliation claim premised on a discrimination ban on Hinton taking courses at the University. (It seems that many employees did take courses at the University, and Hinton had done so in the past, but was ordered not to.) Judge Payne found that this Order could materially affect Hinton’s job opportunities and thus was sufficiently severe to have a retaliatory effect.

The EEOC’s ruling in *Baldwin*, which is binding, at least for now, in federal sector workplaces, was undoubtedly destined to have limited if any effect in circuits that have already taken an adverse position on the question, although there is always the possibility that in any given circuit a case, if taken *en banc*, might result in a reversal of that circuit’s position based on the very persuasive reasoning of the EEOC in its opinion. However, it seems more likely that a significant circuit split may emerge on this question, eventually making it ripe for Supreme Court review if Congress fails to pass the pending *Equality Act* proposal that would amend all federal discrimination laws to add sexual orientation and gender identity to the express list of prohibited grounds for discrimination. Unless there is a radical realignment of views by the Republican Party, passage of that bill will require, at a minimum, achievement of Democratic control of the House, a filibuster-proof Democratic majority in the Senate, and election of a president who would be willing to sign it – most likely a Democrat. Stay tuned... ■

## Virginia Supreme Court Rules That Former Spouses Cohabiting with Same-Sex Partners Can Trigger Statutory Loss of Alimony

The Supreme Court of Virginia ruled that a man can stop paying spousal support to his ex-wife because she now lives with another woman, reversing lower courts that found the state’s statutory cohabitation standard for terminating spousal support and maintenance does not apply to gay couples. *Luttrell v. Cucco*, 784 S.E.2d 707 (Va. Apr. 28, 2016). Justice William C. Mims, who served in the Virginia House of Delegates in 1997 when the alimony statute at the heart of the case was amended to add the relevant provision, wrote the unanimous opinion.

person in a relationship analogous to a marriage for one year or more.”

Luttrell sought to end his alimony payments by invoking that provision in 2014. He said in court filings that Cucco was engaged to her new lesbian partner and had been living with her for more than a year. Cucco admitted those facts, but argued her situation did not qualify as cohabitation under the statute because the relationship was with another woman.

Both the Fairfax County Circuit Court and the Virginia Court of Appeals ruled in Cucco’s favor. The courts found that cohabitation was understood to

### Cucco argued her situation did not qualify as cohabitation under the statute because the relationship was with another woman.

The case stemmed from the breakup of Michael Luttrell and Samantha Cucco, who divorced in 2008 after being married for sixteen years. They executed a “Property, Custody, and Support Settlement Agreement” (“PSA”) that was incorporated into the final divorce decree. In the PSA, Luttrell agreed to pay monthly alimony to Cucco for eight years. The PSA made clear, though, that the monthly payments would terminate sooner if either of them died, Cucco remarried, or a court acknowledged that Cucco is cohabiting with someone as specified in § 20-109(A) of the Virginia Code.

Under that provision of state law, alimony payments can be cut off if a court sees clear and convincing evidence that a payee has been “habitually cohabiting with another

apply only to relationships between a man and a woman, citing dicta in two Virginia Supreme Court precedents, both decided five years before the Virginia General Assembly amended the statute in 1997 to add cohabitation as an action that could trigger the end of alimony payments. The ACLU of Virginia filed a petition on Luttrell’s behalf asking the Virginia Supreme Court to hear the case.

Justice Mims began his analysis “by observing that the language of § 20-109(A) is gender neutral” and “the provision may be understood to apply to either same-sex or opposite-sex relationships.”

After examining the two precedents cited by the lower courts, Mims noted that the General Assembly considered language clearly defining cohabitation as only pertaining to opposite-sex

couples as in those cited cases, but that such a limitation was ultimately rejected in favor of the broader language put in the statute. “By declining to modify the word ‘person’ with the phrase ‘of the opposite sex,’ the General Assembly signaled its intention that ‘person’ would include individuals of either sex,” he wrote.

He added: “The fact that same-sex marriage was not legal in Virginia in 1997 is not relevant to this statutory analysis” because “there is no textual basis to interpret ‘a relationship analogous to marriage’ as having precisely the same meaning as ‘a marriage.’”

Instead, “Code § 20-109(A) recognizes that an individual who has entered a committed, financially interdependent relationship with a third person is no longer dependent upon his or her spouse in the same manner as when the agreement was executed” and “provides a mechanism designed to prevent one spouse from obtaining a windfall at the expense of the other after the recipient has entered such a relationship.”

Mims concluded by saying Cucco’s favored interpretation would produce an “untenable result” of unequal treatment in otherwise identical divorce situations. “The individual in the same-sex relationship would continue to receive support while the individual in the opposite-sex relationship would not,” he wrote in the opinion. “We cannot conclude that the General Assembly intended such a result.”

The Virginia Supreme Court also vacated the lower courts’ award of attorney’s fees to Cucco and remanded the case to the circuit court for an evidentiary hearing to determine whether she had cohabited with her fiancée within the now-clarified meaning of § 20-109(A).

Gail Deady of the ACLU of Virginia, Joshua Block of the ACLU’s national LGBT & HIV Project, Annesha Grant of Livesay & Myers, P.C., and Lynette Kleiza of Curran Moher Weis, P.C. handled the successful appeal. — *Matthew Skinner*

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

## Ohio Appeals Court Also Rejects Challenge to HIV Exposure Law

The Ohio Court of Appeals rejected a constitutional challenge to the state’s HIV exposure law in *State v. Batista*, 2016-Ohio-2848, 2016 Ohio App. LEXIS 1735, 2016 WL 2610027 (Ohio App., 1st Dist., May 6, 2016). The statute, R.C. 2903.11(B)(1), provides: “No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct.”

Orlando Batista was charged with violating R.C. 2903.11(B)(1) “for engaging in sexual conduct with his girlfriend without first disclosing his HIV-positive status to her.” He moved

was “rationally related to stopping the spread of HIV.”

While acknowledging advances in treatment since the beginning of the epidemic, the court rejected Batista’s contention that there was an equal protection violation because Ohio’s criminal law does not require people infected with Hepatitis C to make such a disclosure to sexual partners, even though many people die each year from Hepatitis C, which is even more highly contagious through sexual contact than HIV. Stautberg maintained that this argument misses the point: “The state does not have to criminalize every failure to disclose a sexually-transmitted disease to make the statute at issue comport with” the requirements of equal protection, he insisted. “Nor

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**Judge Peter J. Stautberg found requiring disclosure was “rationally related to stopping the spread of HIV.”**

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to dismiss the indictment, claiming violations of the Ohio Constitution’s equal protection clause and the federal 1st and 14th Amendments. The trial court denied his motion. Batista pled no contest to the charge and was sentenced to a maximum term of 8 years in prison.

In rejecting his challenge to the statute under which he was convicted, Judge Peter J. Stautberg wrote for the court that as the case does not implicate suspect classifications or fundamental rights, the statute would be upheld if the state had a rational basis for making it a crime for somebody who is HIV-positive to fail to disclose that fact to a potential sexual partner. Stautberg wrote that “HIV causes an incurable disease that shortens the life expectancy of anyone infected” and “can be sexually transmitted.” Thus, he found, requiring disclosure

does the fact that HIV is more easily treatable than in the past affect our analysis,” the judge continued. “It cannot be disputed that the state has a legitimate interest in stopping the spread of HIV. And there is a rational relation between this goal and requiring disclosure of an HIV-positive status before engaging in sexual conduct.”

The court also rejected Batista’s contention that the law violated the 1st Amendment by compelling him to speak about his HIV status to others. The court found that the statute is a content-based regulation of speech, thus invoking strict scrutiny, but that the state had met the test of showing a compelling interest and narrow tailoring as required by 1st Amendment precedents.

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# CIVIL LITIGATION

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

– A 3rd Circuit panel ruled in *Singh v. Attorney General*, 2016 U.S. App. LEXIS 9598, 2016 WL 2957213 (May 23, 2016), that the court lacked jurisdiction to decide an appeal by a man from Guyana of the Board of Immigration’s denial of his claims for asylum, withholding of removal, or protection under the Convention against Torture. The petitioner, removable from the U.S. due to a drug conviction, asserted he would be persecuted in Guyana “on the basis of his Americanization and sexual orientation.” The Immigration Judge found that neither petitioner nor his witnesses testified credibly as to his sexual orientation, and the BIA affirmed. The petition addressed to the court of appeals challenges “only the Immigration Judge’s adverse credibility finding.” This places in issue a question of fact. Under current immigration statutes, factual determinations based on credibility rulings are almost impossible to reverse on appeal, especially when the petition is removable for being convicted of a controlled substance offense. The court concluded that it lacked jurisdiction over the matter, since the only questions subject to judicial review in such a case would be “constitutional claims or questions of law” under 8 U.S.C. sec. 1252(a)(2)(D).

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

– The 4th Circuit upheld a decision by U.S. District Judge Thomas E. Johnston to dismiss for failure to state a claim a lawsuit brought by a lesbian attorney against the public university where she was studying to obtain a West Virginia teachers’ license as well as various university employees and a public school teacher who had been her student teacher supervisor during the Fall 2013 semester. *Kerr v. Marshall University Board of Governors*, 2016 U.S. App. LEXIS 9501, 2016 WL 2995806 (May 24, 2016). Lisa Marie Kerr practiced law for more than 15 years before enrolling

at Marshall University’s Master of Arts in Teaching program. In the fall of 2013, she was fulfilling the student teaching requirement when she had a falling out with the teacher with whom she was placed, resulting in her leaving that assignment prior to completion and receiving unsatisfactory grades and a denial of credit. She attempted to appeal her grade and denial of credit through several levels of the University without success. She had interviewed for teaching positions in the expectation of graduating from the program, but due to failure to complete the student teaching assignment she would not be graduating. Representing herself, she filed a seven-count complaint in the U.S. District Court against the university, various university personnel, and the public school teacher. She asserted a claim of defamation against the school, the supervising teacher, and two of the university staff, tortious interference with a business expectancy against those defendants and additional administrators who denied her appeals, the tort of outrage (intentional infliction of emotional distress), violations of due process and equal protection, and a Fair Labor Standards Act claim, asserting that on days when her supervising teacher was absent, she should have been compensated for covering the class as a de facto substitute teacher. The trial court assigned the case to a magistrate judge for a report and recommendation on the defendants’ motion to dismiss, then followed the recommendation and dismissed the case. The lengthy opinion by Circuit Judge Allyson K. Duncan affirming the dismissal first upheld the trial court’s conclusion that the university enjoyed sovereign immunity from all the claims asserted against it by Kerr. She had argued that in light of recent interpretations of Title IX extending coverage to sexual orientation discrimination claims, she should benefit from the sovereign immunity waiver under that statute regarding state educational institutions that received

federal money, but the court pointed out that she had not asserted a claim under Title IX in her complaint. (Oops! We noticed that something seemed to be missing from the court’s listing of Kerr’s claims.) Thus, the balance of the opinion dealt with her claims against the supervising teacher and the university faculty and administrators. As to them, a defamation claim based on the evaluation and grade she received went nowhere, as the court found these were expressions of opinion and were privileged in any event, as they were communicated only within the academic community and not published outside the scope of privilege. Interference with business expectancy requires more than a showing that somebody has interviewed for jobs without having yet received an offer, said the court, and emotional distress claims require a showing of more than adverse evaluations and bad grades. The court found that the university had accorded all the procedural rights due Kerr, including multiple levels of appeals of her grades, and found no merit to her equal protection claim, finding that some of the challenged decision makers were unaware of her sexual orientation and there was no showing that she was singled out for disparate treatment because she is a lesbian. As to the FLSA claim, the court of appeals agreed with the district court that a student teacher enrolled in a degree program is not an employee of her supervising teacher entitled to compensation for covering the classes to which she is assigned. “The fact that Kerr did not ultimately receive course credit does not convert her truncated educational experience into unpaid labor,” wrote Duncan. “Given the economic reality of Kerr’s position as a student teacher, the district court properly determined that Kuhn (the supervising teacher) was not an ‘employer’ under FLSA and dismissed Kerr’s final claim.” A total wipe-out against Kerr, who had argued also that the trial court had failed to give her complaint the liberal reading usually

# CIVIL LITIGATION

accorded *pro se* litigants because Kerr is a lawyer. The court rejected that argument with the comment that even a liberal reading would not save Kerr's complaint.

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

– Is a butch lesbian likely to be targeted for torture in Guatemala? Is the likelihood of that happening increased if she is deported there after having lived in the United States for twenty-five years? A 9th Circuit panel was notably unsympathetic to a petitioner's appeal of the denial of her application for protection under the Convention against Torture (CAT) that raised these facts in *Perdomo-Salgero v. Lynch*, 2016 WL 2961557, 2016 U.S. App. LEXIS 9422 (May 23, 2016). Under the CAT, an applicant must show that it is more likely than not that she would be subjected to torture or serious physical harm at the hands of the government or private forces with the acquiescence of the government if returned to her home country because of her membership in a particular social group. The U.S. has recognized LGBT people as coming within the "particular social group" requirement of the statute. The issue in any CAT case brought by an LGBT person will be how LGBT people are treated in the petitioner's home country. In this case, the petitioner, represented by Los Angeles attorney Aaron Michael Morrison, presented an expert witness who testified that she had a "75 to 80 percent chance of being attacked, raped, or killed in Guatemala." However, wrote the court, "the expert did not provide any statistics on violence against lesbians in Guatemala to support his conclusion. Nor did he provide any specific factors that made [petitioner] particularly likely to be attacked, except to say that [she] had a masculine presentation and would immediately be recognized as a lesbian. The expert made this assessment without have met [petitioner], and without knowing

where [she] planned to live or work. The IJ gave reasoned consideration to the expert's testimony, and then reasonably chose to reject the expert's conclusion." The court rejected petitioner's argument that the determination should be reversed because "the IJ did not specifically mentioned the three documents" that were presented in support of her claim, finding that the IJ's "factual descriptions of conditions in Guatemala were generally consistent with the descriptions in the documents." Ultimately, said the court, the IJ's decision mentioned all of the "risk factors" argued by the petitioner, but concluded that she had not shown a "greater than fifty percent chance she would be tortured if returned to Guatemala." Thus, the agency did not err in rejecting her claim. Since she had resided in the U.S. for twenty-five years, she could not file an asylum claim (which must be done within one year of arrival in the U.S.), and a petition for withholding of removal would have required proof, apparently unavailable, that she had a reasonable fear of official persecution based on her past experiences in Guatemala, a standard that would be hard to meet by somebody who left the country young, lived in the U.S. for a quarter century, and then got caught up in a deportation sweep, as seems likely in this case (although not specifically mentioned by the court). Her only hope, then, was to persuade the court that conditions are now too dangerous for masculine-appearing lesbians in Guatemala to require her to return, and this argument failed to sway the agency or the court.

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## BOARD OF IMMIGRATION APPEALS

– On April 8 the Board of Immigration Appeals issued an unpublished opinion in the matter of *In re Claudionizio Alves-Leal*, File A098 892 990 (Harlington, TX), granting *sua sponte* a petition to reopen a removal proceeding in light of the changes in United States

law affecting recognition of same-sex marriages. According to the brief opinion, Alves-Leal, a Brazilian man, had been ordered removed "in absentia" on May 5, 2005, when he failed to show up for a hearing. He filed a motion on December 8, 2014, asking to reopen the removal proceeding, affirming that on November 1, 2013, he had "entered into a same-sex marriage to a United States citizen who has submitted a visa petition (Form I-130) on his behalf. The Immigration Judge denied his motion to reopen and he appealed, arguing that he "is now eligible to adjust his status to a lawful permanent resident due to recent changes in the law, and that his departure from the United States would cause his spouse extreme hardship." The changes, of course, are the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and the Board of Immigration Appeals' subsequent ruling in *Matter of Zeleniak*, 26 I&N Dec. 158 (2013), holding that same-sex marriages will be recognized by the federal government. "Given the intervening Supreme Court and Board precedent," wrote the agency, "reopening sua sponte is warranted." The case was remanded to the Immigration Court. The appellant is represented by attorney Sarah Schendel.

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## EEOP – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

– *AP Business News* (May 5) reports settlement of a transgender discrimination complaint against Ellucian, a technology services company, which was charged with removing a transgender employee from an assignment at a college after a college in Minnesota requested her removal from the campus. EEOC announced that the company would pay \$140,000 to settle the gender identity discrimination claim, and would modify its employee conduct policy to include gender identity in its anti-discrimination provision. See also

# CIVIL LITIGATION

*BloombergBNA Daily Labor Report*, 87 DLR A-9 (May 5, 2016).

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**ALABAMA** – The Alabama Supreme Court issued a brief *per curiam* opinion in *Ex parte E.L.*; *E.L. v. V.L.*, No. 1140595, on May 27, acknowledging the U.S. Supreme Court’s March 7 ruling in *V.L. v. E.L.*, 136 S.Ct. 1017 (2016), which had rejected the Alabama Supreme Court’s September 18, 2015 decision, 2015 WL 5511249, refusing to extend full faith and credit to an adoption of children by the biological mother’s then-same-sex partner in a Georgia court. In its ruling last year, the Alabama court had taken the position that because there was no clear appellate authority under Georgia law authorizing second-parent adoptions, the Alabama courts should deny full-faith-and-credit on the ground that the Alabama Supreme Court believed that the Georgia trial court did not have jurisdiction to approve the adoption, as strict construction of Georgia statutes would support an interpretation that such adoptions are not specifically authorized. The U.S. Supreme Court rejected the contention that the Alabama Supreme Court could substitute its interpretation of Georgia statutes for the interpretation by the Georgia court. In its new ruling, the Alabama Supreme Court said: “In *V.L.*, the United States Supreme Court held that the adoption decree appeared on its face to have been rendered by a court of competent jurisdiction and that that presumption of jurisdiction has not been rebutted. Inasmuch as there is no merit in *E.L.*’s other arguments asking this Court not to enforce the adoption decree, we affirm the judgment of the Court of Civil Appeals.” Significantly, with Chief Justice Roy Moore having been suspended due to a pending ethics proceeding [sparked by his direction to the lower Alabama courts to refuse to follow the U.S. Supreme Court’s ruling in *Obergefell v. Hodges*, this opinion was unanimous. The court vacated

its September 18 decision, leaving in place a ruling by the Court of Civil Appeals that had backed up Jefferson Family Court’s decision to recognize the Georgia adoption for purposes of a pending dispute over custody and visitation between the former lesbian partners. The U.S. Supreme Court had stayed the Georgia Supreme Court decision while considering how to rule on the adoptive mother’s *certiorari* petition, but then issued a ruling granting the petition and ruling on the merits, reversing the Alabama Supreme Court without requesting further briefing or oral argument. Adoptive parent *V.L.* is represented by Legal Director Shannon Minter and staff attorneys from the National Center for Lesbian Rights, San Francisco, and attorneys from Jenner & Block LLP (Washington, D.C.) and Boyd, Fernambucq, Dunn & Fann P.C. (Birmingham). Attorneys from Morrison & Foerster LLP represented the guardian ad litem appointed by the trial court to represent the child’s interests. The birth mother, *E.L.*, is represented by attorneys from Massey, Stotser & Nichols, P.C. (Birmingham) and S. Kyle Duncan (Washington, D.C.).

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**ALABAMA** – In *Dates v. Norton*, 2016 U.S. Dist. LEXIS 71706, 2016 WL 3087050 (N.D. Alabama, June 2, 2016), U.S. District Judge Virginia Emerson Hopkins ruled that a heterosexual African-American female former employee of the corporate defendant had stated a claim under Title VII of same-sex harassment and retaliation based on the alleged conduct of a female supervisor (who admitted that she “exclusively” dated women) who had expressed interest in dating the plaintiff. The plaintiff had made clear that she was not interested in and was offended by the sexual interest of her supervisor. Plaintiff claimed that the supervisor “rubbed up” against her and smiled or smirked on several occasions, and that after plaintiff attempted to

complain about this conduct, she suffered a retaliatory reduction in hours and her employer failed to conduct an adequate investigation of her complaint, taking no action against the supervisor. Plaintiff alleged that other workers heard of management’s plan to find a pretext to discharge the plaintiff. The plaintiff filed two EEOC charges as well as a 42 USC 1981 race discrimination charge and a state law tort claim. Judge Hopkins granted summary judgment against the plaintiff on the race discrimination claims, for lack of supporting factual allegations, as well as the tort claim, but denied summary judgment on the hostile environment and harassment claims, which were to be set for trial. In support of its motion for summary judgment, the employer implied, without making its argument explicit, that Title VII would not reach a same-sex harassment claim, but failed to provide explicit argument on the point, which would be a non-starter anyway under the Supreme Court’s *Oncale* decision. The court’s extremely lengthy opinion is made up largely of a detailed account of the plaintiff’s factual allegations and the deposition testimony of witnesses for both sides.

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**ALABAMA** – The Alabama Judicial Inquiry Commission temporarily removed Chief Justice Roy Moore of the Alabama Supreme Court from sitting on the court when it preferred various ethics charges against him, arising from his militant defiance of the U.S. Supreme Court’s *Obergefell* decision. The Commission’s complaint faulted Moore for willfully failing to respect the authority of the federal court decision on marriage equality, perhaps most spectacularly by an order he sent to the state courts earlier this year, contending that *Obergefell* was a ruling only on the constitutionality of state same-sex marriage bans within the 6th Circuit and was not binding on lower courts in Alabama, which should continue

# CIVIL LITIGATION

refusing to issue licenses pending a ruling by the Alabama Supreme Court on a pending petition filed by marriage equality opponents. (After Moore was forced off the Alabama Supreme Court under the contested state constitutional provision, the remaining members of the court agreed to dismiss the pending petition as being resolved by the *Obergefell* case.) Moore came roaring back, represented by fiercely anti-gay attorney Mat Staver, who filed a lawsuit on his behalf against the Judicial Inquiry Commission in federal district court in Montgomery, seeking a declaration that the automatic removal provision in the Alabama Constitution violates his rights under the federal constitution. Moore stoutly insists that he has done nothing wrong, but is merely fulfilling his oath to defend the state Constitution. (That oath also invokes the federal Constitution, a document towards which Moore apparently feels less fealty – at least as it is construed by the U.S. Supreme Court.) The irony of all this is delicious: on one hand, Moore argues that Alabama courts are not bound by federal district and circuit court opinions, and on the other he turns to the federal courts asking them to strike down a provision of the Alabama Constitution, a document he has previously exalted as being of superior authority in Alabama to the federal Constitution. *Associated Press*, May 27.

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**ALABAMA** – Senior U.S. District Judge Callie V.S. Granade issued an opinion on May 27, responding to the plaintiffs’ motion for attorneys’ fees and costs in *Searcy v. Strange*, 2016 WL 3034324 (S.D. Ala.), one of the two Alabama marriage equality cases. Plaintiffs in this case were represented by David Kennedy and Christine Hernandez, who sought fees of \$189,310.00 and costs of \$8,400.00. The defendant, Attorney General Luther Strange, argued that they should receive no more than \$50,000.

Among other things, he argued that the case as originally filed named various other defendants, who were eliminated during pretrial motion practice, and that the litigation involving the other defendants should not be charged to his office. He also claimed that the hours billed by the plaintiffs’ lawyers, more than 800, were excessive, and many of them were expended on dealing with impediments to enforcing the district court’s decision that were imposed by third parties after the court had granted their motion for preliminary injunctive relief, not the defendant. Judge Granade recounted the tortured history of this case, accepting to some degree the various arguments made by Strange in support of reducing the fee award. She also noted that plaintiffs’ counsel were not experienced civil rights litigators, so might be expected to have spent more hours in preparing and presenting the case than experienced counsel would have needed. In addition, the affidavit they submitted by a partner at a major Alabama firm on the subject of hourly rates, endorsing their claim for \$275 per hour as on the lower end, was countered by Strange as being representative of large firms, not small practices typified by plaintiffs’ counsel in this case. Also, Judge Granade observed that by the time this case was being litigated, there were numerous marriage equality decisions from other courts that plaintiffs’ counsel could use as models for their arguments, so in that sense although the underlying legal issues were hotly contested, the case in itself (which involved a demand for recognition of an out-of-state marriage) was not unduly complicated. Thus, comparison to fees awarded counsel in earlier marriage equality cases were not particularly probative. Furthermore, a second case was filed *pro se* by another same-sex couple seeking a marriage license; they won their preliminary injunction without involvement of counsel, although they subsequently obtained counsel for later stages of their case.

Taking all these considerations together, Judge Granade decided to award 2/3 of the requested fee, amounting to \$126,206.66. She found that plaintiffs’ counsel had failed to supply adequate documentation for their requested costs, and stated that she would allow them to submit an amended motion for costs with appropriate documentation before ruling on that claim.

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**CALIFORNIA** – What appears to be monumental carelessness and poor strategy by management has resulted in a decision by a California trial judge, backed up by a panel of the 4th District Court of Appeal, denying the employer’s motion to refer to arbitration a gay former employee’s discrimination lawsuit. *Joyce v. Volt Management Corp.*, 2016 WL 2937058, 2016 Cal. App. Unpub. LEXIS 3678 (Cal. App., 4th Dist., May 17, 2016). Perhaps the most significant management error that led to the determination that Juan Carlo Joyce may pursue his sexual orientation harassment and discrimination claim under California’s Fair Employment and Housing Act in the San Diego County Superior Court was the employer’s issuance of a “New Employee Orientation Guide” which clearly stated that it “supersedes any prior handbooks or policy manuals issued by Volt,” and which did not make any mention of arbitration of disputes. In seeking to compel arbitration, the company relied upon a one-page employment agreement that Joyce allegedly signed prior to his employment by Volt, but that Joyce affirmed under oath he did not recall having seen until the company attached it to its motion to compel, and a form Joyce signed at the time of his hiring acknowledging his receipt of an employee handbook, which happened to contain an arbitration agreement. Joyce claims that although he signed that form, he was never given a copy of the referenced handbook. Joyce’s attorney sought a copy of his personnel

# CIVIL LITIGATION

file after he was discharged, when Joyce was contemplating filing suit. The contents of the file turned over by Volt did not contain the arbitration form that Volt contends Joyce had signed. That form also contains the signature of a Volt employee who allegedly signed the form on behalf of Volt, but Volt fought successfully to get the trial judge to deny Joyce's motion to depose this person prior to a ruling by the court on Volt's motion to compel, arguing that Joyce was not entitled to conduct discovery until after the court concluded that the alleged arbitration agreement did not apply to this case. Writing for the appellate panel, Justice Cynthia Aaron found that Superior Court Judge Katherine A. Bacal did not err in denying the motion to compel, since the record before the trial court did not establish that Joyce had signed an agreement to arbitrate any disputes he had with Volt. The court also rejected Volt's theory that Joyce had effectively agreed to the arbitration provision by continuing to work with knowledge that the employer required employees to submit all disputes to arbitration, finding that the arbitration forms introduced in evidence by the employer all required the employee's manifestation of assent through a signature. Joyce is represented by Kimberly A. Ahrens, Ahrens Law Office, and Johanna S. Schiavoni.

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**CALIFORNIA** – The 2nd District Court of Appeal affirmed a ruling by Los Angeles County Superior Court Judge Dan T. Oki, who had granted summary judgment to a defendant in an HIV/sexual orientation discrimination case brought by a terminated employee of the California Department of Food and Agriculture against his former supervisor and the agency. *Kuklovsky v. Cooley*, 2016 WL 3091564, 2016 Cal. App. Unpub. LEXIS 3816 (May 24, 2016). Steve Kuklovsky worked for the Department from 2006 until

his termination in 2012, allegedly for excessive unapproved absences. Defendant Laura Cooley became his supervisor in August 2011. In January 2012, Kuklovsky "disclosed" to Cooley that he is gay and HIV-positive. He alleges that after this disclosure Cooley "began treating him differently by micromanaging his work and routinely questioning him as to whether he was performing his job duties." He also alleged that "she placed more stringent and difficult requirements on him regarding sick time than other employees," including requiring frequent communication when he was out on sick leave, "additional doctors' notes" and refusing to provide him "with the paperwork necessary to obtain a disability leave." He alleged that after he was terminated from his job, he lost his condo, became homeless and lived in his car for several weeks. He alleged that Cooley "was apprehensive about touching things related to Kuklovsky and sometimes wore rubber gloves," became unfriendly to him, relocated his desk and a couch (which she called "disgusting") to a remote area of the office while he was out on sick leave, asked a branch chief of the agency whether HIV was contagious, tolerated staff joking and teasing Kuklovsky about being a "drama queen," and kept a substantial distance between herself and Kuklovsky. Kuklovsky's complaint against Cooley alleged harassment and hostile work environment in violation of the California Fair Employment and Housing Act, intentional and negligent infliction of emotional distress, a demand for punitive damages, and an action directed against the agency under the FEHA asserted claims of discrimination, failure to engage in an interactive process concerning accommodating his HIV condition, and failure to make reasonable accommodations, resulting in his discharge for excessive absences. The May 24 decision written for the court of appeal panel by Justice Judith Ashman-

Gerst goes to Cooley's summary judgment motion, which Judge Oki had granted. It seems that co-workers who were deposed in anticipation of the motion confirmed that Cooley was a micromanager of everybody and that the various complaints lodged against her by Kuklovsky seemed to be general traits that predated his disclosure to her about his HIV status and sexual orientation. (A co-worker even confirmed she would not have wanted Kuklovsky's couch in her home!) Furthermore, the court found that even if his allegations were all true, they didn't amount to the kind of severe and pervasive conduct required to make out a hostile environment claim. The court found that his tort claims against Cooley were preempted by the Workers' Compensation Law and, even if they weren't, failed to meet the high evidentiary standard for imposing tort liability for emotional distress. Kuklovsky is represented by Jeffrey M. Cohon and Kristina S. Keller of Cohon & Pollak.

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**CALIFORNIA** – In *Sandoval v. Colvin*, 2016 U.S. Dist. LEXIS 68758 (C.D. Calif., May 24, 2016), U.S. Magistrate Judge Karen E. Scott rejected an appeal of denial of Social Security disability benefits to a transgender woman with AIDS who suffers from depression and required Spanish translation at her hearing because of lack of English language fluency. Scott upheld a ruling by an administrative law judge that despite these and other problems, "there were jobs that existed in significant numbers in the national economy that she could perform, including the jobs of small products assembler, inspector and hand packager, and housecleaner," and thus that she was not "disabled" within the meaning of the statute. The appeal challenged this conclusion in light of the testimony of three medical experts, all of whom asserted that the plaintiff was disabled from working.

# CIVIL LITIGATION

The ALJ had rejected their conclusions, finding inconsistencies between the treatment records and the conclusions. The judge's opinion goes through the medical testimony in detail, pointing out the discrepancies and lack of factual support for the doctors' conclusions, and describes how the vocational expert's conclusions as to the residual functional capacities of the plaintiff were consistent with the facts supported by the medical records.

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**CALIFORNIA** – The state's Division of Occupational Safety and Health has fined fetish pornography producer Kink.com a total of \$146,000 for allegedly violating condom requirements and other safety laws, thus exposing workers to potentially infection materials. Cal/OSHA cited the producer for 13 safety violations, including violation of the state's bloodborne pathogens standard. Agency Chief Juliann Sum announced May 3, "The use of barrier protections, such as condoms, is required during adult film production. Cal/OSHA will continue to enforce California's health and safety regulations, which exist to protect workers from job-related harm." *BloombergBNA Daily Labor Report*, 87 DLR A-3 (May 5, 2016).

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**DELAWARE** – Here's an odd situation. Michael J. Spence is a 26-year-old man being treated for HIV infection. As of June 17, 2014, he had not yet decided to share his diagnosis with his parents, but he filled his prescriptions at the same Rite Aid Pharmacy that his parents used. On that date, Michael's father, David Spence, when to the pharmacy to pick up a prescription for his wife. When he asked the clerk for Mrs. Spence's prescription, the clerk told him that there were two prescriptions available for Michael Spence. David identified himself as Michael's father and the clerk brought over the medications "contained in a clear bag – Tivicay

and Epzicom. They were placed on the counter before Mr. Spence in such a way that he could read at least one of their labels. Mr. Spence asked the clerk what the medications were for, and the clerk in turn asked the pharmacist on duty, Defendant Achamma Cherian, Pharm. D., RPH. Cherian told Mr. Spence that the medications were anti-virals or anti-retrovirals." Although Mr. Spence didn't take Michael's prescriptions, when he left the pharmacy he did not do some quick research and learned his son's medications were used to treat HIV. "The next day Mrs. Spence spoke with Michael about his HIV status. According to his complaint, from these events Michael 'suffered severe emotional distress, sleep deprivation, became physical ill, and vomited.'" After Michael learned how his parents got the information, he went to Rite Aid and asked to speak with Cherian, who was not there. Cherian called Michael the next day admitted she had told his father what the medications were, apologized, but insisted "it was impossible for his father to determine what the medications were for." Michael sued Cherian and Rite Aid on several negligence theories, invasion of privacy, intentional infliction of emotional distress, breach of contract and promissory estoppel. Rite Aid then filed a third-party complaint against David Spence, identifying him as a "joint tortfeasor" responsible in part for Michael's claimed injuries, alleging that Michael's injuries 'were directly and/or proximately caused by the intentional and/or reckless and/or negligent actions' of David, so if Rite Aid is held responsible for any damages to Michael, his father should be held "jointly and severally liable for contribution" as to Michael's claims. On May 20, 2016, Superior Court Judge Paul Wallace granted David's motion to dismiss the third party complaint in *Spence v. Cherian*, 2016 WL 2996895 (Del. Superior Ct.). "There are no allegations that Michael's father disclosed his HIV

diagnosis to anyone other than Michael's mother," wrote Judge Wallace. "Thus the only reasonable inference in Rite Aid's favor is that Mr. Spence told one person – his wife, Michael's mother – about Michael's diagnosis. Rite Aid has adopted this factual allegation as true. Such disclosure does not arise to the level of 'publicity' defined by the Restatement [of Torts, in defining the tort of wrongful publicity as to private facts]. Nor does Mr. Spence's visit to and discussion of Michael's medical status with Michael's doctor; that visit occurred with his wife and Michael" after the incidents giving rise to Michael's claim against Rite Aid. Furthermore, going to the other tort claims as to which Rite Aid contended that David should be held jointly liable, the court found that Rite Aid's pleadings fail to demonstrate, "under any reasonably conceivable set of circumstances," that David "either acted intentionally or recklessly, or that his conduct was extreme and outrageous," all prerequisites for recovery under the causes of action asserted against Rite Aid. Judge Wallace also concluded that David had not violated any duty to Michael, so he could not be held on any negligence theory, and that there was no promise on the part of David to Michael on which to ground joint liability under a promissory estoppel theory. (Presumably, Michael's promissory estoppel theory against Rite Aid is grounded on the pharmacy's implied promise to keep the facts about his prescriptions confidential.) David Spence is represented by New Castle attorney Andrew C. Dalton. Rite Aid's counsel is New Castle attorney Stephen F. Dryden, who might want to review his first year Torts notes from law school, having submitted a third party complaint whose claims Judge Wallace characterized as "remarkable and futile." Presumably David will apply to Judge Wallace to have Rite Aid cover his expense of hiring attorney Dalton to secure dismissal of this complaint.



# CIVIL LITIGATION

**HAWAII** – The former CEO of Jeans Warehouse, Inc., a Hawaii-based retail chain, is suing for sexual orientation discrimination. William Estill, 65, is openly-gay and presided over several very successful years of operations. He was dismissed shortly before the 2014 holiday sales period. The holiday sales period is when the company earns most of its yearly profits, thus at the time he was fired most of the profits for 2014 had not yet been earned. Under his leadership, the company posted record-breaking sales and profits during 2012 and 2013. According to the complaint filed under Hawaii's state statute banning sexual orientation discrimination in employment, Estill was subjected to anti-gay comments and hostility from the company's chief operating officer and also a member of the board of directors of the company. He formally complained about this and was dismissed. The lawsuit asserts claims of disparate treatment discrimination, retaliatory termination, and negligent and intentional infliction of emotional distress. *Estill v. Jeans Warehouse, Inc.*, No. 16-1-0874-05 (VLC). *NewsRx.com*, 2016 WLNR 15342440 (May 23, 2016). \* \* \* The city of Honolulu has tentatively agreed to settle a lawsuit brought by two lesbians who allege that a police officer wrongfully harassed and arrested them after seeing them kissing in a grocery store. Details of the settlement were announced on May 20 in U.S. District Court in Honolulu. It is subject to final approval by the City Council, which is expected to take place at its July 6 meeting, according to Deputy Corporation Counsel Nicolette Winter, who represented the city in the case. Courtney Wilson and Taylor Guerrero were visiting Hawaii from Los Angeles last year when they were harassed and arrested by a police officer, who expressed dislike for public displays of affection after seeing them in a Foodland store on Oahu. The amount of the tentative settlement is \$80,000. *Associated Press*, May 20.

**ILLINOIS** – Senior U.S. District Judge Milton I. Shadur decided that he should not rule on a school district's motion to dismiss a sexual orientation discrimination claim asserted by an employee under Title VII, because of the pendency of a ruling by the 7th Circuit addressing the question whether sexual orientation discrimination claims are actionable under Title VII. *Matavka v. Board of Education of J. Sterling Morton High School District 201*, 2016 U.S. Dist. LEXIS 70451 (N.D. Ill., May 31, 2016). Lubomir Matavka alleges that while employed at Morton High "he experienced severe harassment from his coworkers and supervisors, including taunts that he was 'gay' and should 'suck it,' frequent jokes about his perceived homosexuality, the hacking of his Facebook account to identify him publicly as 'interested in boys and men', and an email stating 'U. . . are homosexual.'" The school district moved to dismiss the complaint, pointing out that the 7th Circuit has repeatedly refused to allow sexual orientation discrimination claims under Title VII. "Because it is difficult to escape the conclusion that Matavka's harassment was rooted in his perceived sexual orientation," wrote Shadur, the 7th Circuit precedents "would appear to bury Matavka's lawsuit. But fortunately for Matavka his action may be spared by a recent ruling of the United States Equal Employment Opportunity Commission (EEOC) that is prompting reconsideration of Title VII's breadth." After citing and quoting from *Baldwin v. Foxx*, Shadur commented, "While that ruling does not of course bind this court, a case argued before our Court of Appeals on September 30, 2015, and awaiting decision – *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720 – is poised to revisit the question whether sexual orientation discrimination is indeed sex discrimination in light of *Baldwin*. Should *Hively* follow recent district court decisions in finding *Baldwin* persuasive, that finding plainly would

affect the disposition of Morton High's motion. That being so, the prudent course at present is to stay this matter pending the issuance of a decision in *Hively* – a decision that should clarify whether Matavka's [amended complaint] can be sustained." Judge Shadur set July 29, 2016, for a status hearing, noting that if the 7th Circuit ruled before then, he would expect the parties to bring the matter before the Court promptly by motion, and if no ruling eventuates by then, "this Court will issue a minute order vacating that date and setting a replacement date." Matavka is represented by Bradley K. Staubus, Nicholas Frank Esposito, and Brittany N. Bermudez, Esposito & Staubus, Burr Ridge, IL.

**MAINE** – U.S. Magistrate Judge John H. Rich III ruled in *Doe & Maine Human Rights Commission v. Brunswick School Department*, 2016 U.S. Dist. LEXIS 59107 (D. Maine, April 29, 2016), that a demand by defendant school district for discovery of records of the plaintiff's treatment by a psychiatrist, a pediatrician and a psychologist would be conditionally denied in light of the plaintiff's concession not to ask for damages beyond the "garden variety" mental distress that a jury could find to flow naturally from the homophobic bullying and sexual assaults he claims to have sustained at the hands of other students while he was attending high school in the defendant school district. Magistrate Rich summarizes the allegations of the complaint (which builds on a probable cause ruling by the Maine Human Rights Commission), describing a male high school student subjected to severe harassment, including name-calling and physical assaults, due to the perception by other students that he was gay, and the failure of school officials to respond effectively – indeed, allegations that they were dismissive and had expressed a "boys will be boys" attitude, telling him to

# CIVIL LITIGATION

“suck it up.” The complaint, filed by the boy’s mother on his behalf together with the Maine Human Rights Commission as co-plaintiff, alleged that the boy and his mother suffered severe emotional distress, including post-traumatic stress disorder suffered by the boy, which led him ultimately to refuse to continue attending school there. Under Maine law, a plaintiff seeking damages for such extreme emotional distress must waive privilege and allow disclosure of medical records documenting the distress. In this case, the plaintiffs offered to abandon a substantial part of their damage claims in order to retain the privilege and keep these medical records confidential, limiting their claim to “garden variety” emotional distress damages. Wrote Magistrate Rich, “In this case, it is readily apparent that the parties may have ‘very different notions of what could grow in the garden. . . . In this case, on the facts alleged in the complaint, the plaintiff and her son may well have experienced emotional injuries that were, given their personal characteristics and pre-existing conditions, in excess of those that would be likely to have been experienced by ‘any healthy, well-adjusted person’ who found himself in either plaintiff’s alleged position. . . . To the extent that the plaintiffs seek such damages at trial, the defendants’ motion would be granted. However, in reliance and on the strength of the limitations offered by the plaintiffs to their claims, the defendants’ motion is conditionally denied.”

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**MICHIGAN** – An arbitration award in favor of the company is apparently the end of the road for a “bisexual black male” who filed a Title VII employment discrimination case, alleging that he was subjected to unlawful harassment at work because of his race and sex. *Myers v. Darden Restaurant Group*, 2016 U.S. Dist. LEXIS 57113, 2016 WL 1728789 (E.D. Mich., April 29, 2016). The court

had referred the matter to arbitration on the employer’s motion, finding that the employee was contractually bound to arbitrate any Title VII claim under the company’s Dispute Resolution Policy. The arbitrator held a hearing and produced a ten page Opinion and Award, finding that the incidents complained of by the employee did not amount to a Title VII violation. (Most egregiously, a co-worker whose identity has not been discovered had hung a pair of women’s underpants on a coatrack under the plaintiff’s coat. The plaintiff complained to having been subjected to verbal harassment by several co-workers while being employed as a chef in defendant’s Olive Garden franchise restaurant.) Recurring to the limited grounds on which a court can refuse to enforce an arbitration award, District Judge Denise Page Hood wrote, “In his Motion to Vacate, Plaintiff does not allege, nor does he submit any evidence that the arbitration award was procured by fraud, corruption or undue influence, or that the arbitrator was partial or corrupt, engage in misconduct, or failed to make an award on the subject matter. The Court notes that, in his Motion to Vacate, Plaintiff does little more than assert that he disagrees with the Opinion and Award.” This, of course, is not sufficient grounds to vacate an award when the parties have agreed to submit their disputes to arbitration. The court also noted that the arbitrator’s written award “sets forth the factual and legal analysis of Plaintiff’s claims in detail, including a reasoned explanation of why Plaintiff did not provide sufficient support for his legal claims.” There is no mention of a union being present here, and plaintiff represented himself *pro se*, frequently a recipe for disaster; this suggests that this would be the fairly typical scenario in which an employer requires job applicants to sign an agreement to arbitrate all claims as a condition of employment – a scenario in which courts routinely enforce such “agreements” without considering that

they are rarely if ever the result of fair bargaining and a conscious decision by a prospective employee that it is in his or her interest to agree to waive the right to sue on possible future discrimination claims.

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**MINNESOTA** – U.S. District Judge Richard H. Kyle has concluded that he must dismiss on standing grounds a discrimination claim brought by a woman whose son, a beneficiary under the woman’s employment-related health insurance plan, was denied coverage for drugs and surgery connected with his gender transition. *Tovar v. Essentia Health, Innovis Health LLC*, 2016 U.S. Dist. LEXIS 62529, 2016 WL 2745816 (D. Minn., May 11, 2016). The employee benefits plan provided by Brittany Tovar’s employer, Essentia Health and Innovis Health, LLC, as it was in effect during 2015, specifically excluded coverage for “services and/or surgery for gender reassignment.” As a result of this exclusion, the plan administrator denied coverage claims for Lupron, a drug intended to prevent menstruation, and Androderm, a form of testosterone intended to assist in female to male gender transition, and also denied coverage for sex reassignment surgery. Tovar could not afford to provide these drugs or surgery for her son without insurance coverage. She managed to come up with the money for Androderm, and as a result of her appeal the employer subsequently agreed to cover this prescription as a “one-time exception,” most likely because it was in the process of amending its plan to remove the exclusion, which was done effective January 1, 2016. In the meantime, however, Tovar alleged that because her son couldn’t get necessary medical services under her health plan, she suffered from stress, worry, anger, disappointment, and sleeplessness, experienced an increase in migraines, and ultimately reduced her work hours. In this lawsuit, filed on January 15,

# CIVIL LITIGATION

2016, she alleged discrimination in violation of Title VII, the Minnesota Human Rights Act, and the Affordable Care Act. The problem she encountered was that the court accepted the defendants' argument that she could not sue the plan administrator, because it had no discretion to provide services expressly excluded from the plan, and she could not sue the employer, because, said the court, she had not been the victim of discrimination. Argued the employer, Essentia, "only an employee is protected from discrimination and can bring a claim. There is no dispute that Tovar is an employee and her son is not. Accordingly, Tovar must be the individual to have suffered the discrimination – and this is where her claim falters. Essentia argues that Tovar is not an aggrieved person because she does not allege that she, as the employee, was discriminated against based on her sex or gender identity." Judge Kyle accepted this argument, finding that "there are no facts in the Complaint to support that she was ever personally denied the benefits or privileges of her employment or personally experienced anything less than full coverage of the benefits provided." Indeed, he continued, "While the Court must take as true the fact that Tovar has been injured emotionally and financially, these purported injuries are *effects* of the discrimination her *son* allegedly endured based on his sex." And, said the court, this would not be sufficient to provide her with standing to sue her employer under the relevant statutes.

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**MISSISSIPPI** – The state has not filed an appeal of the decision by U.S. District Judge Daniel P. Jordan III in *Campaign v. Miss. Dep't of Human Services*, 2016 U.S. Dist. LEXIS 43897 (S.D. Miss., March 31, 2016), which held that the state's ban on adoptions of children by same-sex couples was unconstitutional. Since the deadline for appeal has passed, the court's decision is final and

binding on the state government. A team of attorneys from Paul Weiss led by Roberta Kaplan joined with local counsel to litigate the case.

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**NEW YORK** – An openly lesbian custodial worker for the Suffolk County Department of Public Works who did not conform to her supervisors' stereotypes of how female employees should dress suffered summary judgment of her Title VII and Equal Protection claims against the County and two named supervisors, upon a finding by U.S. District Judge Sandra J. Feuerstein that some of the claims were time-barred, some were precluded by a lack of coverage under Title VII for sexual orientation discrimination claims, claims relating to sexual harassment and hostile environment did not meet the "severe and pervasive" requirements needed to survive summary judgment, and that the county would be immune from suit in any event because the plaintiff had failed to exhaust internal remedies in the county's grievance system before resorting to Title VII proceedings and a lawsuit. *Magnusson v. County of Suffolk*, 2016 WL 2889002, 2016 U.S. Dist. LEXIS 64897 (E.D.N.Y., May 17, 2016). Of particular note is the court's failure to discuss any recent developments under Title VII concerning sexual orientation discrimination claims. Relying on older 2nd Circuit precedents, Judge Feuerstein wrote, "Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here. *See, e.g., Dawson v. Bumble & Bumble*, 398 F.2d 211, 217-18 (2nd Cir. 2005) (noting that Title VII does not prohibit sexual orientation discrimination and 'like other courts, we have recognized that a gender stereotyping claim should not be

used to 'bootstrap protection for sexual orientation into Title VII'") (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2nd Cir. 2000). Accordingly, Plaintiff's claims regarding incidents of harassment based on her sexual orientation do not give rise to Title VII liability." Arline Magnusson is represented by attorneys from the Great Neck firm of Borrelli & Associates, P.C.: Alexander T. Coleman, Michael J. Borrelli, and Samuel Veytsman. Perhaps an appeal to the 2nd Circuit would provide the vehicle for the circuit to rethink its approach to sexual orientation claims in light of recent circumstances, such as the EEOC's ruling last summer in *Baldwin v. Foxx*. However, between the statute of limitations issues and the failure to exhaust internal administrative remedies, this case might not in the end be a suitable vehicle to raise the substantive doctrinal question.

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**NEW YORK** – U.S. District Judge Naomi Reice Buchwald denied a motion for preliminary injunction filed by Jennifer Louise Lopez, whom the court describes as "a woman of trans experience" and a "community activist," who sought the court's assistance in compelling the NYC Police Department and the not-for-profit corporation operating the city-subsidized housing facility in which she resides to take seriously her complaints about anti-trans harassment by her neighbors. *Lopez v. City of New York*, 2016 WL 2858890, 2016 U.S. Dist. LEXIS 6356 (S.D.N.Y., May 12, 2016). Plaintiff moved into The Cecil apartment building in April 2013, and alleges that she quickly became the target of harassment by neighbors and by a building guard assigned to her building. Plaintiff frequently called the police seeking an intervention, which she claims was stymied when the security guard told police officers that the matter would be dealt with internally. Plaintiff wanted the court to order the police department to take down and take action

# CIVIL LITIGATION

on her complaints. Plaintiff's problems at The Cecil escalated in August 2015, when, she alleges, while suffering a "hateful diatribe, Plaintiff struck one of her Tormentors in the face as he came close enough to physically intimidate her," and "another Tormentor grabbed Plaintiff and dragged her roughly down the hall before she escaped his grasp and left the building to get away." Cecil management then coordinated with NYPD to accomplish her arrest, and NYPD refused to take her own complaint arising from the incident. Cecil management cited the incident in denying her certain benefits accorded to residents. Judge Buchwald found that for purposes of ruling on the motion for preliminary relief, plaintiff had failed to show she was likely to succeed on her Equal Protection Claim due to lack of factual allegations going to the question of motivation by the Police, and agreed with The Cecil that this privately owned and operated facility was not rendered subject to constitutional claims by the fact that the city was subsidizing the rent of tenants. The court also found that plaintiffs' factual allegations fell short in showing that any action by the Police had enhanced the risk of harm to the plaintiff from her neighbors; if anything, frequent responses by the police to her communications showed that they were ready to intervene. Judge Buchwald agreed with the Cecil management that its actions did not fall within the purview of New York City's bias-related intimidation law. Buchwald pointed out that the complaint did not even cite a particular provision of the City Human Rights Law prohibiting gender identity discrimination in housing accommodations. However, since the ruling is limited to rejecting a request for preliminary relief this is hardly the end of the case, and Judge Buchwald indicated that the court would be contacting the parties to schedule a conference shortly. Bronx attorney Donald Robert Dunn, Jr., represents Lopez.

**OHIO** – The Court of Appeals of Ohio, 12th Appellate District in Warren County, upheld a decision by the Warren County Court of Common Pleas to order a change of custody of a fifteen-year-old girl from her mother to her father, evidently in the midst of severe tensions between mother and daughter about daughter's struggles with her sexual orientation. *Jones v. Wall*, 2016-Ohio-2780, 2016 Ohio App. LEXIS 1653 (May 2, 2016). The opinion for the court by Judge Piper is not rich in factual detail, speaking mainly in generalities, but it seems as if the child's mental state became increasingly unsettled as she proceeded into adolescence, and her mother's response was to impose greater discipline, restrict her internet use and closely monitor her contact with friends. Judge Piper wrote, "The magistrate determined that the child had not adjusted well to her home with Mother, as she struggled with depression while in Mother's care and engage in self-harm. The child also performed poorly in school, though she took solace in joining a gay, lesbian, bi-sexual, and transgender group at school." The magistrate also heard evidence about how the child apparently thrived during visitation periods with her father and his girlfriend, relating particularly well to the girlfriend's two children who were of about the same age as her. The father described a more laid-back parenting style than was used by the mother. The court noted that the bar is set rather high for a court to upset the original custody order that was entered when the parents divorced, since a premium is usually placed on continuity and stability of the child's home environment. But in cases where the facts have changed significantly, the court can make a change to avoid harm to the child. Without attributing blame to the mother, the court of appeals found that the magistrate had correctly ruled that this was one of those cases where changing custody made sense for the best interest of the child.

**OREGON** – U.S. District Judge Michael H. Simon refused to dismiss certain constitutional claims asserted against administrators and a teacher at Century High School in Washington County, Oregon, by a gay former student, J.D., in *J.D., by and through his parent Shawna DiCintio v. Hillsboro School District*, 2016 WL 3085900, 2016 U.S. Dist. LEXIS 70413 (D. Ore., May 31, 2016). J.D. filed suit on December 14, 2015, against the Hillsboro School District and several administrators and teachers at the high school, asserting the following claims: (1) violation of his First Amendment right to freedom of speech; (2) violation of his 14th Amendment right to equal protection; (3) violation of Title IX's ban on sex discrimination; (4) violation of Section 504 of the Rehabilitation Act; (5) common law intentional infliction of emotional distress; (6) common law negligence; and (7) claim for declaratory relief. J.D. alleges that he was speaking with another student at a school assembly in March 2015 when Brett Trosclair, a teacher, "turned on the boys and told them to shut up, I'll kill you, and that he was going to throw them down the stairs." J.D. alleged that he is openly-gay and was enrolled in special education due to learning disabilities. J.D. reported this incident to the administration and Trosclair was put on administrative leave. During his leave, Trosclair allegedly encourage a large number of students to stage a walk-out from classes in protest of his being disciplined. J.D. alleges that Trosclair and other teachers "condoned and supported a hostile education environment and led to threats of violence and death against Plaintiff and a fear of imminent bodily harm," but J.D. did not specify who actually threatened him with violence and death, other than Trosclair at the assembly. J.D. also alleged that various District employees subjected him to hostile and discriminatory conduct, describing several specific incidents where he was denied assistance by

# CIVIL LITIGATION

administrators when he was being physically and verbally assaulted by students in the lunchroom. He alleged that Greenwood, the Dean of Students at the school, called him a “girl” and another teacher told him to stop being a “diva” and a “priss.” He also claimed that the principal refused to speak with him about his allegations of hostile and discriminatory conduct, and that the District removed him from school because of these incidents, denying him a public education. The May 31 decision responds to a motion by the individual named defendants to dismiss J.D.’s claims against them. J.D. agreed to dismiss individual defendants from all but his 1st and 14th Amendment claims, which were brought under 42 U.S.C. Sec. 1983. (Thus, his Title IX claim continues against the school district; there would be no claim against individual defendants under Title IX, which applies solely to educational institutions receiving federal financial assistance.) Individual defendants argued that the complaint was defective in failing to specifically allege which individual Defendants deprived J.D. of which constitutional rights. Judge Simon found that the complaint adequately alleged specific First Amendment claims against Brett Trosclair, the teacher who threatened J.D. at the assembly, and the district superintendent and the high school principal. As to the equal protection claim, Simon found adequate pleadings against the superintendent and the principal. Although J.D. had described “allegedly inappropriate acts performed by Greenwood [the Dean of Students] and Duggan [another teacher],” he had not specified how those actions deprived him of 1st or 14th Amendment rights. Consequently, the bottom line on the claims against individual defendants was that the 1st and 14th Amendment claims survive against a limited number of individual defendants. J.D. is represented by Kevin C. Brague of Kivel and Howard, LLP, Portland, Oregon.

**OREGON** – U.S. Magistrate Judge Youlee Yim You, faced with a deficiently pleaded *pro se* discrimination complaint filed by a transgender woman who also sought permission to proceed *in forma pauperis* and have pro bono counsel appointed for her, has reacted with empathy and concern for the plaintiff in *Clark v. Oregon*, 2016 U.S. Dist. LEXIS 58808, 2016 WL 1732875 (D. Ore., May 2, 2016), granting the motion to proceed *in forma pauperis*, granting a motion seeking representation by pro bono counsel, and dismissing the complaint without prejudice and with leave to replead after pro bono counsel is obtained. The plaintiff’s allegations against the State of Oregon and state’s Bureau of Labor and Industries are as follows: “Plaintiff began employment with Defendant on or about May 6, 2014. Defendant abruptly terminated Plaintiff’s employment after obtaining information regarding the Plaintiff’s gender identification, sexuality, and Religious Affiliation. Plaintiff only received positive verbal feedback and was never disciplined or written up for anything what-so-ever. Plaintiff is a transgender woman whom, at the time presented male for work and female in her person life til July 2015 when she no longer presented male in any aspects of her daily life.” In other words, Ms. Clark obtained employment presenting as a man, things were going well, then she began presenting as a woman and got discharged. This recitation, if fleshed out with more specifics, sounds like a potential cause of action under the 14th Amendment (assuming the defendant is a public employer), Title VII as now construed by the EEOC, and Oregon’s state law ban on gender identity discrimination. The problem was that the pro se complaint, containing insufficient factual allegations for current federal pleading standards, also did not cite any sources of legal authority for Clark’s claim, failed to articulate any legal theory for the case, and did not describe

any attempts to exhaust administrative remedies that might be available to Ms. Clark. Employment discrimination law is sufficiently complex that lay people should avoid practicing it on their own. In this case, however, the plaintiff encountered a magistrate judge who is pointing her in the necessary direction to take action in her case.

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**PENNSYLVANIA** – Ruling on the employer’s motion to dismiss, U.S. District Judge Matthew W. Brann held that Ralph Oberdorf, a licensed practical nurse who was discharged from his job at Manor at Penn Village, a “predominately female-staffed skilled nursing facility” in Selinsgrove, Pennsylvania, had stated a claim under Title VII for sex discrimination, but not for retaliation or hostile environment. *Oberdorf v. Penn Village Facility Operations, LLC*, 2016 U.S. Dist. LEXIS 58339 (M.D. Pa., May 3, 2016). Oberdorf alleges that he was employed for about two years prior to his discharge, and that his female supervisor, the Assistant Director of Nursing, subjected him to disparate treatment because he is a man. He alleged that the supervisor “made derogatory comments including, but not limited to, statements that Mr. Oberdorf must be gay because he is a male nurse and that she could not believe that he was a straight male nurse. (Sex stereotyping! Sex stereotyping! Sex Stereotyping!) He further alleged that he was treated by her in “a rude and condescending manner and was disparately disciplined when compared to his female co-workers.” Oberdorf’s numerous complaints to management did not lead to any resolution, and shortly after his filed his last complaint he was discharged. Applying the high exacting federal civil pleading standards, Judge Brann found that Oberdorf’s factual allegations were sufficient to meet the pleading requirements for a disparate treatment sex discrimination claim, but that he failed to supply sufficient factual

# CIVIL LITIGATION

detail to meet the pleading requirements for his other two legal theories. As to retaliation, the complaint lacked specific factual allegations linking his discharge causally to his filing of complaints. The judge noted that Oberdorf's allegations lacked precision in terms of dates when alleged incidents occurred, and although he alleged that the employer cited pretextual reasons for his discharge, and he did not state what those pretextual reasons were, making it impossible for the court to determine whether he has a plausible retaliation claim. Similarly, as to hostile environment, the court found Oberdorf's allegations insufficiently specific. A hostile environment claim requires a showing severe or pervasive harassment, but "he failed to plead... the multiple comments were made on separate or on one occasion and did not provide any dates or even a range of dates, other than to say that he began experiencing discrimination "while under the supervision" of the female supervisor in question. He also failed to plead any facts "concerning the detrimental effect of the discrimination he suffered." The retaliation and hostile environment claims were dismissed without prejudice, and Judge Brann appeared to be encouraging Oberdorf's counsel, Ari Karpf and Jeremy Cerutti, to come back with an amended complaint pleading more facts in support of these claims.

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**PUERTO RICO** – U.S. Magistrate Judge Bruce J. McGiverin found that it is no longer defamation *per se* to call somebody a "homosexual," in *Cornelius-Millan v. Caribbean University*, 2016 WL 2910278, 2016 U.S. Dist. LEXIS 66519 (D. Puerto Rico, May 18, 2016). Pedro Cornelius-Millan alleged that Luis Estades, a professor at the defendant University, made slanderous statements during a physical altercation with him, in which he called him "homosexual," "little

woman," "crybaby," and "cocky black man." First McGiverin found that under 1st Circuit precedent statements made in the heat of a physical altercation usually may not serve as the basis for a defamation claim. However, McGiverin also analyzed the claim in terms of substantive precedent. "The majority of courts that previously found a false accusation of homosexuality to be slander *per se* reasoned that such a statement imputed criminal conduct," he wrote. Continuing, he cited the Supreme Court's 2003 ruling in *Lawrence v. Texas*, holding that criminal laws against gay sex violate the 14th Amendment. "Reasoning that *Lawrence* has extinguished the rationale underlying [such cases], recent case law holds that falsely accusing a person of being a homosexual is not slander *per se*. And at least one court has held that such a statement is not susceptible to a defamatory meaning. Having noted that falsely accusing someone of being a homosexual can no longer be considered slander *per se*, I need not delve into whether the remark was susceptible to a defamatory meaning in this case for three reasons. Most importantly, and as explained above, the remark was made in the midst of a physical altercation – when Estades had clearly lost his temper and was attempting to insult Cornelius. The context in which the statement was made places the statement outside the ambit of protections afforded by defamation law. Second, Cornelius, who was enrolled in the engineering program and presumably strives to become an engineer, does not assert that 'he lost any specific professional opportunities because of' this specific statement, nor did he adduce specific evidence to support that particular assertion. Without doing so, the claim he presses is doing 'nothing more than trading in the same kinds of stereotypes that recent case law and good sense disparage.' Third, Cornelius does not cite any Puerto Rico law that is contrary to the foregoing, and so there

is nothing to suggest that the result would be different under the law of that jurisdiction." Thus, the court granted summary judgment in favor of the defendant on this slander claim.

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**TEXAS** – Victory for a Cracker Barrel Old Country Store operating in Dallas, which discharged an employee "for using the word 'fag' in the workplace to refer to homosexuals" and getting into a physical fight with a co-worker. *Towery v. CBOCS Texas, LLC*, 2016 U.S. Dist. LEXIS 58483 (N.D. Tex., Dallas Div., May 3, 2016). Artissa Towery filed claims against Cracker Barrel under Title VII and the Age Discrimination in Employment Act alleging discriminatory discharge. Cracker Barrel moved for summary judgment, supported by affidavits relating the reasons for Ms. Towery's discharge, as noted above. Towery never filed a response to the motion, so District Judge Sidney A. Fitzwater found that her case on the summary judgment motion rested solely on her "unsworn pleadings," which were insufficient to create a material fact issue about the reason for her discharge in light of the evidence submitted by the employer. This case arouses memories of the long-ago boycott launched against Cracker Barrel by gay consumers when that chain adopted an express policy of discharging gay employees based on the management's view that homosexuality was incompatible with the "family friendly" image that the chain was cultivating. Employees were fired, lawsuits were filed, public angst and taking sides ensued, and Cracker Barrel eventually backed down, rescinded the anti-gay policy, and now appears to have a strong non-discrimination policy and no tolerance for expressions of homophobia by the staff. Still, one with long memories may feel uneasy setting foot in a Cracker Barrel store. . . . Discriminatory reputations are difficult to shake.

# CRIMINAL LITIGATION

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## CRIMINAL LITIGATION NOTES

**U.S. ARMY COURT OF CRIMINAL APPEALS** – Chelsea Manning has filed an appeal with the U.S. Army Court of Criminal Appeals, seeking reversal or a reduction of sentence from her 2013 conviction for releasing a large quantity of classified information to WikiLeaks while serving as an Army intelligence analyst in Iraq. The 299-page appeals document filed with the court was made public on May 19. Manning, formerly known as Bradley Manning prior to her gender transition in military prison, was convicted of 6 Espionage Act violations and several other offenses, and is confined at Ft. Leavenworth, Kansas, where local courts approved her application for a name change as part of her transition. The appeal argues that Manning’s disclosures did not harm anybody or compromise U.S. national security. *AP Alerts*, May 19.

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**CALIFORNIA** – Some California judges continue to order HIV testing for persons convicted of various sex crimes without having made a specific finding that they had engaged in conduct likely to transmit HIV to their victims, and it is amazing, in light of the numerous appellate rulings vacating such testing orders, that some judges have remained ignorant or careless of the necessity to develop a factual record to support findings on the statutory criteria before ordering testing after a conviction. This seems to be the situation in *People v. Munoz*, 2016 WL 3092212 (Cal. App., 5th Dist., May 24, 2016). Jose Munoz was convicted by a jury of lewd conduct with a child under 14 involving “substantial sexual conduct.” The “sexual conduct” in this case consisted of Munoz, who was dating the mother of a thirteen year old girl, taking advantage of a situation to “rub [the girl’s] vagina over her running shorts.” Lewd conduct is

one of the listed offenses for which HIV testing may be ordered upon conviction, provided, of course, that the court finds that HIV could be transmitted through the conduct for which the defendant was convicted. No such finding was made in this case, but the Contra Costa County superior court judge during sentencing “made ancillary orders including one requiring appellant to submit to HIV testing.” Munoz appealed his conviction and sentence on various grounds, but as relevant here contended that the testing order was inconsistent with the statutory requirements. The state conceded as much; that “there is no substantial evidence in the record of this case to support the requisite finding, implied or otherwise.” However, it seems that no objection was raised when the judge entered the testing order, so the court decided that remanding rather than simply vacating the testing order was appropriate “given the significant public policy considerations at issue.” Since no objection was raised, the prosecutor at the time of sentencing had no notice that evidence of conduct that could transmit HIV was needed. Evidently the trial court’s entry of a testing order was a surprise. Wrote the court of appeal, “Given the serious health consequences of HIV infection, it would be unfair to both the victim and the public to permit evasion of the legislative directive [for testing] if evidence exists to support a testing order.” This seems strange, since the court’s recitation of the facts presented at trial does not include a description of any conduct that could transmit HIV. This is not a virus that passes through clothing as a result of digital manipulation of a vagina. Quick: remedial HIV 101 course for the judges of the 5th District Court of Appeal!

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**COLORADO** – In *Hamilton v. Bird*, 2016 U.S. App. LEXIS 9665, 2016 WL 1993653 (10th Cir. May 24, 2016), the court of appeals was faced with multiple habeas corpus applications filed pro se

by a lesbian who was incarcerated in the Pitkin County Jail in Colorado after having pled guilty to violation some orders of protection that were evidently issued in connection with a dispute she had with fellow-parishioners of her church over her refusal to submit to conversion therapy to “cure” her sexual orientation. After wading through a lengthy (and not entirely coherent) recital of the procedural history, it seems that this pro se litigant has become hopelessly entangled by the procedural pitfalls of the criminal appellate process. The court found that many of her claims on appeal await exhaustion of state court appellate process before she can petition for habeas corpus in federal court, some of her claims relate to issues that can’t be raised initially in a federal habeas corpus proceeding (such as her allegation that she has been denied appropriate medical treatment while confined in the county jail), and even as to claims she alleges to have appealed through the state court system, her failure to attach appropriate documentation stymies her effort to initiate a federal court habeas proceeding. In her opinion for the 10th Circuit panel, Circuit Judge Carolyn B. McHugh summarizes Hamilton’s claims: “First, Ms. Hamilton claims many of her constitutional rights were violated as a result of sexual orientation discrimination by private parties, Aspen police officers, and Colorado state court judges. Second, Ms. Hamilton alleges she was denied access to cancer treatment while incarcerated. Third, Ms. Hamilton claims that Colorado law enforcement and state courts failed to enforce state criminal statutes. Finally, Ms. Hamilton claims ineffective assistance of counsel, asserting that she pled guilty [to violating protection orders] because she was manipulated by her counsel, the district attorney, and the trial court judges.” As a pro se litigant contesting the refusal of the district court to issue certificates of appealability to her on its denial of her habeas corpus petitions, Hamilton is apparently

# CRIMINAL LITIGATION

unaware of, or unable to comply with, federal pleading requirements, since the court's description of her filings suggests they are full of conclusory statements unsupported by specific factual allegations sufficient to indicate the plausibility of her claims. Somebody find this woman a competent attorney! Of course, it is possible that no competent attorney would take her case after evaluating whether she has any potentially valid legal claims against the defendants she identifies.

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**NEW YORK** – A unanimous panel of the New York Appellate Division, 4th Department, rejected an appeal by Nushawn Williams of an order determining that he is a dangerous sex offender requiring confinement under the N.Y. Mental Hygiene Law. *State of New York v. Williams*, 2016 WL 2602503 (May 6, 2016). According to the court, the evidence admitted at Williams' trial showed that, "in 1996, after he was advised that he was HIV-positive, respondent, using charm and/or force, engaged in sexual relations with 42 females, both adult women as well as girls under the age of 14 years old, 13 of whom contracted the virus. Two inmates and two corrections officers testified that, *inter alia*, respondent stated that he intended to continue that behavior upon his release, specifically referencing underage girls. Furthermore, respondent failed to complete sex offender treatment and had a poor prison disciplinary record prior to 2006." Obsessive media coverage of the prosecution of Mr. Williams fixed him indelibly in the minds of many New Yorkers as the showcase of an irresponsible HIV-positive person. Expert testimony at trial, offered both by the defense and the prosecution, suggested a variety of mental disorders that convinced the court to issue the order that was upheld in this appellate ruling. An amicus brief was filed by a coalition of HIV policy and medical groups to advise the

court on the latest science concerning HIV, but the court's reference to this issue was brief, going to Williams' contention that he received inadequate representation at his trial: "Respondent contends that there was no strategic or legitimate explanation for his counsel to challenge the validity of respondent's HIV-positive diagnosis or to present evidence regarding the limited risk of transmission of that virus by respondent to other based upon the medical advances since respondent's conviction in 1999. We reject that contention and conclude that respondent's attorney may have decided, legitimately, to avail himself of those approaches in light of the report of one of petitioner's experts, submitted in support of the petition, who referenced respondent's condition as a 'highly infectious disease.' The record establishes that respondent's attorney provided zealous representation both before and during the trial, and we therefore conclude that he received the meaningful representation to which he was entitled." The court rejected Williams' argument that the trial court should have granted his motion seeking to vacate the order determining that he is a dangerous sex offender requiring confinement.

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**NEW YORK** – A Manhattan jury found Bayna-Lekheim El-Amin guilty of a hate crime by his hurling of a wooden chair at a gay couple during a "melee" inside a Chelsea restaurant, Dallas BBQ. The two men had confronted El-Amin, who was overheard saying "white faggot spilling drinks" when one of the men, Jonathan Snipes, who had a bit much to drink, had knocked over his fishbowl margarita. Snipes, outraged by El-Amin's comment, reported smacked El-Amin in the faced with his A&M purse, and El-Amin responded by tossing the chair. Lawyers for the defendant argued that he acted in self-defense, having been attacked by the gay couple. The defendant claimed to be gay, and argued

that he was not motivated by the sexual orientation of the victims. The case generated considerable notoriety and controversy in the press. *NYPost.com*, May 25.

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**TEXAS** – In *Holt v. State of Texas*, 2016 WL 3018793 (Tex. App., Dallas, May 18, 2016), the Court of Appeals affirmed the conviction of Cody John Holt on a charge of continuous sexual abuse of a young child and the sentence of twenty-five years in prison. Holt is identified by Justice Lang in the Court of Appeals opinion as "transgender – he was born male, but identifies as a female. However, during oral argument and in response to this Court's inquiry, Holt's appellate counsel confirmed that Holt has not obtained a legal declaration changing his gender to female. Accordingly, because this is a court of law, we will refer to Holt through the use of male pronouns in this opinion." Holt was convicted on the testimony of young children the Holt had improperly touched their genitals while they were visiting with their grandmother, with whom Holt, their uncle, lived. Holt stated, in an interview with a police investigator, that "he had seen the children naked, J.M.R. had slept with Holt in his bed on numerous occasions, he had helped J.M.R. dry off after he got out of the bath several times, and he recalled accidentally touching J.M.R.'s penis for five or six seconds while daydreaming about his boyfriend." But he also claimed that he had used meth just before this incident occurred. The court rejected his motion to exclude this police officer's testimony at trial, and he was convicted by a jury. The main issue on appeal was Holt's contention that this statement should have been excluded, but the court concluded that he was present voluntarily and he had been advised of his rights adequately. Another issue was Holt's objection to evidence concerning his brother Dustin's conviction of indecency with a



# CRIMINAL / PRISONER LITIGATION

child, which he challenged as extraneous offense evidence. Holt argued this was improper propensity evidence and highly prejudicial to his own case. The State responded that the evidence properly rebutted the defense's theory that the children had been coached by their grandmother to falsely accuse Holt "in order to retain custody of her grandchildren and continue to collect their checks from the government." The court found that the general objection to the evidence offered by Holt's trial counsel did not perverse an extraneous offense claim, because it did not expressly put the trial court on notice that the defendant wanted the court to "balance the probative value against the prejudicial effect" under the relevant evidence rule, which trial counsel did not mention.

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## PRISONER LITIGATION NOTES

**CALIFORNIA** – United States Magistrate Judge Stanley A. Boone recommended denial of *pro se* prisoner Billy Coy Cochran's application for an injunction placing her in federal custody pending disposition of her case of lack of protection in *Cochran v. Aguirre*, 2016 U.S. Dist. LEXIS 62551 (E.D. Calif., May 11, 2016). Cochran alleged that another inmate "called him 'faggot rat,' punched him in the head until he fell down then kicked him in the chest and head until he was unconscious" – causing need for four stitches and a period of medical observation. According to Judge Boone, the slur "refers to Plaintiff being transgender." When Cochran returned from medical, she reported continued harassment, after which she was assigned to a "special needs yard," where she alleges some of the same inmates continued to harass her. Judge Boone wrote: "Plaintiff has only described past incidents of harassment and has failed to identify what specific

relief an 'order of protection' would entail." The opinion recites boilerplate standards for a preliminary injunction, without mention of the leading case of protection from harm – *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) – or any of its hundreds of progeny. There is also no discussion of transphobic or homophobic animus, although Cochran pled an Equal Protection claim. The bulk of the opinion concerns Cochran's allegation of denial of access to the law library, which Judge Boone finds also not to require injunctive relief, because Cochran has not been denied access to the Courts in fact, since she filed this case. *William J. Rold*

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**CALIFORNIA** – United States Magistrate Judge Elizabeth D. Laporte dismissed without prejudice *pro se* HIV-positive gay inmate Carlo Antonio Del Conte's petition for a writ of habeas corpus in *Conte v. Bordera*, 2016 U.S. Dist. LEXIS 69983 (N.D. Calif., May 26, 2016). His complaint challenged conditions of his confinement – including discrimination based on his sexual orientation, mistreatment and violence from staff and other inmates, and improper medical care – but the pleading did not attack the "legality or duration" of his confinement, as required for *habeas* relief. Judge Laporte declined to convert the case to a civil rights action alleging Eighth Amendment violations because there were no allegations of exhaustion of administrative remedies, as required under the Prison Litigation Reform Act [PLRA], and a prisoner cannot circumvent the PLRA's requirements by casting a civil rights lawsuit as a *habeas* case, she pointed out, citing *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Judge Laporte also reminded Del Conte that should he refile, the PLRA requires payment of a \$400 filing fee (as opposed to \$5 for a *habeas* petition), payable in installments even if relief is denied for

plaintiffs allowed to proceed *in forma pauperis*, and it limits the number of actions a prisoner can bring (three strikes rule). Judge Laporte denied a certificate of appealability, ruling that the correctness of this decision to dismiss the petition was not reasonably debatable. *William J. Rold*

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**GEORGIA** – *Pro se* HIV+ inmate Ronnie Sanks sued the warden, the prison's unknown chronic care doctor, and the prison's unknown dentist for failure to treat his "rotten infected teeth" (one of which had abscessed) in *Sanks v. Toole*, 2016 WL 2858881 (S.D. Ga., May 16, 2016). United States Magistrate Judge R. Stan Baker's Report and Recommendation ["R & R"] allowed him to proceed against the dentist. The pleading did not establish any personal involvement by the warden except the failure to respond to a letter from Sanks. The R & R likewise found the pleading insufficient as to the chronic care doctor, who referred lab results to an HIV specialist; but the doctor's statements – that the lack of dental care "could compromise [Sanks'] immune system" and was "possibly interfering" with his HIV medication – were bases for proceeding against the dentist. This "plausible" claim also rested upon allegations that Sanks made multiple requests for dental care for a condition that was diagnosed and in need of treatment, the absence of which posed a "risk" to health under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Goebert v. Lee Cty.*, 510 F.3d 1312, 1326 (11th Cir. 2007); and *Haney v. City of Cumming*, 69 F.3d 1098, 1102 (11th Cir. 1995). The R & R denied a preliminary injunction, although Judge Baker noted this did not necessarily preclude injunctive relief at a later date (should defendants not get the point after the dentist is served). The R & R found no "exceptional circumstances" warranting appointment of counsel.

# PRISONER LITIGATION

Noting that the “unknown” dentist apparently no longer works for the prison system, Judge Baker directed “reasonable efforts” to locate him. Presumably, the current dentist could be substituted for ongoing claims under F.R.C.P. 25(d). The opinion notes that Sanks had several teeth extracted at a prior Georgia prison, when his treatment plan was interrupted by his transfer. [Note: There is no recognition in the R & R that prisoners in state custody are patients in a closed “system” of multiple institutions whose services need to be coordinated if there is to be continuity of care upon transfer. Outstanding medical orders and unfinished treatment plans should be caught as part of intake processing. Transfer screening and intake health assessments are “essential” standards of a system for purposes of accreditation by the National Commission on Correctional Health Care. See P-E-03 and -04.] *William J. Rold*

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**ILLINOIS** – In *Harding v. Balwin*, 2016 U.S. Dist. LEXIS 63507, 2016 WL 2766641 (S.D. Ill., May 13, 2016), *pro se* plaintiff Samuel C. Harding alleged that he was subjected to abusive search and use of force procedures by the Illinois Department of Correction’s “Orange Crush” tactical team. Specifically, he plead that a team of officers without name tags: ordered him to strip (while uttering homophobic slurs); subjected him to an anal cavity search without cause; marched him with other inmates in such close formation that their hands cuffed behind their backs were in contact with the genitalia of the next inmate; forced him into prolonged painful “restraint” positions; beat and struck him with batons without cause; denied him medical care; and deprived him of toilet facilities, forcing him to sit in urine for hours. United States District Judge Staci M. Yandle recited these facts in even greater detail, on review

of the case under 28 U.S.C. § 1915A, noting the allegation that the actions took place in the presence of warden-level supervision. She determined that the allegations were similar to those in the class action challenge to Illinois “Orange Crush” abuse of inmates in *Ross v. Gossett*, No. 15-cv-309-SMY-SCW (filed March 19, 2015); and she ordered Harding’s case consolidated with *Ross*. She also ordered that the unnamed officers be listed in the caption as “John Does/Orange Crush Tactical Team” and directed that a magistrate judge set procedures for identifying and serving these defendants “with particularity.” *Ross* is also before Judge Yandle, wherein she denied a motion to dismiss Eighth Amendment claims on unreasonable searches, excessive use of force, and deprivation of basic rights, including supervision’s failure to intervene. She likewise found here that Harding’s similar claims survive screening, and she ruled that defendants could not waive reply under 42 U.S.C. § 1997e(g). The decision marshals case law on denial of toilet facilities. Judge Yandle referred Harding’s request for appointment of individual counsel to the magistrate judge, noting that all future filings in *Harding* should be made in *Ross* as lead case. The putative class in *Ross* is represented by Leovy & Leovy and the Uptown People’s Law group, Chicago, whose Complaint says the cuffed marching imposed by “Orange Crush” has become so common that it has taken on the prison colloquialism of “nuts to butts” formation. *William J. Rold*

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**ILLINOIS** – United States District Judge Staci M. Yandle permitted HIV+ *pro se* inmate Dannel M. Mitchell to proceed past preliminary review under 28 U.S.C. § 1915A on several counts of civil rights violations in *Mitchell v. Foster*, 2016 WL 2766748 (S.D. Ill., May 13, 2016). Suing nine defendants

and several John Does, Mitchell alleged that he was subjected to retaliation for bringing a lawsuit about medical care, subjected to excessive force, breach of medical confidentiality, racial and homophobic slurs, and cruel and unusual punishment. Judge Yandle divided the “somewhat disjointed” allegations into thirteen causes of action. In summary, Judge Yandle allowed Mitchell to proceed on claims that: (1) he was denied access to a physician for HIV-related neuropathy, in violation of the Eighth Amendment and in retaliation for exercise of his First Amendment rights; (2) he was punished for asking for medical care, in violation of the First Amendment; (3) he was placed at risk by revelation of his HIV status, in violation of the Eighth Amendment and as retaliation, in violation of the First Amendment – citing *Estate of Miller, ex rel. Bertram v. Tobiasz*, 680 F.3d 984 (7th Cir. 2012); (4) he was subjected to excessive force, placed naked in a strip cell for over 4 days, and denied medical care for his injuries – again, in violation of the Eighth Amendment and in retaliation for exercising First Amendment rights. The complaint includes allegations showing actual animus against Mitchell regarding defendants’ motivation that Judge Yandle declined to dismiss at this “early juncture.” This particular judge has plainly seen a lot in the Southern District of Illinois, writing: “As too many cases filed in the district court reflect, it is not uncommon for individuals who are HIV positive to be subject to physical harm, particularly in the prison setting.” Judge Yandle directed service (including production of home addresses of defendants *in camera*, if needed), and she precluded waiver of an answer under 42 U.S.C. § 1997e(g). *William J. Rold*

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**MARYLAND** – In January, United States District Judge George L. Russell, III, denied self-declared transgender

# PRISONER LITIGATION

inmate Michael Jones, a/k/a Latrina Marie Lopez, a preliminary injunction on medical care; but he reserved decision on declaratory relief on protection from harm, in *Jones v. Doe*, 2016 U.S. Dist. LEXIS 9908 (D. Md., January 28, 2016), reported in *Law Notes* (March 2016 at pages 112-3). Now, he grants summary judgment against Jones on all claims in *Jones v. Doe*, 2016 U.S. Dist. LEXIS 69603 (D. Md., May 26, 2016). Although Judge Russell denied appointment of counsel for Jones, the Maryland Corrections Commissioner appeared through the state Attorney General as an “Interested Party,” according to the opinion. The facts are much as stated in the earlier opinion. Jones was not found to be a transgender woman, distinguishing the instant claims from the holding of the leading Fourth Circuit transgender inmate medical care case of *De’lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013). Judge Russell’s second opinion is noteworthy for its extended discussion of correction’s officials’ attempts to diagnose Jones, who did not always cooperate (refusing some interviews) and presented inconsistent history (claim of treatment since age eleven, but no record of any treatment or even requests for same until 2015). Judge Russell also noted Jones’ inability to differentiate between being gay and being transgender, and Jones’ “very atypical” attribution of transgender development to being raised by women without a “father figure,” when transgender people typically attribute gender identity to “nature, not nurture.” Perhaps Jones was misdiagnosed, but it is difficult to conclude from the record as recited by Judge Russell (without input from counsel or an expert for Jones) that Maryland officials were deliberately indifferent to the attempt to diagnose a difficult patient. As such, the Eighth Amendment claim fails. Jones has remained in a single cell separate from general population

since the time of the earlier litigation and following investigation, screening, and counseling under the Prison Rape Eliminate Act. Although Judge Russell had reserved on the point of declaratory relief on protection from harm, he now finds no basis to order protective custody, after officials found claims of assault to be “unsubstantiated” and without medical corroboration, and Jones remains in a single cell. The latest opinion contains useful case law recitation of protection from harm standards under *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994). *William J. Rold*

**TENNESSEE** – Those who follow how one event in jail can lead to another, with increasingly disgusting conditions of confinement, should read the entirety of *Loyde v. Wilkes*, 2016 U.S. Dist. LEXIS 70867 (M.D. Tenn, May 31, 2016). It is a primer on claims of violation of a prisoner’s civil rights, a number of which survive screening by United States District Judge Aleta A. Trauger under the Prisoner Litigation Reform Act, 28 U.S.C. §§ 1915(e)(2) and 1915A, and 42 U.S.C. § 1997e. For readers of *Law Notes*, this discussion focuses on one particular thread. *Pro se* inmate Mack Mandrell Loyde alleged that a sequence of events started when he and his cellmate were charged with “homosexual activity” after hanging a sheet to block view of their cell. Although an investigation found “no evidence of any sexual activity,” they were subjected to a “separation” order as “incompatible,” which Loyde protested, saying he was not gay. In response, defendants: said “no known homosexual is going to hang around you for free”; claimed Loyde “cannot truly be a Muslim because he is friends with a homosexual”; and threatened “just stay away from those type of people and you’ll be fine.” Loyde says he experienced increased harassment and retaliation (including placement

in “the hole”) because he refused to “choose a side.” Judge Trauger plainly grasped the Equal Protection ramifications. “The Equal Protection Clause prohibits discrimination by government actors that burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.... Sexual orientation has not been identified as a suspect classification in the Sixth Circuit, but it does constitute an ‘identifiable group’ for equal protection purposes. See *Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012).” She continues: “The plaintiff’s claims that he has been subjected to selective enforcement of jail rules, additional restrictions and worse conditions than other inmates on the basis of his suspected homosexual relationship state a sufficiently colorable claim to survive initial review,” citing *Kohn v. Unknown Myron*, 2015 U.S. Dist. LEXIS 1165, 2015 WL 93726, at \*7 (W.D. Mich. Jan. 7, 2015) (claim that a plaintiff “was placed in a cell near the front of the unit where he could be observed by officers because he was gay, [and] was not allowed to pick his own cell mate unlike heterosexual prisoners” was not clearly frivolous). [Note. *Kohn* was the subject of an article in *Law Notes* (February 2015, pages 55-6), “Federal Judge Allows Some Claims to Proceed by Gay Inmate Subjected to Hostile Environment.” The Equal Protection holding in *Kohn* is a bright spot in an otherwise somewhat bleak treatment of gay plaintiffs’ claims.] Here, Judge Trauger also noted: “Whether the plaintiff is actually homosexual is not critical to this analysis.” The challenged actions in light of the “alleged comments” began “the chain of events comprising his complaint.” The facts as “understood” by the defendants are what matters, she wrote, citing the very recent

# PRISONER LITIGATION

Supreme Court case of *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016) (holding that city officials violated the First Amendment by demoting a police officer because they incorrectly believed that he had engaged in protected activity). This is one of a very few cases where a self-described straight inmate has been willing (and has been permitted) to raise an Equal Protection claim based on (mis)perceived sexual orientation. *William J. Rold*

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**VIRGINIA** – Pro se heterosexual inmate Tekur Dalga Anbessa was found guilty of violating prison rules by “masturbating off of” a correction officer (gender not specified) from his cell – something he admitted doing for months. He was fined \$12.00 and loss of privileges for “indecent exposure.” His attempt to protect his behavior from discipline under the Due Process Clause failed in *Anbessa v. Riddick*, 2016 U.S. Dist. LEXIS 58375 (E.D. Va., May 2, 2016). Senior U.S. District Judge James R. Spencer, screening the case under 28 U.S.C. §§ 1915(e)(2) and 1915A, found a “legitimate penological interest” in prohibiting sexual activity in prison under *Veney v. Wyche*, 293 F.3d 726, 733 (4th Cir. 2002). While “consent” is not an issue with masturbation, this writer is aware of no case extending the privacy/liberty interests found in *Lawrence v. Texas*, 538 U.S. 558 (2003), to the prison setting; *Bowers v. Hardwick*, 428 U.S. 186 (1986), remains alive and well in correctional facilities. See *Williams v. Reynoso*, 2015 WL 3795033 (E.D. Calif., June 17, 2015), reported in *Law Notes* (October 2015 at pages 463-4) (discussing California prohibitions after *Lawrence*); *People v. Perez*, 104 A.D. 3d 403, 961 N.Y.S.2d 51 (1st Dept. 2013) (sexual activity “would have been lawful, as well as being constitutionally protected... had it not occurred in a prison setting”). It is not much,

but one court has “reserved” on this point in a footnote in an unpublished opinion. *State v. Music*, No. 33285-3-III (Wash. App., April 28, 2016), n. 14. In his “rambling” complaint, Anbessa attributes his masturbation to his confinement in a “male-only” facility that deprived him of his “right to have sex and reproduction with a woman.” He also complains that the “male-only” prison environment “fosters homosexual behavior” and caters “to the gay lifestyle.” He maintains that gay prisoners “have the liberty to exercise their gay habit and culture day and night without ceasing” and he objects to their receiving meals three times a day and using commissary purchases for “snacks” during “gay dating.” He says his long sentence “extinguishes” his sex life, while gay inmates are permitted to “flourish” in the prison. Judge Spencer found that it is “beyond controversy” that male and female prisoners “may lawfully be segregated into separate institutions within a prison system,” citing *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 615 (8th Cir. 1997), and that Anbessa’s allegations do not state a “plausible” due process claim. While there is considerable sexual activity in prisons, much of it is violent or extorted. Those inmates who find consensual sex do what LGBT people have done for generations before *Lawrence*: they act outside the law and at risk of punishment. There is no evidence that those whose bathhouse fantasies extend to razor wire are volunteering to be incarcerated or that prisons are likely to be touted destinations for gay Club Med or Olivia Cruises. *William J. Rold*

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**WISCONSIN** – Chief United States District Judge William C. Griesbach denied summary judgment to two nurses and ordered a trial on inmate Ernesto Rivera’s claims of deliberate indifference to his serious health needs (burst appendix) in *Rivera v. Kettle Moraine Correctional Institution*,

2016 WL 2766642 (E.D. Wisc., May 12, 2016). The case is notable for finding a triable issue on two days’ delay in access to a physician, given the plaintiff’s presentation. Rivera (who is HIV+) complained multiple times of severe abdominal pain (10 on a scale of 10), accompanied by cramping, nausea, vomiting and diarrhea. Correction officers also made numerous calls to the medical unit on his behalf. The defendant nurses screened several of the complaints by telephone, ordering over-the-counter remedies and recommending walking and showers for relief. They denied Rivera’s request to see a physician, despite an “Abdominal Pain Nursing Protocol,” which stated that an inmate who is suffering from severe abdominal pain and also has an HIV diagnosis should be referred to a doctor on an urgent basis. On the last officer-initiated telephone call, Rivera reported that he believed his stomach was going to “burst” – only to be told he would be seen when the nurses “had time.” Within hours, he lost consciousness and was found on the floor of his cell by an officer. Rivera was transported to an emergency room, where it was found his appendix had ruptured. He had emergency surgery; and “[a]s a result of the rupture... the surgery was more complicated and the recovery more lengthy than expected.” Rivera’s claim that the nurses were deliberately indifferent to his serious needs survived a motion for summary judgment under *Estelle v. Gamble*, 429 U.S. 97, 107 (1976). It was not necessary for Rivera to show that the nurses knew he had appendicitis; it was sufficient that his symptoms and the standing protocol presented a jury question on their disregard of the serious risk in their refusal to send him to urgent care under *Chavez v. Cady*, 207 F.3d 901, 906 (7th Cir. 2000). There are material facts in dispute as to whether the delays increased the likelihood that Rivera’s appendix

# PRISONER / LEGISLATIVE

would rupture. Rivera's claims were supported by expert testimony. Rivera is represented by Foley & Lardner, LLP, Milwaukee.

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## LEGISLATIVE & ADMINISTRATIVE

**CONGRESS** – The House of Representatives has come to an impasse in enacting spending bills as a result to a controversy over President Obama's executive orders from last year requiring federal contractors to refrain from discriminating because of sexual orientation or gender identity. An amendment to a pending Defense authorization bill added in committee would have overturned the order, at least with respect to defense contractors. Then a counter-amendment was proposed on the floor, and soon the issue was looming over every pending spending authorization bill. Although the Defense Authorization bill passed the House on May 19 by a vote of 277-147 with the bad committee amendment intact, Democrats led by N.Y. Rep. Sean Maloney successfully proposed an amendment codifying the non-discrimination requirement which received enough Republican votes to add it to the pending MilCon-VA appropriations bill. However, enough House Republicans then withheld support from the bill (which did not have Democratic support) to defeat it, with some conservatives stating that they were voting against the Republican leadership's endorsed bill because it included the non-discrimination amendment. This is, of course, a must-pass bill, in order to continue funding of Veterans Benefits when the new federal fiscal year begins on October 1. This vote came a week after the House leadership had stopped the clock on a prior vote in order to persuade enough Republicans to switch their votes in order to defeat a Maloney anti-discrimination amendment that had

been added to the Defense bill with the support of some Republican members. Rep. Maloney has announced plans to continue proposing his amendment to every spending authorization bill that comes to the House floor.

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**CONGRESS** – U.S. Representatives Joe Kennedy (D-Mass.) and Bobby Scott (D-Va.) introduced the Do No Harm Act on May 18, intended to amend the federal Religious Freedom Restoration Act to make explicit that it does not provide a defense for individuals who violate federal laws because of their religious beliefs. Among other things, the DNH Act would specify that RFRA could not be used to excuse compliance with anti-discrimination laws, wage and hours laws, child welfare laws, provisions of goods and services under government contracts and grants, and provision of government services. Actual legislative action along these lines will not occur as long as Republicans control both houses of Congress.

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**U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES** – HHS released a final rule on May 13 implementing the non-discrimination provisions of the Affordable Care Act. The provisions include a ban on denial of health care or health coverage based on an individual's sex, including discrimination because of pregnancy, gender identity and sex stereotyping. This builds upon the expanded concept of sex discrimination that other federal agencies, such as the EEOC and the Office of Civil Rights in the Department of Education, have been developing. The final rule "does not resolve whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination," said the HHS release announcing the rule, but indicated that the agency would accept complaints

from lesbian, gay or bisexual individuals who allege they have been discriminated against because of sex stereotyping by a health care provider or insurer subject to the regulations.

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**CALIFORNIA** – Governor Jerry Brown has signed into law S.B. 1408, which creates an exception to the rule barring the use of organs from HIV-positive owners for transplants. Under S.B. 4, transplants can take place between HIV-positive donors and HIV-positive recipients. This brings state law in line with federal law, according to a press advisory issued on May 27 by EQCA, the state-wide LGBT lobbying group, and received unanimous approval from both houses of the legislature. \* \* \* The California Senate has approved S.B. 1146, which will prevent private universities from discriminating against students and staff based on gender identity or expression or sexual orientation. This measure is specifically intended to fill the gap left by the Department of Education's practice of granting exemptions from Title IX compliance to private universities that apply for them, usually citing religious objections. Bill sponsor Senator Ricardo Lara observed that at least 34 California universities had obtained Title IX exemptions. "These universities have a license to discriminate and students have absolutely no recourse," he said. "Addressing this issue is long overdue." *California Senate Press Release*, May 26. \* \* \* The Assembly has passed A.B. 1732, requiring single-occupancy restrooms in places of public accommodation and government facilities to be open to all genders. Another measure passed by the Assembly, A.B. 1887, would ban state agencies from requiring their employees, officers or members to travel to states that allow or require discrimination because of sexual orientation, gender identity or gender

# LEGISLATIVE

expression, and would require agencies to refrain from approving requests for state-funded or state-sponsored travel to such jurisdictions. *BloombergBNA Daily Labor Report*, 89 DLR A-12 (May 9, 2016).

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**FLORIDA** – Equality Florida Institute, Inc., reported on May 17 that the Florida Department of Health circulated a notice to hospitals and birthing centers in the state on May 5, advising them to begin issuing birth certificates to married same-sex couples that list both parents on the birth certificate. Amended birth certificates will be made available to married same-sex couples who had children during their marriages. This development occurs sixteen months after marriage equality went into effect in Florida as a result of a federal court ruling that the 11th Circuit and the Supreme Court refused to stay.

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**KENTUCKY** – Campbell County’s Fiscal Court voted 3-1 in favor of a syringe access program at their May 4 meeting, as part of a public health strategy to stem transmission of HIV. Implementation will depend on approval by the Northern Kentucky Health Department. Thus far the only county to establish a syringe exchange has been Grant County. *Cincinnati Enquirer*, May 19.

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**LOUISIANA** – The Senate Judiciary Committee rejected a proposed “pastor protection bill” intended to insulate from liability any clergy who refused to perform marriage ceremonies for same-sex couples. According to a May 25 report by the *New Orleans Times Picayune*, “Committee members voted to kill the bill after two key Democrats on the committee accused [Rep. Mike] Johnson of making changes to the legislation that would have allowed

clergy to refuse to perform marriages for interracial couples.” They also questioned the necessity for such legislation, since a state law passed in 2010 already protects individuals who decline to perform certain functions due to their religious beliefs. Johnson had argued that the measure was needed because of the Supreme Court’s *Obergefell* decision. Such arguments reveal a deep ignorance about how the 1st Amendment has been interpreted by the Supreme Court. No sane American judge would dare to order a member of the clergy to perform a marriage that is contrary to the tenets of their faith, or uphold any state sanction for a refusal by a member of the clergy to perform such a marriage. Proposed “pastor protection bills” are really wedge issue legislation intended to make political points, with no rational legal justification.

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**MARYLAND** – Under the Equal Pay for Equal Work Act of 2016, signed into law on May 29, 2016, the state’s law requiring equal work for equal pay regardless of sex has been extended to cover claims based on gender identity. *National Law Review*, May 23. One of the other important provisions makes it unlawful for employers to require employees not to discuss their pay with other workers.

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**NEW HAMPSHIRE** – H.B. 1661, which would ban conversion therapy by licensed therapists on minors, was described on May 25 as “likely dead” for this session of the legislature. The Senate approved a version of the bill by a 16-8 vote earlier in May, and the House approved a different version by a vote of 229-99, but differences in language have proved a stumbling block to achieving a final bill that passes both houses. A conference committee meeting was adjourned with the suggestion that lawmakers come back

next year with a new bill acceptable to both Houses. *New Hampshire Union Leader*, May 25.

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**NEW YORK** – The N.Y. Division of Human Rights adopted a new regulation on May 18 that prohibits discrimination based on a relationship or association with members of a protected class. This is intended to ensure that all individuals are able to gain and retain employment regardless of the race, color, creed, national origin, sexual orientation, gender identity, disability, or other protected characteristic of their family members or associates. This reflects longstanding federal case law construing Title VII, but had not previously been established under judicial interpretations of New York’s anti-discrimination law.

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**TENNESSEE** – The state’s enactment of SB1556/HB1840, religious freedom legislation that allows licensed counselors to deny service to LGBT clients based on the counselor’s religious beliefs, has prompted the American Counseling Association to announce that it will relocate its 2017 Conference & Expo, which had been scheduled to take place in Nashville.

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**VERMONT** – On May 25, Governor Peter Shumlin signed S.B. 132 into law, joining Vermont with California, New Jersey, Oregon, and Illinois as states that have legislated to prohibit licensed health care professionals from performing “sexual orientation change efforts” on minors. In addition, New York has condemned the practice by regulation, and the District of Columbia and Cincinnati have enacted ordinances against it. The Vermont law will go into effect on July 1, 2016. Lawsuits have challenged the California and New Jersey laws unsuccessfully, federal courts rejecting the argument

# LEGISLATIVE / LAW & SOCIETY / INT'L

that because such “therapy” is provided mainly through speech the measures should be found to violate 1st Amendment rights of health care professionals to engage in the speech and of their “patients” to hear it. The courts have also rejected the argument that the laws unconstitutionally abridge the Due Process rights of parents who want to procure such therapy for their children. *NCLR Press Advisory*, May 25.

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## LAW & SOCIETY NOTES

**CONSERVATIVE JUDAISM** – The Rabbinical Assembly, the professional association of rabbis in the Jewish Conservative Movement, passed a resolution during its annual convention on May 22-25, calling for Conservative synagogues to be “explicitly welcoming” to transgender people. The very scholarly resolution recites historical evidence of “non-binary gender expression” in ancient Jewish texts, speaks of the Jewish tradition that “all humanity is created in God’s Divine Image,” and calls on all institutions in the movement to ensure that their facilities meet the needs of transgender people, use names and pronouns that people prefer, and advocate for national and local policies on behalf of transgender people. *Washington Post*, June 1.

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## INTERNATIONAL NOTES

**UNITED NATIONS** – A group of 51 Muslim states blocked eleven gay and transgender organizations from attending a meeting at the United Nations to be held in June on global strategies to combat the AIDS epidemic, evoking protests from the United States, Canada, and the European Union. Egypt wrote to the president of the General Assembly on

behalf of the Organization of Islamic Cooperation, objecting to allowing LGBT NGOs to participate, without stating any reason for the objection. U.S. Ambassador to the U.N. Samantha Power reacted by writing in protest: “Given that transgender people are 49 times more likely to be living with HIV than the general population, their exclusion from the high-level meeting will only impede global progress in combatting the HIV/AIDS pandemic.”

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**ANTIGUA** – The Minister of Social Transformation has indicated she will make a recommendation to the cabinet of this Caribbean nation to reform the nation’s criminal laws to decriminalization consensual sodomy.

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**AUSTRALIA** – Victoria Premier Daniel Andrews stood up in Parliament on May 24 and expressed official government apologies to gay men who were convicted under criminal solicitation and sex crimes laws that have since been repealed. “There was a time in our history when we turned thousands of ordinary young men into criminals,” he said. “And it was profoundly and unimaginably wrong.” He apologized for the laws that had been passed and the “lives ruined,” stating, “It all started here. It will end here, too.” The opposition leader also apologized. Several men who had been convicted under the old laws were specifically invited to sit in the gallery so as to received their apologies in person, and Police Chief Commissioner Graham Ashton posted for photographs with the men on the steps of Parliament to commemorate the event. *The Age*, May 25.

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**AUSTRIA** – The Regional Criminal Court of Vienna ruled on April 29 that a transgender inmate is entitled to appropriate hormonal treatment

and gender reassignment surgery if medically indicated. The case concerned an inmate who was identified as male at birth but has identified as female for several years, but has been denied treatment for gender dysphoria by prison authorities. Dr. Helmut Graupner, counsel for the inmate and president of Rechtskomitee LAMBDA (Austria’s LGBT rights organization), described the decision as “groundbreaking” and stated, “Human rights do not end on prison walls, neither for trans inmates, who often face an especially hard time in jail.”

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**BERMUDA** – Premier Michael Dunkley urged voters to approve a same-sex marriage referendum which is scheduled to take place on June 23. Bermuda is a self-governing British territory.

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**BOLIVIA** – Vice-President Alvaro Garcia Linera signed into law a measure that will allow transgender people over age 18 to change their name, gender and photo in all public and private documents by virtue of the new Gender Identity Law. Justice Minister Virginia Velasco stated that the law was intended to conform to the Constitution, which contains a guarantee of equal rights. “Our transgender and transsexual brothers and sisters have suffered, but now with this law we have taken a step forward and we will continue to do this, because we are equal in the eyes of the law,” said Velasco. The signing ceremony was held after the two houses of the legislature approved the measure on May 19 and 20. *China Daily*, 2016 WLNR 15628942 (May 23).

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**CANADA** – Prime Minister Justin Trudeau announced that his government would be introducing federal legislation to guarantee legal and human rights

# INTERNATIONAL

protection to transgender people across Canada. The measure, which was unveiled on May 17, would update the Canadian Human Rights Act and the Criminal Code to ensure that gender identity and gender expression are included among other grounds of forbidden discrimination and protection against harassment and bias-motivated violence. \* \* \* Quebec Justice Minister Stephanie Vallee has introduced legislation, Bill 103, to change the Civil Code to allow transgender teenagers to seek permission to legally change their names and gender designations on their birth certificates. If a parent objects, the matter would be referred to a tribunal, and requests for such changes from children under the age of 13 must be initiated by one of their parents. Since gender reassignment surgery is not performed on minors, this means that such surgery would not be a prerequisite to obtaining the name changes and birth certificate designations. The measure would also amend Quebec's Charter of Human Rights and Freedoms to explicit prohibit gender identity discrimination. *Canadian Press – Broadcast Wire*, June 1, 2016. \* \* \* Openly-lesbian Ontario Premier Kathleen Wynne announced on May 20 her intent to fix “outdate” laws under which same-sex co-parents are required to adopt their own children in order to establish their legal parental relationship. She stated that she has asked the attorney general to “bring forward legislation in September that would, if passed, ensure that parents are clearly recognized in Ontario, whether they be gay or straight, and whether their children are conceived with or without assistance.” *Hamilton Spectator*, June 1. \* \* \* Canada's Conservative Party voted to remove that traditional definition of marriage from the party's policy book, accepting the reality that marriage equality has been the law in Canada for more than a decade. A proposal to effectively recognize the reality

of same-sex marriage passed at the party's Vancouver convention by a vote of 1,036 to 462. It was seen as part of a bid to recast the public image of the party away from the more hardline conservatism of former Prime Minister Stephen Harper, now out of leadership after being defeated by Justin Trudeau. *Globe & Mail*, May 29.

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**CHINA** – An arbitration panel rejected a complaint of gender identity discrimination by a man in Guizhou Province who was dismissed from employment by a health center there. News reports suggested this was the first attempt to a transgender person to seek a legal remedy for employment discrimination in China. *Agence France Presse*, May 11. It was widely reported that the man plans an appeal. He was identified female at birth but identifies and dresses as a man. He was discharged after eight days on the job when his employer learned that he was identified at birth as a woman.

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**DENMARK** – The Parliament's Health Committee decided on May 31 that Denmark should no longer classify “being transgender” as a mental illness. Deputy Chair Flemming Mortensen stated, “It is complete inappropriate to call it a sickness. There is a longstanding wish from the trans community in Denmark to have it removed” from the health ministry's clinical guidelines on illness. The proposal is intended to pressure the World Health Organization to make a similar move. A spokesperson for LGBT Denmark, a civil rights group, hailed the move as a “means of removing an institutionalized stigmatization of trans people.” *Agence France Presse English Wire*, May 31.

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**ENGLAND** – The National Health Service stirred up outrage in the LGBT community when it announced that

PrEP (Pre Exposure Prophylaxis to prevent HIV transmission) would not be made available through the public health benefits routinely provided to residents of England. The denial was not premised on any evidence that PrEP is ineffective, but rather, according to the statement released, that the agency was concerned about the risk of legal challenges from “proponents of other ‘candidate’ treatments and interventions that could be displaced by PrEP if NHS England were to commission it.” Bizarre! Responding to arguments from “stakeholder groups,” the agency agreed to reconsider the decision at a meeting on May 31, but resolved to stick with its position, stating that it was relying on “external legal advice” but that it would continue to work on research to see how PrEP could be “commissioned in the most clinically and cost effective way.” “Stakeholder groups” were not happy.

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**GERMANY** – Germany is moving to overturn convictions under anti-gay criminal laws that were imposed after World War II until Germany decriminalized consensual sodomy in 1969. Ironically, as part of reparative action after the war, persons convicted of crimes under those statutes during the Nazi period had their convictions overturned in 2002, but about 50,000 men who were convicted between 1946 and 1969 did not benefit from that action, because their convictions were obtained under the post-war democratically elected government. A study commission by the Federal Anti-Discrimination Agency concluded that the government is legally obligated to rehabilitate the men, overturn their convictions, and pay compensation. *BBC.com*, May 11.

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**JAPAN** – Recognition of same-sex partnerships continues to spread at the municipal level. The city of Takarazuka



# INTERNATIONAL

in western Japan announced that it would issue certificates to recognize same-sex partnerships as equivalent to marriage, beginning on May 31, becoming the fourth local government in Japan to take such a step. The city, in Hyogo Prefecture, will issue certificates where both of the partners are age 20 or older and reside in the city. The other jurisdictions now issuing such documents are Shibuya and Setagaya wards in Tokyo, and Iga in Mie Prefecture, central Japan. The city government also plans to revise its ordinance governing city housing to allow same-sex partners to live together in such apartments. Under existing rules, only married couples can cohabit in the city housing. *BBC International Reports*, May 31.

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**LATVIA** – The Supreme Court of Latvia announced agreement with an administrative ruling that current regulations for marriage registration do not extend to same-sex marriages. However, said the court, the administrative court erred by refusing to let a same-sex couple argue that they should be allowed to register as a “family relationship” other than marriage, so the case should go back to the administrative court for a full review of the question whether it would contravene European Human Rights Law and the Convention on Human Rights to deny such registration. This ruling would seem to set up the possibility of legal civil unions in Latvia, since the European Court on Human Rights has ruled that states party to the Convention on Human Rights must provide some form of legal recognition to same-sex relationship. *LSM.lv*, May 27.

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**MALAWI** – In December the Minister of Justice and Constitutional Affairs, Samuel Tembenu, announced a moratorium on enforcement of the

laws against homosexual conduct. In February, two ministers and a political leader applied to the High Court for an injunction against the moratorium on the ground that the government could not order suspension of enforcement without legislative authorization. On May 12, High Court Judge Dingiswayo Madise upheld an injunction against the moratorium, stating that “the interest of justice tilt towards sustaining the order of injunction” until a final determination can be made as to the constitutionality of the criminal law. Madise ruled that the case is “suitable” to be referred to Chief Justice Andrew Nyirenda for certification as a constitutional matter to be taken up by the nation’s highest appellate tribunal. “I am of the view that a panel of not less than three judges will be able to adjudicate on all the issues that have been raised in the matter, wrote Judge Madise. At the same time, he concluded that the two ministers did not have sufficient interest to be plaintiffs in the matter. At the same time, however, the court allowed the Center for Development of the People and the Center for Human Rights and Rehabilitation to join the case as *amicus curiae*. *AllAfrica.com*, May 12.

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**MEXICO** – Campeche became the seventh Mexican state to allow same-sex marriages by a 34-1 vote of the state Congress on May 10, according to a report by internet journalist Rex Wockner. These seven were achieved by a variety of means – litigation, legislative votes, reinterpretation of existing laws, governor orders – and there is no easy mechanism to achieve marriage equality nationwide through a federal Supreme Court ruling, but the momentum continues as litigation or legislative proposals are pending in various states. Short of achieving that, same-sex couples who are determined to get married in their home state and are willing to invest the time

and money can seek a court order (“amparo”), which must be granted by local courts pursuant to a Supreme Court order. The Supreme Court has already ruled that legally-contracted marriages must be recognized throughout the country. There have been some cases of groups of couples joining together to seek marriage court orders successfully. So full marriage equality in Mexico seems to be a matter of time now: when, not if. By the end of May, more states had fallen in line, leaving the count at ten states and the capital district. On May 17, Mexican President Enrique Peña Nieto proposed amending the Constitution to achieve marriage-equality nationwide rather than through this piecemeal process. Nieto penned an eloquent argument in support of his proposal; an English-language version was published by *Huffington Post*. Amending Mexico’s Constitution is not easy, requiring 2/3 votes from each chamber of the national legislature and ratification by a majority of the 31 states. A few observers expressed concern that this proposal could backfire, leading to a contrary amending sealing a different-sex definition of marriage into the Constitution. And the state-by-state efforts continued.

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**NAURU** – The island nation of Nauru has revised its criminal code, in the process repealing criminal penalties for consensual homosexual conduct. The prior criminal code provisions derived from an 1899 statute that was based on old laws from the Australian state of Queensland. The reform also eliminates criminal penalties for “attempted suicide” and removes immunity of married men from charges of rape by their wives. *Sydney Morning Herald*, May 27.

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**ROMANIA** – Groups linked with the Orthodox Church, joined under

# INTERNATIONAL

the umbrella title of “Coalition for Family,” have submitted 3 million signatures on a petition seeking to block legal recognition for same-sex unions. The action closely followed on statements by right-wing politicians in Italy that they would seek to overturn the recent legislation establishing civil unions for same-sex couples in that country. The Italian action came in response to a ruling by the European Court of Human Rights that Italy was required to extend some form of legal recognition to same-sex couples under European human rights law. Romania is also a member of the European Union, and thus under a similar duty, as yet unfulfilled. Proponents of the initiative want the government to change the wording of current marriage law, which refers to a union of “partners” rather than a union of “husband and wife.” Since the current law has not been construed as allowing same-sex marriages, the Coalition’s effort has been criticized as being intended to “incite public opinion against LGBT people,” according to a press report of a statement issued by Accept, a group “that promotes the rights of the LGBT community.” *Agence France Presse English Wire*, May 23.

**SCOTLAND** – The Church of Scotland’s general assembly has voted to allow ministers to enter into same-sex marriages, but will retain its “traditional view of marriage between a man and a woman” and will not authorize the ministers to actually perform same-sex marriages for others. This result was accomplished by allowing individual congregations to “opt out” of the traditional teaching if they want to appoint a minister or deacon who is married to a same-sex partner. A debate on whether the church will sanction same-sex marriages is expected to be held after the church’s Theological Forum presents a report on

the issue next year. *Associated Press*, May 21.

**SEYCHELLES** – Seychelles, an island chain off the coast of East Africa that was a long-time British colony that achieved independence in 1976, has voted to decriminalize consensual sodomy between adults. The National Assembly voted to approve the reform on May 18. Out of 28 members present for the vote, 14 votes in the affirmative and 14 abstained, with four other members not present for the vote. The proposal to repeal the law, a surviving remnant from British colonial rule, was made by President James Michel in his State of the Nation address. Prior to repeal, a consensual sodomy offense could subject a defendant to a potential prison term up to 14 years. *Seychelles News Agency*, May 18.

**SOUTH KOREA** – A gay male couple is appealing a ruling rejecting their attempt to register their marriage. The Seoul Western District Court ruled against Kim Jho Gwang-soo and Kim Sung-hwan, who conducted their own marriage ceremony in September 2013 but suffered rejection by the Seoul district office of their attempt to register the marriage officially. The Western District Court said legislative action would be required to allow registration of a same-sex marriage. The plaintiffs’ legal representative said that two more same-sex couples were planning to file separate lawsuits seeking legal status for their marriages. *Korea Times*, May 26.

**SRI LANKA** – The Sri Lanka Supreme Court has ruled that children living with or affected by HIV/AIDS have a full right to education, ruling against a school that had denied admission to a five-year-old boy because he is HIV-positive. The April 28 ruling was

hailed by the United Nations UNAIDS Asia and Pacific Support Team, which issued a statement on May 5 praising the April 28 ruling. *Arab News*, May 5.

**SWITZERLAND** – The parliament has approved a measure allowing second parent adoptions for same-sex couples. There was overwhelming support for allowing this when the same-sex couples are married, with somewhat narrower support for allowing adoptions when children are being raised by unmarried same-sex couples. *swissinfo.ch*, May 30.

**SYRIA** – The Islamic State jihadist group was reported to have stoned a 16-year-old boy to death in Eastern Syria for alleged homosexuality, according to the Syrian Observatory for Human Rights, a monitoring group based in the U.K. The punishment was inflicted in front of a crowd of people in the city of al-Mayadin in Deir Ezzor province. *ADNKronos International*, May 24.

**TAIWAN (REPUBLIC OF CHINA)** – Justice Minister Chiu Tai-san announced on May 30 that he would support enactment of a new same-sex companion law, rather than amending the Civil Law to legalize same-sex marriages. Chiu spoke while attending the Judiciary and Organic Laws and Statutes Committee session of the Legislative Yuan. He asserted that amending the Civil Law would be more complicated than introducing a new law specifically to protect same-sex couples. A spokesperson for the Taiwan Alliance to Promote Civil Partnership Rights, Hsu Hsiu-wen, stated opposition to this, criticizing the proposal as “segregative” and stating: “The true meaning of marriage equality is to allow opposite-sex couples and

# INT'L / PROFESSIONAL

same-sex couples enjoy the same legal protection under the same law.” Public opinion polls in Taiwan have shown increasing support for extending equal marriage rights to same-sex couples, but the government has shied away from endorsing such proposals. *China Post*, June 1.

**UNITED KINGDOM** – “Lloyds Banking Group has become the first UK organization to extend its staff healthcare plans to cover gender dysphoria,” reported *European Union News* on May 11. Staff at the banking group, which owns Lloyds Bank, Halifax, Bank of Scotland and Scottish Widows, can access gender reassignment surgery through their company health insurance coverage. It was estimated that at least twenty employees were likely to use the new benefits relatively soon.

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## PROFESSIONAL NOTES

**DONALD VERRILLI, JR.**, who as Solicitor General of the United States is the chief representative of the federal government in litigation before the Supreme Court, announced that he would leave office on June 24. Verrilli argued on behalf of the Obama Administration to persuade the Court to find unconstitutional the Defense of Marriage Act and state laws banning same-sex marriages. He and attorneys under his supervision argued before the Court in *Hollingsworth, Windsor* and *Obergefell*, helping to achieve historic victories for LGBT rights. Prior to his service in the Justice Department during the Obama Administration, Verrilli had been a partner at Jenner & Block, and it seemed possible that he would rejoin that firm, where the head of the firm’s appellate and Supreme Court practice is Paul Smith, who

argued on behalf of Lambda Legal in the historic Texas sodomy case, *Lawrence v. Texas*, and went on to become a board member at Lambda Legal.

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On May 25, the **LGBT BAR ASSOCIATION OF GREATER NEW YORK (LEGAL)** initiated its first Section, The Family & Matrimonial Law Section, with a reception at the Atlas Social Club. The FMLS will offer members who practice, or have an interest in, family and matrimonial law a combination of resources, access to events, and discourse uniquely focused on the intersection of family and matrimonial law and the LGBTQ community. LeGaL will hold its annual LGBT Pride Reception at Proskauer Rose LLP on June 16.

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The **NEW YORK CITY BAR ASSOCIATION**’s annual Pride Reception will be held on June 23, at which time the LGBT Rights Committee will present its annual Arthur S. Leonard Award to Michael Silverman, departing Executive Director, Transgender Legal Defense and Education Fund, and Allen Drexel, Partner, Drexel LLC. Drexel is a past chair of the Committee and an activist for LGBT rights.

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The **WILLIAMS INSTITUTE AT UCLA LAW SCHOOL** has announced new staff members: Michael Allan is the new Administrative and Events Coordinator. Cathryn L. Dhanatya is the new Chief Administrative and Finance Officer and Scholar of Policy, Reilly Nelson is the new Executive Administrator. Megan A. Brownlee is a 2016 Gleason/Kettel Fellow, Ashley King is the 2016 Michael D. Palm Fellow, and Yashasvi Datta is the 2016 Zeke Webber Fellow.

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“*State v. Batista*” cont. from pg. 236

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“The statute requires disclosure only to potential sexual partners – persons who would be directly affected by a lack of such knowledge. In this way, a potential partner may elect not to engage in sexual conduct, or may take measures to ensure that the virus is not spread during sexual relations. Further, there is no requirement that the public in general be informed of an infected person’s HIV status, or that this information become public in any way.” Rejecting Batista’s challenge on the “narrow tailoring” point, the court found it irrelevant that there are other means of HIV transmission apart from sex. “While the state has a compelling interest in stopping the spread of HIV through any means,” wrote Stautberg, “the interest address by R.C. 2903.11(B)(1) is halting the spread of HIV through sexual conduct. We can think of no less restrictive alternative to serve this interest.”

Batista also challenged his sentencing, to no avail. He objected that during the sentencing proceeding, the victim in his case, who was not infected, was allowed to speak and informed the court that Batista had previously infected his wife and a former mistress with HIV, and that Batista’s wife had unknowingly passed the virus to one of their children. “Batista did not deny these allegations,” wrote the court. “And his history of infecting others was relevant to his likelihood to reoffend and to the court’s need to protect the public. We find no error.” The court also dismissed Bautista’s objection to the trial court’s statement, when pronouncing sentence, that Batista was a “lethal weapon.” Wrote Judge Stautberg: “Since AIDS remains an incurable disease, and since Batista has infected a number of people, we do not find this statement to be particularly problematic.”

Batista is represented by the Hamilton County Public Defender’s Office. ■

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