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The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII of the Civil Rights Act of 1964, issued a decision on July 15 holding for the first time that Title VII’s ban on employment discrimination because of sex includes discrimination against somebody because they are gay, lesbian, or bisexual. This marks a complete turnaround by the EEOC from the position taken by the agency throughout all of its 50-year history. The Commission, acting in its appellate capacity, overruled a 2013 agency decision that had rejected a discrimination claim by a man who had been denied a permanent Front Line Manager position by the Federal Aviation Administration (FAA). Baldwin v. Foxx (Anthony Foxx, Secretary, Department of Transportation), Appeal No. 0120133080, 2015 WL 4397641 (EEOC, July 15, 2015).

The EEOC went into business in July 1965 when Title VII took effect. That statute was the result of prolonged struggle in Congress, including a lengthy filibuster in the Senate led by southern conservative Democrats opposed to racial integration of the workplace. Almost all of the attention around Title VII focused on the proposal for a federal ban on race discrimination in employment. The bill originally introduced in the House of Representatives was limited to race or color, religion, and national origin as prohibited grounds of discrimination. The relevant House committees did study sex discrimination issues, but decided that the Equal Pay Act passed in 1963, which prohibited compensating men and women at different rates for the same work, was sufficient, and proponents of the bill feared that adding a general prohibition on sex discrimination in employment would endanger the bill’s passage. Nonetheless, on the floor of the House, Rep. Howard Smith (Dem.) of Virginia, a long-time proponent of equal legal rights for women, introduced an amendment to add sex, which was passed by an unlikely alliance of pro-feminist liberals and southern conservatives, some of whom likely supported the amendment hoping that this would make the final bill more difficult to pass. Because “sex” was added as a floor amendment, the committee reports on the bill do not discuss its meaning, and Smith’s amendment did not add any definition of sex to the definitional section of the bill, merely adding the word “sex” to the list of prohibited grounds of discrimination.

After the bill passed the House it went to the Senate under a deal worked out by the leadership to bypass the committee process, in order to prevent it from being bottled up in committee by the conservative southern Democratic chair of the Judiciary Committee, Senator Eastland, who was a staunch opponent measure. Instead it went directly to the Senate floor under a procedure that allowed little opportunity for amendments. There was some brief discussion about the inclusion of sex but nothing really illuminating, apart from a floor amendment attempting to reconcile the bill with the Equal Pay Act, the meaning of which wasn’t settled until a Supreme Court ruling several years later.

Consequently, the “legislative history” provides no direct help in figuring out what kind of discrimination Congress intended to ban when it voted to add “sex” to the list of prohibited grounds of employment discrimination. Without such guidance, the EEOC and the courts were left to their own devices in trying to figure out what this meant, and the conclusion they reached early in the history of Title VII was that it was intended to prohibit discrimination against women because they were women or against men because they were men. As such, both the EEOC and many courts ruled after the Act went into effect that it did not apply to discrimination because of a person’s sexual orientation or gender identity, both concepts that were largely missing from American jurisprudence during the 1960s. One commonsense reason usually raised by courts in rejecting such discrimination claims was that if Congress had intended to ban these forms of discrimination, there surely would have been some mention during the debates over the bill. They have also pointed to the fact that bills to add sexual orientation and gender identity to Title VII or to enact a free-standing law addressing such discrimination have been frequently introduced in Congress since the early 1970s, but no such measure has ever been enacted.
Some courts have construed this history to reflect Congress’s view that Title VII does not already ban such discrimination and should not ban it.

A Supreme Court decision from 1989, Price Waterhouse v. Hopkins, 490 U.S. 228, initiated a changing landscape for sexuality issues under Title VII. Ann Hopkins, rejected for a partnership at Price Waterhouse, won a ruling from the Supreme Court that sex stereotypes held by some of the partners who voted against her application violated her rights under Title VII. Writing for a plurality of the Court, Justice William J. Brennan said that Title VII applied to discrimination because of gender, not just biological sex. Later courts seized upon this to justify taking a broader view of sex discrimination under Title VII.

By early in this century, there was a growing body of federal court rulings suggesting that LGBT people might be protected to some extent under Title VII, depending on the nature of their case. If the discrimination they suffered could be described in terms of sex stereotypes, or if they could show that they had been the victim of sexual harassment that turned in some way on their gender, they might be able to maintain a legal claim of discrimination.

Within the past few years, the EEOC has taken a leading role in making these developments more concrete, first by its treatment of discrimination claims within the internal investigative process, and then through its decision-making on discrimination claims brought against federal agencies, where the Commission plays an important appellate role reviewing rulings by federal agencies on internal employment grievances. In 2012, the EEOC ruled in a case against the Justice Department that a transgender woman who was denied a position because of her gender identity had a valid claim under Title VII. Macy v. Dep’t of Justice, 2012 WL 1435995 (April 20, 2012). This ruling echoed many then-recent federal court decisions, including some by courts of appeals, finding that discrimination because of gender identity almost always involves sex stereotyping by the discriminating employer. Late last year, the agency, and then the Justice Department, concluded that all gender identity discrimination claims could be investigated and prosecuted under Title VII. Pushing that position forward, the Justice Department has filed suit on behalf of the EEOC, or joined ongoing private cases in federal court, seeking to move the courts beyond the stereotyping theory to accept that gender identity discrimination is sex discrimination.

The July 15 ruling by the EEOC seeks to achieve the same thing for lesbians, gay men and bisexuals confronting employment discrimination. While acknowledging the significance of the Supreme Court’s Price Waterhouse decision and sex stereotyping theory in widening the agency’s appreciation of the scope of sex discrimination, this ruling takes things a step further. “In the case before us,” wrote the Commission, “we conclude that Complainant’s claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. The Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.”

The Commission amplified this conclusion with an extended discussion, grounding its conclusion in rulings by several federal courts and pointing especially to the well-established principle that discriminating against somebody because of the race of their sexual partner has long been deemed by the Commission and the courts to be race discrimination. Logically, then, discriminating against somebody because of the sex of their sexual partners would be sex discrimination. The Commission also referenced the recent marriage equality litigation, noting the Supreme Court’s statement in Obergefell v. Hodges that laws prohibiting same-sex marriage “abridge central precepts of equality.” Of course, the Commission also explained that recent court rulings have made clear that stereotyped thinking about proper gender roles, as well as behavior, underlies much sexual orientation discrimination, thus providing a firm theoretical justification in the Supreme Court’s Price Waterhouse case.

What is the significance of this EEOC ruling? It is likely to result in the agency initiating federal court litigation, enlisting the Justice Department, to push this interpretation of Title VII into the courts. Although federal courts are not bound by an administrative agency’s interpretation of its governing statute, the Supreme Court might well endorse it, perhaps in a decision following Honey v. United Parcel Service.
Court has frequently deferred to agency interpretations when they are seen as consistent with the statutory language and overall congressional purpose and constitute a reasonable interpretation of the statute. Here is where the EEOC’s past rulings may result in less deference than courts otherwise might give. When an agency “changes its mind” about an issue, courts may be skeptical about whether the new ruling is more political than legalistic. So it may be premature to assume that this ruling by the EEOC means that there is no need to enact explicit federal protection through a vehicle such as the Employment Non-Discrimination Act (ENDA), which has been pending in one form or another in Congress since 1993, or the new Equality Act (see below) introduced this summer. Since there is little likelihood that the current Congress will pass the Equality Act, it will be useful for the federal government’s primary civil rights enforcement agency, the EEOC, to be on record that sexual orientation discrimination is sex discrimination that violates Title VII. EEOC’s view may be influential with the agencies that enforce the Fair Housing Act and the other titles of the 1964 Civil Rights Act, and its analysis may prove persuasive to the courts, regardless of the level of deference it receives.

The vote on this decision is not indicated in the opinion (which was drafted by the Commission’s staff), but was reported in the press as a party-line vote of 3-2. Under the statute, the five-member Commission may not have more than three commissioners who are members of the same political party. The two Republicans on the Commission voted against this decision, but did not issue a written dissent. A prime mover behind the EEOC’s expanded view of sex discrimination to encompass gender identity and sexual orientation claims has been Commissioner Chai Feldblum, the first openly lesbian or gay member of the Commission, who was appointed and reappointed by President Obama and confirmed by the Senate.

Democrats Introduce “Equality Act” in Congress

On July 23, a group of almost 200 Democratic members of Congress introduced The Equality Act in the House and Senate. The lead sponsor in the House is Rep. David Cicilline of Rhode Island. The lead sponsor in the Senate is Senator Jeff Merkley of Oregon. The bill was introduced with 155 House cosponsors and 40 Senate co-sponsors, all Democrats. Although they were invited to do so, no Republican members of either chamber agreed to co-sponsor the bill prior to its introduction, even though several Republicans in both houses have voted for or co-sponsored at various times the predecessor Employment Non-Discrimination Act (ENDA), which has been introduced in some form in every session of Congress since the mid-1990s. Abandoning the methodology of ENDA, the Equality Act takes the approach of amending various federal civil rights statutes to add “sexual orientation” and “gender identity” to the existing lists of forbidden grounds of discrimination. The measure is formally identified as H.R. 3185 and S. 1858 in the 114th Congress.

Among the statutes to be amended are the Civil Rights Act of 1964, the Civil Service Reform Act of 1978, the Government Accountability Act of 1995, the Fair Housing Act, the Equal Credit Opportunity Act, and a statute governing non-discrimination in jury service.

Notably, the bill does not propose to add “sexual orientation” or “gender identity” to the list of grounds on which discrimination is permissible as a bona fide occupational qualification; the proponents of the measure thereby take the position that sexual orientation and gender identity, like race or color, cannot be legitimate grounds for employment discrimination under any circumstances.

Unlike ENDA, which focused narrowly on intentional employment discrimination, the Equality Act will apply broadly to the areas of public accommodations, access to public facilities and public education, employment (including government employment), credit, and jury service. The bill specifically provides that the federal Religious Freedom Restoration Act of 1993 “shall not provide a claim, or a defense to a claim under, a covered title, or provide a basis for challenging the application of enforcement of a covered title.” Thus, businesses and employers subject to the statutes amended by the Equality Act will not enjoy religious exemptions any broader than those already contained in those statutes (together, of course, with the ministerial exemption read into Title VII by the Supreme Court as an application of the 1st Amendment Free Exercise Clause). Also unlike ENDA, the bill does not eschew “disparate impact” claims; wherever such claims could be made under existing federal civil rights laws, they could be made on the basis of sexual orientation and gender identity. This is particularly significant in that the Supreme Court ruled for the first time this past term that disparate impact claims can be brought under the Fair Housing Act, endorsing a position taken by most of the federal circuit courts of appeals.

The lack of Republican sponsors, at a time when the Republicans control the agenda in both houses of Congress, suggests that the bill is going nowhere in this session. However, introduction of the measure is a first step towards building support, in the hope that the measure might pass in a future session. It gives groups evaluating congressional candidates an item to include on any scorecard purporting to measure support for LGBT rights, and can also be used to pin down the positions of presidential candidates.

The bill includes a lengthy section of Congressional findings in an attempt to counter any concerns about the legislature’s jurisdiction to enact the bill under the Commerce Clause and Section 5 of the 14th Amendment. BloombergBNA Daily Labor Report, 141 DLR A-14 (July 23, 2015).
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

A seven-judge chamber of the European Court of Human Rights ("ECHR") has ruled that Italy’s failure to adopt a same-sex marriage or civil union law similar to those in other European countries violates the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Oliari and Others v. Italy, Applications Nos. 18766/11 and 36030/11 (July 21, 2015). While all seven judges found Italy had violated Article 8 of the Convention, the panel was split 4-3 as to the basis of the violation.

Three same-sex couples had sought to marry in Italy and were rejected by the civil authorities. All three couples took legal recourse through the legal framework in Italy, but were unsuccessful. The couples filed actions with the ECHR, arguing that Italy’s refusal to allow them to marry violated Articles 8, 12, and 14 of the Convention. Article 8 states: “Everyone has the right to respect for his private and family life, his home and his correspondence,” and “There shall be no interference by a public authority with the exercise of this right except as such is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others.” Article 12 relates to the right to marry, and Article 14 sets forth a non-discrimination provision.

Neither the majority nor the concurring judges went as far as to rule or suggest that they were ready to hold that Article 12 requires all member states to establish a legal framework of same-sex marriage or civil unions. The majority of the panel noted that it previously had ruled that there was no right under Article 12 for same-sex marriage, when the court found the Article was not violated by Austria because it had established a civil-union law with rights similar to marriage. The panel noted, however, that Greece had run afoul of the Convention when it created a civil-union law that excluded same-sex couples. The majority set forth the present state of the law in Europe: 24 out of 47 Convention countries had some form of same-sex marriage, civil unions, or both. The panel summarized the last decade’s legal developments world-wide with respect to same-sex marriage, explaining the reasoning behind major decisions, and stated that the Court already had ruled that “same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relatively similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.”

After disposing of several procedural issues and ruling that the three couples constituted “victims” with standing to bring the action, the majority examined whether implementing a same-sex marriage or civil union law would amount to a burden to the Government of Italy. The court stated that Italy had “failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole,” noting that there were approximately one million homosexuals and bisexuals in central Italy alone and citing to various public opinion polls showing that a majority of the Italian people felt that same-sex couples should have their relationships legally recognized in some way.

The Court concluded that “in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants’ momentous interests as identified above, and in the light of the domestic courts’ conclusion on the matter which remain unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfill their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.”

In a concurring opinion, three judges presented an alternate theory for finding Article 8 of the Convention had been violated. The concurrence noted that Italy’s constitutional court had already ruled that the Convention required Italy to enact a same-sex marriage or civil union law; however, the Italian legislature had failed to enact such a law. The concurrence found that Italy’s failure to comply with its own constitutional ruling was sufficient on its own to find that Article 8 had been violated and the concurring judges would have found for plaintiffs on this legal reasoning instead.

Having found there to be a Convention violation, the majority awarded damages and some legal costs to the three same-sex couples. – Bryan C. Johnson
California Agrees to Pay for One Transgender Prisoner’s Sex Reassignment Surgery and Paroles Another to Avoid Ninth Circuit Ruling

Over the last two years Law Notes has followed two cases of California transgender prisoners seeking sex reassignment surgery [SRS]. Both are before United States District Judge Jon S. Tigar.

An order for sex reassignment surgery for Michelle-Lael B. Norsworthy, in Norsworthy v. Beard, 2015 WL 1500971 (N.D. Cal., April 2, 2015), is reported in Law Notes (May 2015, pages 199-200). California Attorney General Kamala D. Harris appealed that ruling and obtained a stay pending decision of the appeal. The day before oral argument was to take place, according to the Associated Press, California Governor Jerry Brown approved Norsworthy’s parole. The state promptly moved to dismiss the case as moot.

At the same time, California officials announced a settlement in the second case, Quine v. Beard, C 14-02726 JST, early stages reported in Law Notes (October 2014, page 438), which Judge Tigar had set for trial in January 2016. The settlement required California as “promptly as possible” to refer Shiloh Heavenly Quine to an “agreed upon” genital sex-reassignment surgical practice, to negotiate a contract, and to pay for such surgery. The settlement acknowledged that such services were “medically necessary” and that “no medical or mental health clinician has indicated otherwise.” The settlement attaches expert reports from psychologists Randi Ettner (for Quine) and Richard A. Carroll (for the state) that document the necessity and serve as useful references for future litigants. Quine is serving life without parole, and the settlement requires moving her to a female facility after SRS and allowing her access to property items (consistent with security) that are designated “as available to females only.”

Neither case was a class action. However, according to the Los Angeles Times (August 10, 2015), there are nearly 400 transgender inmates in the California penal system who may be affected by this settlement. The Quine settlement has a bit of systemic relief in one section: California agrees to “review and revise” its policies about inmate property for transgender inmates that was previously designated for one gender only and to permit Quine’s comments before finalization. The settlement also notes that California “is reviewing and revising its policies concerning medically necessary treatment for gender dysphoria, including surgery.”

It appears for now that California has averted a Ninth Circuit merits decision on prisoner access to SRS.

Judge Tigar is retaining jurisdiction.

It appears for now that California has averted a Ninth Circuit merits decision on prisoner access to SRS. This avoids the potential of a Ninth Circuit clash with the First Circuit decision denying SRS to for a transgender inmate in Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014), reported in Law Notes (January 2015, pages 3-4), and the prospect that the Supreme Court will address the issue in the near future. The Ninth Circuit has perhaps tipped its hand in Rosati v. Igbinoso, 2015 WL 3916977 (9th Cir. June 26, 2015), reported in Law Notes (Summer 2015, page 288), when it summarily reversed a screening dismissal of a transgender prisoner’s claim for “medically necessary treatment.”

While these two California actions can be viewed cynically, they represent progress in the slow advance of transgender prisoners’ rights. The federal government has also overruled its prior National Coverage Determination prohibiting SRS coverage under Medicare. See Decision 2576 (May 30, 2014) of the Department Appeals Board, Docket No. A-13-87, of U. S. Department of Health and Human Services. According to Lambda Legal’s Impact (Summer 2015, page 11), Medicaid now covers transgender health care services in eight jurisdictions: California, Connecticut, Massachusetts, New York, Oregon, Vermont, Washington (partial coverage), and the District of Columbia. Prisoner litigants can use these developments positively (particularly the Quine settlement) as evidence of the “evolving” standards the courts often apply in Eighth Amendment jurisprudence. See coverage of Crawford v. Cuomo, 2015 WL 4728170 (2d Cir., August 11, 2015), below in this issue of Law Notes.

Plaintiffs Norsworthy and Quine were represented by attorneys from Morgan Lewis & Bockius, San Francisco; and the Transgender Law Center, Oakland. A copy of the settlement in Quine is available on-line at transgenderlawcenter.org. – William J. Rold

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

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A panel of the U.S. 6th Circuit Court of Appeals ruled on August 3 in Ondo v. City of Cleveland, 2015 WL 4604860, that the Supreme Court’s recent marriage equality decision, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), is irrelevant to an equal protection claim asserted against Cleveland, Ohio, police officers regarding the manner in which they arrested two gay men on April 8, 2011. Referring to the “law-of-the-circuit” doctrine, Circuit Judge Alice M. Batchelder relied on pre-Obergefell 6th Circuit precedents to apply the “rational basis” test and find that even if plaintiffs’ counsel had not waived their equal protection claim, the police had a rational basis for refusing to let them wear pants for the ride to the police station and the booking process. One member of the panel, Circuit Judge Jeffrey Sutton, dissented from this part of the ruling, but not on the merits. Sutton found that the court should have ruled that the equal protection issue was waived by plaintiff’s counsel at oral argument and thus should not have been addressed by the court.

Steven Ondo and Jonathan Simcox, roommates, were returning home after several hours of drinking at 2:00 AM on April 2, 2011. They “got into a heated argument outside their apartment building.” A neighbor came out to confront them about the noise, and Simcox told him to “fuck off.” “An altercation ensued between the three men,” wrote Judge Batchelder, “during which the neighbor identified himself as an off-duty police officer.” Evidently the neighbor called the precinct, because later that night the police came and arrested the plaintiffs in their apartment, resulting in them spending two nights in jail. The police followed up on the altercation with the off-duty officer, getting arrest warrants against Ondo and Simcox for “felonious assault on a police officer,” and a SWAT team showed up at their apartment building at 7:00 AM on April 8 to execute the warrant. Ondo and Simcox were not dressed at the time, wearing only boxer shorts. They allege that the police used homophobic slurs and when they asked to be allowed to put on pants, the officers said “faggots don’t wear pants in jail.” Further, they claimed that one officer said “It’s a house full of fags here.” They also allege that they were dragged down to the police station in their underwear and not given jumpsuits to wear until well after they were booked, an allegation that the trial judge found to be contradicted by other evidence.

They filed their 42 USC 1983 civil rights lawsuit against the City of Cleveland and 17 police officers in January 2012, but their complaint was deficient in specific factual allegations against specific officers and even an amended complaint fell short on this. The City got several of the defendants dismissed from the case so that it was narrowed down to the SWAT team members, and then moved for summary judgment. Responding to the s.j. motion, the plaintiffs alleged further facts trying to bolster their case in affidavits which made the allegations based on “personal knowledge and belief,” without specifying which facts were based on “personal knowledge” and which facts were based on “belief.” The City moved to strike the affidavits and the court granted the motion, on the ground that only factual assertions based on personal knowledge were sufficient to ground the plaintiffs’ equal protection claim against specific police officers. Then the court granted the City’s summary judgment motion.

A major part of the 6th Circuit’s opinion was devoted to explaining why the trial court was correct to strike the affidavits, and to examining the City’s further argument that plaintiffs had abandoned many of their claims at oral argument. Ultimately, in the view of the majority of the panel, plaintiffs’ counsel had conceded at argument that if the Court of Appeals upheld the trial judge’s decision to strike the affidavits, the case was basically over, but, wrote Judge Batchelder, “Regardless of our stance on abandonment, on the remaining record the equal protection claim fails as a matter of law,” and this is where the court found that Obergefell made no difference to the analysis. Plaintiffs’ counsel had stated at argument that the entire equal protection claim boiled down to the contention that the police refused to let the men wear pants over their boxer shorts because they were gay, and this constituted unconstitutional unequal treatment. There was also a state law allegation of infliction of emotional distress.

Plaintiffs argued that “state actions involving homosexuals should trigger some form of heightened scrutiny under the Equal Protection Clause.” Wrote Judge Batchelder, “First, Plaintiffs cannot demonstrate that the state action of which they complain burdens a fundamental right. When the Supreme Court held that state laws against sodomy violate the Due Process Clause, it did so using the language of rational-basis review, rather than any form of heightened scrutiny,” citing Lawrence v. Texas. “The Court did not hold that the Constitution includes a fundamental right to homosexual conduct. Whether the Court’s recent decision in Obergefell v. Hodges recasts engaging in homosexual acts as a fundamental right is irrelevant, because the decision by the police relevant here does not impair Plaintiffs’ ability to engage in such conduct. Nor can Plaintiffs establish that homosexuals are a suspect or quasi-suspect class. The Court has never held that homosexuals satisfy the criteria for such classification.” The Court cited two cases for this assertion, neither of which deals with sexual orientation claims. “The Supreme Court has not recognized any new constitutionally protected classes in over four decades,” she continued, “and instead has repeatedly declined to do so. Moreover, the Court has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth, such as race or biological gender. In
Obergefell, the Court was explicitly asked by the petitioners and various amici to declare that homosexuals are a specially protected class, and thus that government actions that disfavor homosexuals are subject to heightened scrutiny. But the Court held only that the Equal Protection Clause was violated because the challenged statutes interfered with the fundamental right to marry, not that homosexuals enjoy special protections under the Equal Protection Clause.”

Since the 6th Circuit has, in its pre-Obergefell rulings, always applied rational basis review to sexual orientation discrimination claims, the court decided that under the “law of the circuit” doctrine, it must do so in this case. Applying that approach here, the court found that the police had provided an adequate basis for their decision to arrest the men and take them to the police station in their underwear — concern for the officers’ safety, as the two men were agitated and were being arrested for assaulting a police officer — which, said the court, “is presumed valid and rationally related to a legitimate public interest. Therefore,” wrote Batchelder, “Plaintiffs’ grievance regarding being kept in their boxer shorts until the police could issue them jumpsuits, even if motivated in part by sentiments regarding homosexual behavior, still does not violate the Constitution.”

Judge Sutton, concurring in the court’s decision to affirm the district court’s grant of summary judgment, wrote that it was unnecessary to take on the equal protection issue, as the plaintiffs’ counsel at oral argument had waived the claim by conceding that if the decision to strike the affidavits was upheld the constitutional claim would have to be dismissed. Judge Sutton, of course, was the author of the 6th Circuit’s opinion that was reversed by the Supreme Court in Obergefell v. Hodges. In that opinion, he had found that the plaintiffs’ equal protection claim was not subject to heightened scrutiny, for essentially the same reasons that Judge Batchelder articulated in the panel opinion in this case.

Plaintiffs were represented by Sara Gedeon on the appeal.■

I n Dickensian litigation that has persisted beyond the lifetimes of both the trial court judge and one of the original attorneys representing a coalition of video stores, bookshops, and topless dancing clubs, the Manhattan-based intermediate appellate division of the Supreme Court, First Judicial Department, affirmed that the 2001 municipal zoning amendments targeting “60/40” adult establishments offended the First Amendment. For The People Theaters of N.Y. Inc. v. City of New York, 2015 WL 4429048, 2015 N.Y. App. Div. LEXIS 6068 (N.Y. App. Div. July 21, 2015). Justice Barbara Kapnick wrote for the majority, joined by Justices Angela Mazzarelli and Paul Feinman; Justice Richard Andrias penned the dissent, joined by Justice Leland DeGrasse.

As part of former New York City Mayor Rudy Giuliani’s efforts to “clean up the city when he took office, the City Council in 1995 passed a zoning resolution that banned adult establishments from operating in certain areas, including residential neighborhoods, and within 500 feet of another sex-related business, a school, or a house of worship. From the beginning of the litigation that soon ensued thereafter, the city has relied on a 1994 Department of City Planning study identifying the negative secondary effects of adult establishments on the nearby quality of life, including a downward pressure on property values and an increased crime rate in areas where the businesses are most concentrated. This original zoning resolution survived constitutional freedom of expression challenges that went all the way to the state’s highest court and the Second Circuit in 1998. See Stringfellow’s of New York, Ltd. v. City of New York, 694 N.E.2d 407 (N.Y. 1998); Buzzetti v. City of New York, 140 F.3d 134 (2d Cir. 1998), cert. denied, 525 U.S. 816 (1998).

That legal resolution proved short-lived as new tensions arose over which businesses were covered by the vague wording of the zoning resolution. The city eventually said a “substantial portion” meant a business qualified as “adult” if at least 40 percent of the accessible floor space or stock was meant for adult purposes. It then began bringing nuisance proceedings against the new mixed-use enterprises that emerged, claiming they were following the 60/40 formula as a sham. The City Council eventually passed amendments in 2001 to address the establishments that were superficially complying with the 60/40 formula. These amendments removed the originally ambiguous “substantial portion” flag from the adult eating and drinking establishment definition, and brought tougher restrictions on all of them.

After the City Council passed the amendments, a variety of adult movie theaters, video stores, and cabarets filed suit in 2002 seeking to enjoin the 2001 amendments as facially unconstitutional, and the actions were later consolidated. The plaintiffs argued the city was improperly relying on the 1994 study and its conclusions about adverse effects in the 2001 amendments. They contended the city was impermissibly changing the rules for businesses engaging in constitutionally protected activities, despite the fact that 60/40 establishments were different from their predecessors that solely offered adult entertainment.

The case has gone up and down the New York State court system several times in the last 13 years, with both sides notching wins along the way. In the last round, a trial court judge found the 2001 amendments facially unconstitutional in 2012 and permanently enjoined them.

On the case’s third trip to the First Department, Justice Kapnick stresses that the city failed to show the adult businesses retained a “predominant sexual focus.” First Amendment aficionados will be disappointed by the analysis in Kapnick’s opinion, which does not include much familiar free

Divided New York Appellate Division Court Finds Giuliani-Era Adult Business Zoning Restrictions Are Unconstitutional

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Houston Equal Rights Amendment Will Be on November 2015 Ballot

Houston citizens opposed to the city’s Equal Rights Ordinance enacted last year due to its prohibition of discrimination because of sexual orientation or gender identity submitted petitions seeking to compel the City Council to either repeal it or put it on the ballot for a public vote. Although the City Secretary certified that the petitions had enough valid signatures under Texas law to require the Council either to repeal the ordinance or place it on the ballot, the City Attorney disagreed, and the Council refused to reconsider the ordinance. Litigation ensued and, Council “to comply with its duties, as specified in the City Charter, that arise when the City Secretary certifies that a referendum petition has a sufficient number of valid signatures.”

The City Council, which was not disposed to repeal the ordinance, voted to submit it to the voters and approved the following language: “Proposition No. 1 [Relating to the Houston Equal Rights Ordinance.] Shall the City of Houston repeal the Houston Equal Rights Ordinance, Ord. No. 2014-530, which prohibits discrimination in city employment and services, city contracts, public accommodations,

The Texas Supreme Court issued a unanimous per curiam opinion holding that the City Council was required to reconsider the ordinance as a result of the City Secretary’s certification pursuant to the clear direction of the City Charter provision on point.

Houston Equal Rights Amendment

on July 24, 2015, the Texas Supreme Court issued a unanimous per curiam opinion in In re Jared Woodfill et al., 2015 WL 4498229, holding that the City Council was required to reconsider the ordinance as a result of the City Secretary’s certification pursuant to the clear direction of the City Charter provision on point. Given the speed with which events were moving – including a statement by election officials that if the measure were to be on the November 2015 ballot, it would have to be submitted with appropriate wording by the end of August – the court, dispensing with oral argument, stated that it would “conditionally grant the writ of mandamus” sought by the petitioners and directed the City private employment, and housing based on an individual’s sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy?” The ballot would allow voters to case either a “yes” or “no” vote on the question of repeal.

The proponents of repeal were dissatisfied with this wording and brought their complaints back to the Texas Supreme Court, which issued another unanimous per curiam opinion on August 19 in In re F. N. Williams, Sr. and Jared Woodfill, 2015 Tex. LEXIS 749, 2015 WL 4931372. While rejecting the argument that the phrase “Houston Equal Rights Ordinance”

speech doctrine, but instead focuses on a series of four factors identified previously in an earlier round of the litigation for the city to meet its burden of proof: 1) if the signage of the businesses strongly advertised adult content; 2) if the establishments maintain a significant emphasis on adult materials or activities; 3) if minors were allowed into the stores; and 4) if the layouts made it difficult to access non-adult material.

Kapnick recounts separately the evidence presented at trial for adult bookstores and video stores and adult eating and drinking establishments, but reaches the same result for both categories because only one factor, a predominant focus on sexual materials or activities, tips in the city’s favor for each. For example, she notes that “[t]he city assumes that because the 60/40 clubs regularly feature topless dancing, this automatically means that they retain a predominant sexual focus. However, there is nothing in the prior related decisions that mandates that conclusion.”

In dissent, Justice Andrias says the majority used an insufficient “mechanical and mathematical approach, under which the predominant sexual focus in the 60/40 businesses’ activities is quantitatively outweighed by signage, policies towards minors, and layouts.” He concludes that the “record fairly supports the City’s contention that the adult establishments reviewed emphasized sexual activities or materials over non-adult materials.” With that understanding of the evidence, he would find the 2001 amendments constitutional in all respects.

In a footnote, Justice Kapnick responds to Justice Andrias’s critique by saying, “in fact, what we have attempted to do, is separately and fully analyze each of the characteristics that this Court suggested should be considered in making this determination.”

The 3-2 split of the Appellate Division creates an appeal as of the right to the state’s highest court, the Court of Appeals, if the city wishes to continue fighting for the zoning regulations. It would seem Mayor Bill de Blasio might be inclined; he has, in a similar vein, recently decried the topless female panhandlers known to approach tourists in Times Square. – Matthew Skinner

Matthew Skinner is the Executive Director of LeGaL.
should not be on the ballot question, the court held that the repeal proponents were correct in their argument that, pursuant to the Charter, the voters should be asked whether they approve the ordinance, not whether it should be repealed.

The court said, quoting from the City Charter, that if sufficient petition signatures are presented and certified by the City Secretary, the Council “shall immediately reconsider such ordinance or resolution and, if it does not entirely repeal the same, shall submit it to popular vote at the next city general election,” and states that the ordinance or resolution “shall not take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.” “Section 5 of the Charter clearly requires the vote to be on the ordinance itself rather than its repeal,” wrote the court. “Because the Charter clearly defines the City Council’s obligation to submit the ordinance – rather than its repeal – to the voters and gives the City Council no discretion not to, we hold that this is a ministerial duty.” As such, the Council had no discretion in the matter. However, the court said, it did have discretion to decide to refer to the ordinance as the Houston Equal Rights Ordinance, inasmuch as the repeal petitioners had referred to it as the Equal Rights Ordinance on their petitions.

The court rejected the City’s argument that a post-election contest would provide an adequate remedy for the petitioners. “We have previously rejected this argument,” said the court, “holding that if ‘defective wording can be corrected’ prior to the election, then ‘a remedy will be provided that is not available through a subsequent election contest.’” The court “conditionally” granted mandamus relief against the Council, ordering it to “word the proposition such that voters will vote directly for or against the ordinance.” If the Council does not comply, the court will issued the writ mandating it to do so.

8th Circuit Rules on Pending State Marriage Equality Appeals

When the U.S. Supreme Court ruled in Obergefell v. Hodges, 135 S. Ct. 2583 (June 26, 2015), that same-sex couples have a right to marry under the 14th Amendment, it technically reversed a ruling by the 6th Circuit Court of Appeals, which had in November 2014 itself reversed rulings issued by federal district judges earlier in that year striking down state bans on same-sex marriage in each of the states in the circuit. Thus, as a technical matter the Supreme Court was just directly holding that the same-sex marriage bans in Michigan, Ohio, Kentucky and Tennessee violate the 14th Amendment. As of June 26, appeals were pending before the 8th Circuit Court of Appeals from three states – South Dakota, Nebraska, and Arkansas – where the states were contesting district court rulings striking down their same-sex marriage bans. The 8th Circuit had scheduled oral arguments to take place in the spring, but the court cancelled the arguments, putting all the state appeals on hold while the Supreme Court case was pending.

After the Supreme Court ruled, plaintiffs in the 8th Circuit cases asked the court of appeals to affirm the district court rulings and enjoin the three states from enforcing their same-sex marriage bans. The three states, on the other hand, claimed that they had begun to issue marriage licenses to same-sex couples and to recognize same-sex marriages in response to the Obergefell decision. As a result, they argued, the lawsuits against them were moot, since there was no longer a live legal controversy to be decided by the court of appeals. They urged the 8th Circuit to vacate the district court opinions and instruct the district courts to dismiss these lawsuits as moot, opposing the plaintiffs’ requests that the 8th Circuit uphold the district court injunctions.

On Aug. 11, an 8th Circuit three judge panel issued three per curiam rulings, rejecting the state arguments using almost identical language holding the state bans unconstitutional pursuant to the Obergefell decision and tailoring remedies for the situations presented by each of the states. The panel consisted of Circuit Judges Roger L. Wollman, Lavsinki R. Smith, and William D. Benton.

In Rosenbrahim v. Daugaard, 2015 U.S. App. LEXIS 14061, 2015 WL 4730871, the South Dakota case, District Judge Karen E. Schreier had issued a declaratory judgment and a permanent injunction, but stayed the injunction pending appeal. In Jernigan v. Crane, 2015 U.S. App. LEXIS 14020, 2015 WL 4731342, the Arkansas case, District Judge Kristine G. Baker had similarly issued a declaratory judgment and a permanent injunction, staying the injunction pending appeal. In Waters v. Ricketts, 2015 U.S. App. LEXIS 14019, 2015 WL 4730972, the Nebraska case, District Judge Joseph F. Bataillon had not issued a declaratory injunction yet, but had granted the plaintiffs’ motion for a preliminary injunction and the state had filed an interlocutory appeal; the 8th Circuit had stayed the preliminary injunction pending ruling on the appeal.

The court of appeals first addressed the issue of mootness. It found that the states’ “assurances of compliance with Obergefell do not moot the case” although the assurances “may, however, impact the necessity of continued injunctive relief.” The court premised its mootness ruling on the precise language that Justice Anthony M. Kennedy had used in his opinion for the Supreme Court, where he said that “the State laws challenged by Petitioners in these cases are now held invalid.” Wrote the 8th Circuit, “The Court invalidated laws in Michigan, Kentucky, Ohio, and Tennessee” but not explicitly in the three states whose appeals were before the 8th Circuit! Furthermore, the Supreme Court had not directly addressed “all issues raised by Plaintiffs here” and none of the three states had repealed their constitutional amendments or statutory bans on same-sex marriage. Of course, as none of the states in the 6th Circuit had filed petitions for rehearing with the Supreme Court, the Obergefell case is at an end, and the Supreme Court’s decision creates a binding precedent that the 8th Circuit Court of Appeals must follow. Thus, the court found, it
was appropriate to affirm the district court declaratory judgments in South Dakota and Arkansas, and to affirm the preliminary injunction in Nebraska and send that case back to the district court for an entry of final judgment in favor of plaintiffs on the merits.

Turning to the question of injunctive relief, the court of appeals panel felt that it should be up to the district judges in each case to decide whether injunctive relief is warranted in light of post-Obergefell developments. Although the states claimed that they have been complying with the Obergefell ruling, the challenged constitutional amendments and statutes are still on the books, so the court decided it was within the discretion of the district judges to determine whether injunctions are necessary at this point.

Local attorneys were heavily involved in the three lawsuits that were being appealed, all of which had multiple plaintiffs and many organizations filing amicus briefs. In terms of national movement legal involvement, the Nebraska case was brought with the assistance of the ACLU’s LGBT Rights Project and the ACLU of Nebraska and the South Dakota case was brought with the assistance of the National Center for Lesbian Rights. The lists of organizations and attorneys filing amicus briefs actually take up more pages than the brief opinions issued by the court of appeals in these cases.

The next step, of course, will involve filing of motions for the award of attorney fees to the plaintiffs under federal statutes authorizing such awards to prevailing parties in civil rights litigation. It was widely speculated that the states were seeking to have the district court opinions vacated and the cases dismissed at least in part to give them an argument for avoiding having to pay attorney fees to the plaintiffs. The 8th Circuit’s orders affirming the district court decisions should forestall that, since there can be no argument that the plaintiffs are “prevailing parties,” having obtained the ruling on the merits that they sought. In other parts of the country, several courts have made substantial fee awards to the attorneys who have represented plaintiffs in the marriage equality cases over the past several years, and new awards have begun to be issued in response to post-Obergefell motions.

### 2nd Circuit Expands Liability for Sexual Harassment by Prison Guards

What the right hand had given in Boddie v. Schneider, 105 F.3d 857, 861 (2d Cir.1997) (sexual harassment of prisoners violates the Eighth Amendment), the left hand took away by requiring that the conduct be “severe and repetitive.” Now, in Crawford v. Cuomo, 2015 WL 4728170 (2d Cir., August 11, 2015), the Second Circuit ruled: “A corrections officer’s intentional contact with an inmate’s genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer’s sexual desire or to humiliate the inmate, violates the Eighth Amendment.” In so doing, the court limited (without expressly overruling) the “severe and repetitive” language in Boddie, which had been invoked to dismiss myriad sexual harassment claims within the circuit, including the ones here by United States District Judge Norman A. Mordue, 2014 WL 897046 (N.D. N.Y.).

The unanimous decision was written by Senior Circuit Judge John M. Walker, Jr., who was joined by Chief Circuit Judge Robert A. Katzmann and Circuit Judge Gerard E. Lynch.

Prisoners James Crawford and Thaddeas Corley were incarcerated in Eastern Correctional Facility. They alleged that, on separate occasions, a guard (Corrections Officer Simon Prindle) “fondled their genitals for personal gratification and without penological justification.” Officer Prindle removed Corley from a visit with his wife, made him stand against a wall, and fondled and squeezed his penis “to make sure Mr. Corley did not have an erection.” Four days later, Prindle made Crawford stand against a wall, squeezed and fondled his penis, roamed his hands down his thighs, and threatened him with solitary confinement if he protested. The complaint also alleged twenty similar grievances about Prindle from other inmates.

Crawford and Corley sued Prindle, the Eastern Correctional Superintendent, the Corrections Commissioner and New York Governor Andrew Cuomo, alleging that Prindle’s superiors either allowed him to sexually abuse inmates as a means of control or were deliberately indifferent to the abuse. The plaintiffs also named as John Doe defendants the officers who were present during Prindle’s abuse but who did not intervene.

In Boddie, the court found insufficient and not “cumulatively egregious” enough to state a claim an officer’s attempted “pass” at an inmate, involving squeezing his hand, touching his penis, calling him a “sexy black devil,” and bumping into him “with her whole body vagina against his penis.” The court noted that Boddie was interpreted by district courts as requiring multiple incidents with the same inmate, excessiveness in duration, direct contract (rather than through clothing) or actions causing “physical injury, penetration, or pain.”

In construing Boddie, the court re-emphasized the adequacy of a single severe incident or the cumulative nature of less severe incidents, writing: “an inmate need not allege that there was penetration, physical injury, or direct contact with uncovered genitalia.” Even during a contraband search, “if contact between an officer and an inmate’s genitalia was initially justified, if the officer finds no contraband, continued sexual contact may be actionable… In determining whether an Eighth Amendment violation has occurred, the principal inquiry is whether the contact is incidental to legitimate official duties, such as a justifiable pat frisk or strip search, or by contrast whether it is undertaken to arouse or gratify the officer or humiliate the inmate,” citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986). “[A] search may not be undertaken maliciously or for the purposes of sexually abusing an inmate.” See Hudson v. Palmer, 468 U.S. 517, 528 (1984).

Assuming the facts in the complaint are true for purposes of the motion to dismiss, the court found the Boddie standard, as rearticulated here, to be met. “Under Boddie, no amount of gratuitous or sexually-motivated fondling of an inmate’s genitals—even if limited in duration or conducted through the
The court reviewed the “evolving standards of decency” regarding sexual abuse of prisoners, noting the passage of the Prison Rape Elimination Act (42 U.S.C. §§ 15601–15609) and the proscription of sexual conduct between guards and inmates in dozens of states. “These laws and policies reflect the deep moral indignation that has replaced what had been society’s passive acceptance of the problem of sexual abuse in prison. They make it clear that the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment.” In language close to admitting error in Boddie, the court “recognize[d] that particular conduct that might not have risen to the level of an Eighth Amendment violation 18 years ago may no longer accord with community standards” and that “we believe that the officer’s conduct in Boddie would flunk its own test today.”

Although there were no transgender issues in this case, sexual abuse/harassment of transgender inmates is a chronic problem in Corrections. This case has very helpful dicta for such prisoner victims, as it allows a claim to proceed based on sexual harassment with intent to “humiliate.”

The court lamented on the issue of qualified immunity to determine whether it was “objectively reasonable” for defendants, who include the Corrections Commissioner and the Governor, to believe that Prindle’s alleged sexual abuse did not violate the Eighth Amendment. New York Attorney General Eric T. Schneiderman and Solicitor General Barbara D. Underwood filed the motion to dismiss and defended it on appeal. It remains to be seen whether they will now continue to litigate. According to the New York Times, a spokesperson for the Corrections Commissioner “declined to comment about whether it still employed Officer Prindle” (August 11, 2015, page A-15). Crawford and Corley are represented by New York attorneys Adam D. Perlmutter, Daniel A. McGuinness, and Zachary Margulis–Ohnuma. – William J. Rold

Federal Court Rejects Recalcitrant Kentucky County Clerk’s Free Exercise Claim; 6th Circuit and Supreme Court Refuse to Stay District Court Order

U.S. District Judge David Bunning rejected a claim by Rowan County, Kentucky Clerk Kim Davis that she has a First Amendment right to refuse to issue any marriage licenses in order to avoid compromising her religious belief that a marriage can be only between one man and one woman. Granting the plaintiffs’ motion for a preliminary injunction requiring Davis’s office to issue marriage licenses in Miller v. Davis, 2015 WL 4866729, 2015 U.S. Dist. LEXIS 105822 (E.D. Ky. August 12, 2015), Judge Bunning concluded that all factors federal courts consider in deciding motions for preliminary injunctions favored the plaintiffs, including likelihood of success on the merits of their claim that the clerk’s action was violating their constitutional rights, and he granted the injunction.

Davis, represented by Liberty Counsel, a so-called Christian law firm, promptly noticed her appeal to the 6th Circuit Court of Appeals and, upon advice of counsel, refused to comply with the injunction. Shortly after noticing the appeal, Liberty Counsel sought a stay of the injunction pending appeal. On August 17, Judge Bunning issued an Order denying the motion for stay, but at the same time “temporarily” staying the injunction until August 31 to give Davis time to apply to the 6th Circuit for a stay. The net effect of Judge Bunning’s actions (which required a clarifying Order on August 19 because the August 17 Order generated some confusion due to its wording) was to grant Davis a short stay, leaving in place her office’s policy of refusing to issue marriage licenses through the end of August. On August 19, Davis filed an “Emergency Motion for Immediate Consideration and Motion to Stay” with the 6th Circuit, No. 15-5880, the parties submitted briefs on August 23, and the 6th Circuit denied the motion for stay on August 26. Davis still refused to issue licenses, contending that she had until August 31 to obtain a stay from the Supreme Court. On August 28,

Early reports on September 1 indicated that she had refused to issue a license to a same-sex couple, invoking “God’s authority” and saying it was a “Heaven or Hell” decision.
Bunning, he ordered that Davis and her staff appear in his courtroom on September 3 to answer the charges.

The lawsuit was filed on July 2, 2015, by two couples: April Miller and Karen Roberts (same-sex couple), and Kevin Holloway and Jody Fernandez (a different-sex couple). Both couples tried to get marriage licenses from the Rowan County Clerk’s Office shortly after the Obergefell decision was announced by the Supreme Court, which reversed the 6th Circuit and affirmed a Kentucky federal district court ruling for marriage equality. Both couples were turned down, being told that the office was not issuing any marriage licenses. Both couples then went to Rowan County Judge Executive Walter Blevins, asking him to issue them licenses. Blevins told them that Kentucky law authorizes him to issue licenses only when the county clerk is “absent.” Since Clerk Davis was not “absent,” but was continuing to fulfill her other duties, Judge Blevins concluded that he did not have authority to issue marriage licenses. Although at least seven neighboring counties quickly began issuing licenses to same-sex couples after the Supreme Court ruling, these two couples insisted that they wanted to get their licenses in the county where they lived, worked and paid taxes, and that they should not have to travel out of the county in order to get married, so they filed suit.

On August 4, Davis filed a third-party Complaint against Governor Steve Beshear, followed by a motion for preliminary injunction seeking to bar enforcement of Beshear’s mandate to county clerks directing them to issue marriage licenses in compliance with Obergefell. Davis’s motion was denied by Bunning’s action in ordering her to comply with the mandate.

Unlike some other states where clerks have argued that their controlling statute does not require them to issue marriage licenses, in Kentucky it is clear that county clerks are supposed to issue marriage licenses as a ministerial function, so Davis rested her defense on the proposition that she has a constitutional right based on the 1st Amendment and the state’s Religious Freedom Act to refuse to have any licenses issued by her office because of her religious objections to being seen to endorse same-sex marriages. Although it is possible that one of her clerical employees could issue the licenses, Davis found this objectionable because, she says, her name as county clerk would still appear on the document, thus implying her endorsement or approval of the marriage. Under Kentucky’s statute, the marriage license form includes “An authorization statement of the county clerk issuing the license for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons named.” Focusing on this, Davis argued that the “authorization statement” constitutes “an endorsement of same-sex marriage, which runs contrary to her Apostolic Christian beliefs,” wrote Judge Bunning.

Governor Beshear had tried to talk her out of this position and had advised her that if she was unwilling to perform her statutory duties, she should resign so that somebody willing to comply with the law could be put in her place. Davis refused, insisting that she intends to serve out the remaining three-and-a-half years of her elected term as county clerk. As a fallback defense, Davis also argued that requiring Rowan County couples who want to marry to go to a neighboring county did not impose any substantial burden on their newly-proclaimed 14th Amendment right to marry, as weighed against the significant burden on her freedom of religion in requiring her to issue licenses to same-sex couples. She explained that her office had stopped issuing marriage licenses to all couples, whether same-sex or different-sex, because she did not want to engage in discrimination against same-sex couples.

Davis was sued in her official capacity for her refusal to issue any marriage licenses, which the plaintiffs alleged “significantly interferes with their right to marry because they are unable to obtain a license in their home county.” Davis countered that they could go to a neighboring county, they could get a license from Judge Blevins, or they might in the future be able to get a license on-line, pursuant to a proposal being considered by the legislature to move the licensing process out of the county clerk offices. Judge Bunning rejected these arguments. Pointing out that the plaintiffs are “long-time residents who live, work, pay taxes, vote and conduct other business in Morehead,” the county seat, they were entitled to get their licenses locally. Furthermore, he observed, “there are individuals in this rural region of the state who simply do not have the physical, financial or practical means to travel,” so the office’s refusal to issue any licenses at all would substantially burden some couples who want to marry and do not want to incur the burden of traveling out of the county to obtain their licenses. The judge also noted that 57 of the state’s 120 elected county clerks had petitioned the governor to call a special legislative session to enact a law allowing them to refuse to issue licenses to same-sex couples. Asked Bunning, “If this Court were to hold that Davis’ policy did not significantly interfere with the right to marry, what would stop the other 56 clerks from following Davis’ approach?” If many county clerks refused to issue licenses, an “inconvenience” could become a “substantial interference” with what the Supreme Court has identified as a “fundamental right.” Additionally, Bunning agreed with Judge Blevins that Blevins was not authorized by statute to issue marriage licenses in place of Davis when Davis was not “absent” from work, and he concluded further that putting the entire burden for issuing licenses in Rowan County on Judge Blevins, who has many other duties, was not a “viable option.” As to the on-line alternative, Bunning pointed out it was only a proposal and so it did not respond to the present concern.

Bunning found that the state did not have a sufficient compelling interest to protect Davis’ free exercise rights that would outweigh the state’s interest in upholding the rule of law, under which the plaintiffs were entitled to get marriage licenses in order to exercise their fundamental right to marry, as declared by the Supreme Court in Obergefell. “Our form of government,” he wrote, “will not survive unless we, as a society, agree to respect the U.S. Supreme Court’s decisions, regardless of our personal opinions. Davis is certainly free to disagree with the
Court’s opinion, as many Americans likely do, but that does not excuse her from complying with it. To hold otherwise would set a dangerous precedent.” Delaying the plaintiffs’ attempts to exercise their fundamental right to marry imposes an irreparable harm on them, the judge found, while he disagreed that requiring the office to issue licenses would impose any substantial harm on Davis.

Bunning disagreed with Davis, for example, that the authorization statement on the form implied or communicated that she personally endorses or approves of same-sex marriage. It is merely a statement in her official capacity as county clerk that the applicants are legally qualified to marry. Furthermore, he rejected her argument that Governor Beshear’s directive issued after the Obergefell decision, instructing county clerks to issue licenses to same-sex couples, did not serve a compelling state interest or that she was entitled to a religious exemption from complying with it. Bunning found that Beshear’s directive was a religiously neutral and generally applicable state policy mandating compliance with the law and not singling out religion in any way. “While facial neutrality is not dispositive,” wrote Bunning, “Davis has done little to convince the Court that Governor Beshear’s directive aims to suppress religious practice.”

He also rejected her argument that Attorney General Jack Conway’s decision not to defend the marriage ban in 2014, leaving the governor to hire outside counsel to represent the state before the 6th Circuit, provided some kind of precedent for her seeking an exemption from being required to comply with her job. Bunning rejected her attempt to draw an analogy, seeing Conway’s position as an “exercise of prosecutorial discretion” based on Conway’s announced view that the ban was not defensible in court, which turned out to be correct at the level of the Supreme Court. “By contrast,” Bunning pointed out, “Davis is refusing to recognize the legal force of U.S. Supreme Court jurisprudence in performing her duties as Rowan County Clerk. Because the two are not similarly situated, the Court simply cannot conclude that Governor Beshear treated them differently based upon their religious convictions.”

Davis also attempted to assert a free speech claim under the 1st Amendment, which was quickly disposed of under Supreme Court precedents holding that public employees speaking in their official capacity do not enjoy individual 1st Amendment protection for their speech. After questioning whether the act of issuing marriage licenses can even be characterized as speech, Bunning pointed out that any speech involved in that process (such as the statements on the license form to which Davis objects) is state speech, not Davis’s speech. “The State prescribes the form that Davis must use in issuing marriage licenses,” he wrote. “She plays no role in composing the form, and she has no discretion to alter it. Moreover, county clerks’ offices issue marriage licenses on behalf of the State, not on behalf of a particular elected clerk.”

Quoting from the Obergefell decision, he wrote, “When such ‘sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty has been denied.’” “Such policies simply cannot endure,” Bunning asserted.

Finally, having concluded that requiring Davis to issue marriage licenses does not substantially burden her free exercise of religion, Bunning rejected her claim to protection under Kentucky’s Religious Freedom Act, which does not grant more protection than the federal Religious Freedom Restoration Act on which it is based. “Davis remains free to practice her Apostolic Christian beliefs,” he wrote. “She may continue to attend church twice a week, participate in Bible Study

“[H]er religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk.”

and minister to female inmates at the Rowan County Jail. She is even free to believe that marriage is a union between one man and one woman, as many Americans do. However, her religious convictions cannot excuse her from performing the duties that she took an oath to perform as Rowan County Clerk.”

Concluding that it was in the public interest to do so, Bunning issued two orders. First, he ordered that the plaintiffs’ motion for a preliminary injunction be granted. Second, he ordered that “Defendant Kim Davis, in her official capacity as Rowan County Clerk, is hereby preliminarily enjoined from applying her ‘no marriage licenses’ policy to future marriage license requests submitted by Plaintiffs.”

Davis filed a Motion to Stay the August 12 order, which Judge Bunning denied in a new Order issued on August 17. Although Judge Bunning determined

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that Davis’s request met none of the requirements usually considered for staying a court order pending appeal, nonetheless he determined to give her some time to seek a stay from the 6th Circuit. “In recognition of the constitutional issues involved, and realizing that emotions are running high on both sides of the debate,” he wrote, “the Court finds it appropriate to temporarily stay this Order pending review of Defendant Davis’ Motion to Stay by the 6th Circuit Court of Appeals.” This wording immediately caused confusion, creating ambiguity whether this was a temporary stay of the Order denying Davis’s Motion for Stay, or a temporary stay of the August 12 Order requiring her to have her office resume issuing marriage licenses (including to same-sex couples). The confusion was reflected in media reports, which focused on the conclusion that Davis had been excused from complying with the Court’s order for some unspecified period of time while seeking relief from the appeals court. Reacting to the expressions of confusion, Judge Bunning issued a clarifying Order on August 19, which set a deadline for Davis to obtain relief from the 6th Circuit. If Davis did not obtain a stay from the 6th Circuit by August 31, Judge Bunning’s August 12 Order would go into effect and any continued refusal to issue marriage licenses could subject Davis to a contempt proceedings and liability to those denied licenses.

Davis filed her “Emergency Motion” seeking a stay with the 6th Circuit on August 19, arguing that in all prior marriage litigation in Kentucky and the 6th Circuit, trial court orders had been stayed pending appeal because of the substantial legal questions or matters of first impression involved in these cases. Davis argued that the district court’s answer to the question of conflicting constitutional rights presented by this case “should not be forced upon Davis until her appeal is finally resolved.” She argued that her “inability to authorize and approve SSM licenses bearing her imprimatur against her religious conscience is protected by the United States and Kentucky Constitutions, along with the Kentucky RFRA,” contending that Beshear’s mandate to the county clerks “must survive strict scrutiny, which the district court acknowledged but failed to apply.” She invoked the Supreme Court’s Hobby Lobby decision in support of her contention that “numerous less restrictive means are available” to accomplish the state’s purpose in making marriage licenses available to same-sex couples, and rejects Bunning’s conclusion that any burden on her free exercise of religion by requiring that her office issue the licenses is “slight.” Her motion signal failed to explain how her constitutional claim could be asserted consistent with the Supreme Court’s decision in Employment Division v. Smith, inasmuch as Governor Beshear’s directive is a religiously neutral policy of general application and is not directed against any specific religious practices as such.

In a brief order issued on August 26, the three-judge panel unanimously wrote that, as Davis was sued only in her official capacity, she could not “decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court.” Finding that there is “little or no likelihood that the Clerk in her official capacity will prevail on appeal,” the court denied the motion. The court pointed out that Davis’s “official duties include the issuance of marriage licenses” and she was required to perform her “official duties.” Although this would seem to have concluded the matter, Davis refused to issue marriage licenses the next day, contending that under Judge Bunning’s “temporary stay” she had until August 31 before his preliminary injunction went into effect. On Friday afternoon, August 28, her counsel filed an “Emergency Application” with U.S. Supreme Court Justice Elena Kagan, who is assigned to hear emergency appeals from the 6th Circuit, requesting that the Supreme Court order the preliminary injunction stayed pending Davis’s appeal on the merits, and simultaneously filed with Judge Bunning a request to extend his “temporary stay” until the Supreme Court rules on the application. Bunning quickly rejected the request to extend his temporary stay.

The “Emergency Application” to the Supreme Court was presented in a 50-page brief, passionately arguing that the preliminary injunction was a severe abridgement of free exercise of religion and essentially accusing Judge Bunning and the 6th Circuit panel of running roughshod over the constitutional rights of Ms. Davis. A quick perusal of the arguments suggested a disingenuous straining of religious freedom precedents to suggest that exempting public employees from fulfilling essential job functions based on their individual religious objections is no big deal and falls within the mainstream of First Amendment law. As an example of such disingenuous straining, they cited Garcetti v. Ceballos (in which the Supreme Court held that speech as part of a public employee’s job function enjoys no 1st Amendment protection), for the broad proposition that public employees enjoy 1st Amendment rights, without noting that the quoted language referred to public employee statements made in their private citizen capacity, and not as part of their job. The Supreme Court was careful to draw this distinction; Ms. Davis’s attorneys were not, providing a quotation out of context that stands the case on its head, inasmuch as she was sued in her official capacity. This is the quality of lawyering and legal advice that Davis was getting from an ideological organization concerned to delay same-sex marriages at any cost.

The Supreme Court provided no explanation for denying the stay on August 31, but none was needed in light of the Court’s clear precedents holding that citizens do not enjoy a religious exemption from complying with neutral state laws of general applicability, and that public employees do not enjoy 1st Amendment rights in connection with their official duties. However, on Tuesday morning, September 1, a local CBS-TV news crew accompanied a same-sex couple to the clerk’s office to record the denial of a license to them and an insistent Kim Davis citing “God’s authority” to justify her defiance of the Supreme Court’s order. Some couples then filed motions with Judge Bunning seeking to hold Davis and her staff in contempt of court, and he ordered that they appear in his courtroom on September 3 to answer the charges.
LGBT Legal Organizations Call for Decriminalization of Sex Work as Federal Government Initiates Prosecution of Rentboy.com’s Owner and Employees

On August 20, leading LGBT rights legal organizations in the United States issued a joint statement supporting Amnesty International’s August 11 Resolution that advocates for the human rights of sex workers. Amnesty International (AI) called on governments on August 11 to repeal laws criminalizing sex work, while asking states to move to prevent and combat sex trafficking, ensure that sex workers are protected from exploitation, and enforce laws against the sexual exploitation of children. In short, AI suggests that adults should be able to freely consent to engage in sexual activity for compensation without criminal penalty, and that continued maintenance of criminalization exposes sex workers to exploitation, violence, and severe health risks. (Reuters, Aug. 13). Just a few days later, federal agents from the Department of Homeland Security, accompany by New York City police officers, raided the Manhattan offices of Rentboy.com, the largest gay escort website in the world, carting away business records and computers, and arrested the company’s CEO and other employees.

Sex work for pay is presently legal in some countries (e.g., Canada, United Kingdom), but outlawed in most. Even those countries that don’t criminalize prostitution as such generally maintain laws against promotion and public solicitation of prostitution. In the United States, every jurisdiction (except some counties in Nevada) treats sexual activity for monetary compensation as unlawful, although the jurisdictions differ as to the classification of the offense and potential penalties. The Model Penal Code as adopted in the states decriminalized private consensual sexual activity between adults, but not when such activity involves a commercial transaction, and courts have been unanimous in holding that the Supreme Court’s 2003 decision striking down sodomy laws, Lawrence v. Texas, does not create a protected liberty interest extending to commercial sex.

The LGBT organizations joining in the statement were Transgender Law Center, Gay & Lesbian Advocates & Defenders, Lambda Legal, National Center for Lesbian Rights, and National Center for Transgender Equality. The Joint Statement explains, “For many LGBT people, participation in street economies is often critical to survival, particularly for LGBT youth and transgender women of color who face all-too-common family rejection and vastly disproportionate rates of violence, homelessness, and discrimination in employment, housing, and education.”

The Joint Statement goes on to describe the various hazards faced by sex workers that are amplified by the criminalization of their activities.

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On August 25, Homeland Security agents appeared at Rentboy.com’s offices on West 14th Street in Manhattan and effectively shut down the website.

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The defendants were listed as Jeffrey Hurant (the owner) and employees Michael Sean Belman, Clint Calero, Edward Lorenz Estanol, Shane Lukas, Diana Milagros Mattos, and Marco Soto Decker. The title of the case on the Complaint is United States of America v. Hurant, filed in the Eastern District of New York on August 18.

The complaint sets out a detailed description of the Rentboy.com website, defining terms, providing graphic descriptions of the activities advertised, and asserting repeatedly that the disclaimers on the site were meaningless and that the entire operation was set up to connect customers with prostitutes. Anyone seeking a detailed description of the on-line male escort business will find it in this complaint, which became found detailed accounts by customers of their experiences with the escorts, including reports on the amount of money charged by the escort.

It is unclear whether this action taken against Rentboy.com was a precursor to actions against similar websites operated from the United States as part of a more general crackdown on the use of the Internet for commercial sexual assignations, whether Homeland Security is also targeting heterosexual escort sites, or whether Rentboy.com was singled out for prosecution because of the brazenness of its owner, who is quoted in the complaint as having made clear in published interviews that the purpose of the website was to assist escorts in marketing their sexual services. According to the complaint, Hurant uses as an email address cyberpimp@rentboy.com, which is hardly subtle. The complaint quotes Hurant telling one interviewer, “There is no place in this website where somebody says I’ll have sex for money because that is against the law. We can talk about what you look like, what you are, what you like to do, what people say about you in bed. . . People say I’m a great top, people say I fuck like nobody’s business, but you can’t say I’ll fuck you for two hundred bucks.” The网站 includes a disclaimer that rates quoted by the escorts on the site are for their time, and that any sexual activity that takes place is a private matter between consenting adults.

In justifying the arrest of the public upon serving of the arrest warrants and was posted later on the 25th on Buzzfeed.com with an article describing the arrests. The complaint describes each of the defendants (including aliases used by many of them) and their role in the Rentboy.com business, including past or present escorting activity by some of them. The complaint asserts that the term “escort” is a euphemism for a prostitute. The complaint describes typical escort listings on Rentboy.com, including the quotation of rates and the listing of specific sexual activity that an escort is willing to engage in. The complaint also notes cross-references in some of the advertisements to another website, daddysreviews.com, in which can be employees as well as the owner, the complaint states, “There is probable cause to believe that anyone employed by the organization was aware that its aim was the promotion of prostitution, based on its publicly-disseminated advertising and promotional material and the content of the site itself.” Illustrating the openness with which Rentboy.com proceeded about its business, the complaint describes how Rentboy.com applied to the Department of Homeland Security for an occupational visa for one of its employees. It also describes an annual public event held by Rentboy.com, the “Hookies,” at which awards were bestowed on escorts listed on the site as the “best” in particular categories of sexual performance.

The prosecution is premised on 18 U.S.C. Section 152, which provides, in relevant part: “(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform - (A) an act described in paragraph . . . (3) shall be fined under this title, imprisoned not more than 5 years, or both. . . (b) As used in this section (i) “unlawful activity” means (I) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States.” The complaint cites provisions of New York law criminalizing “promoting prostitution” and engaging in prostitution activity as the underlying unlawful activity supporting prosecution under the federal statute. News reports indicated that the prosecution may also ultimately involve charges of “money-laundering,” but that is not specified in the complaint submitted to the federal court to get the arrest warrants. Neither does the complaint cite take law violations, although one would expect that the investigation would have included close tax audits of Rentboy.com, its parent company and its employees as well.
Maryland Intermediate Appellate Court Finds State Precedent Precludes Applying “Best Interest of the Child” Standard to Visitation Dispute of Divorcing Lesbian Couple When Child Was Born Before They Married

Due to the oddities of timing during a transitional period in the legal landscape, the Maryland Court of Special Appeals found in the context of a divorcing lesbian couple that the non-biological parent’s claim for visitation with the child conceived through donor insemination at a time when the women could not marry in their domicile of the District of Columbia must be dismissed on standing grounds. It seems that by a fluke of timing the women could have married in D.C. before the child was born, but did not marry until shortly after his birth, and this turned out to be determinative under Maryland law. Conover v. Conover, 2015 Md. App. LEXIS 107, 2015 WL 5037039 (Md. Ct. Spec. App., Aug. 26, 2015). The Court of Special Appeals (an intermediate appellate court) rejected equitable claims, found that potential constitutional claims on behalf of the non-biological parent had not been properly raised or preserved at trial, and, in the opinion for the court by Judge Robert A. Zarnoch, characterized this as a “sad case” since “the present state of Maryland case law leaves us no choice.” In a concurring opinion, Judge Douglas R.M. Nazarian wrote, “I agree with the majority that this case is sad, but I would add the adjective ‘frustrating,’” and he wrote at length about how the current legal parenthood regime in Maryland was inadequate to meet the situation of unmarried same-sex parents.

Maryland’s legislature adopted a law authorizing same-sex marriage, but only after the underlying events in this case occurred. There is no question that Maryland recognizes the District of Columbia marriage of Michelle and Brittany Conover. The question is whether, in the context of a divorce proceeding, Michelle has the standing of a parent seeking visitation, or rather should be treated as an unrelated third party. The court found that existing Maryland precedents, not altered by passage of the Marriage Act, dictates third-party treatment.

The women’s relationship began in 2002, with some “breaks.” They discussed having a child and Brittany became pregnant through donor insemination in 2009, at a time when marriage licenses for same-sex couples were available in three states but not in D.C., where they were then living. In March 2010, D.C. began issuing marriage licenses to same-sex couples under a newly-enacted municipal ordinance. On April 4, 2010, Brittany gave birth to their son, Jaxon William Lee Eckel Conover. (The name incorporates former surnames of the parents’ families.) The birth certificate listed Brittany as the mother and left blank the space for father. On September 28, 2010, the women married in D.C. and subsequently took a common surname, Conover. They subsequently moved to Maryland, which did not legislate for marriage until a few years later, although Maryland was, by virtue of an Attorney General opinion, recognizing same-sex marriages from D.C.

The marriage didn’t last very long. The women separated in September 2011, but Michelle continued to visit Jaxon regularly until Brittany prevented further contact in July 2012. Brittany filed a pro se divorce action in Maryland on February 8, 2013, which did not mention Jaxon. Michelle, also proceeding pro se, answered on February 19, asserting a claim for visitation rights, and then on March 14 filed a counterclaim for divorce pro se, again raising the issue of visitation. At the subsequent hearing on April 30, Michelle was represented by counsel but Brittany was not. Brittany claimed Michelle did not have parental standing to seek visitation, which Brittany opposed. Michelle rested her claim on a Maryland statute governing paternity claims when a child was born before the parents married, asserting that the court should construe the statute to apply to spouses of either sex, not just fathers.

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First addressing constitutional issues, Judge Zarnoch observed that although “nearly half of her brief” was devoted to attacking Maryland’s paternity and legitimacy statutes as unconstitutionally discriminating against women and gay people, Michelle had not raised these arguments before Judge Dwyer, Brittany appearing pro se had not been called to respond to them, and the Attorney General had not weighed in. Zarnoch, quoting another judge in an old case, said that “it would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions” on this sort of record. However, Judge Zarnoch observed, Brittany benefited in this dispute by the well-developed Maryland and federal case law on the constitutional right of fit parents to determine who would associated with their children. As Michelle did not challenge Brittany’s fitness as a parent, Brittany had a right to veto Michelle’s demand for visitation, as the appellate court agreed with the trial judge that under Maryland law Michelle is a “third party,” even though she had helped to plan for Jaxon’s conception and had married Brittany shortly after the child was born.

Zarnoch reviewed Maryland case law, showing that the state’s highest court, the Court of Appeals, had rejected the concept of de facto parenthood in this context, observing that under Maryland law, “A non-biological, non-adoptive spouse who meets one, two or even three tests under ET Sec. 1-208(b) [the paternity statute] is still a ‘third party’ for child access purposes.” The court agreed that the paternity statute was enacted for the purpose of imposing duties on unmarried fathers, not for the purpose of establishing custody or visitation rights on such individuals. If Brittany was seeking a child support order against Michelle, it is possible on these facts that such an order might be forthcoming, but the statutes could not be construed in the court’s view to entitle her to be considered as a legal parent for custody or visitation purposes. “Moreover,” wrote Zarnoch, “there is no gender discrimination or sexual orientation discrimination because all non-biological, non-adoptive parents face the same hurdle, no matter what sex or sexual orientation they are.”

Zarnoch also contended, “The couple could have married before Jaxon was born, but did not. The circuit court did not err in failing to accord weight to the prohibition on same-sex marriage that once existed.” This is because D.C. began allowing same-sex marriages had married, a court would likely have treated this as a step-parent adoption and no more controversial, but that is just hindsight from today’s perspective.) There was evidence that the women talked about adoption, but the expense of a formal adoption was, in their view, a burdensome and unnecessary expense on top of the expenses of raising Jaxon.

Michelle argued that Brittany should be barred from raising the parental status issue, inasmuch as the women had agreed before the child was conceived that Michelle would be a parent, and that Brittany had said and done various things prior to and after the birth to continue to induce Michelle’s reliance that her parental status would be honored and she did not have to go through a formal adoption procedure to protect her rights. The court was unwilling to go down that path, pointing out that most courts had rejected equitable estoppel or parenthood by estoppel arguments in such cases and that Michelle “had ample time – years, in fact – to pursue the adoption of Jaxon.” (Actually, she had just over a year if one assumes that Brittany would become uncooperative about an adoption after the women had separated, so the court’s characterization may exaggerate Michelle’s window of opportunity for this.)

Michelle’s appellate strategy was focused on persuading the court that she should not be treated as a “third party” and thus should not have to show “exceptional circumstances” to overcome Brittany’s objection to her claim for visitation, and that the trial court should have afforded her an additional hearing to address the “exceptional circumstances” issue if the judge was to decide it. The appellate court was not persuaded, finding that she had an opportunity to introduce evidence on this point. Indeed, her trial lawyer on the record said that the evidence “screamed extraordinary circumstances” and that this was an “alternative argument” for her standing. She had also briefed the issue to the trial judge in a post-hearing memorandum, so Judge Zarnoch found that the trial court could not be faulted for reaching and deciding the issue. Since Michelle had not asked on appeal that the appellate court address the correctness of the trial judge’s conclusion on this point, the

Even before D.C. was performing same-sex marriages, the court pointed out, Michelle and Brittany could have gone to one of the other three states that authorized same-sex marriages.
Federal Court Upholds $100,000 Jury Award to Lesbian Plaintiff against United Parcel Service

Rejecting motions to set aside the jury verdict, order a new trial or reduce damages, U.S. District Judge Jack B. Weinstein upheld a federal jury’s award of $100,000 in damages to Tameeka Roberts, an employee at the United Parcel Service facility in Maspeh, Queens, who complained that the company had tolerated a hostile environment created by her supervisor and had retaliated against her when she pressed her complaint to the New York State Division of Human Rights. Roberts v. United Parcel Service, 2015 WL 4509994, 2015 U.S. Dist. LEXIS 97989 (E.D.N.Y., July 27, 2015).

According to Judge Weinstein’s opinion, Ms. Roberts lives with her wife and three sons in New Jersey. She began working for UPS in 1995 and has had about twenty different supervisors over the past twenty years. Her “problem” supervisor whose conduct led to this lawsuit was Donald Woodard, a “full-time area coordinator” who supervised Roberts in 2007 and 2008, and then again from 2010 through 2012, when an incident in which Ms. Roberts was seriously injured at work attributable to misconduct by Woodard led to his assignment to a different facility.

Roberts’ problems with Woodard began in 2007 after she complained to Woodard about a denigrating comment he made to her about another lesbian employee. “The next day,” wrote Weinstein, “Woodard brought his Bible to work and ‘showed [Roberts] where [the Bible] says that being a lesbian is wrong.’ He told her ‘It goes against the Bible…. It’s a sin.’” Woodard admitted making these comments in his trial testimony. Roberts complained to her shop steward and the head of security, but apparently nothing happened in response to her complaint. “During the rest of 2007,” wrote Weinstein, “Woodard repeatedly told plaintiff that ‘being a lesbian is wrong’ and that she was ‘going to hell.’” Woodard made these comments in the hearing of other workers, and told a co-worker not to “hang out” with Roberts because “she’s not living right. She had demons. She doesn’t know who she is.” Roberts complained to Woodard, telling him “this is not church” and “making comments about me being a lesbian is wrong.” Woodard’s comments continued similarly during 2008. Roberts would try to avoid confrontation by walking away or telling him to “leave me alone.”

The problem ceased in 2009 when Woodard stopped working at the Maspeh facility, but he returned as Roberts’ supervisor in 2010 and his comments resumed along the same lines. Woodard again complained to a union shop steward, but nothing changed. Woodard told Roberts that “two women being married is not natural,” that “being a lesbian is wrong,” that she was “going to hell” and she needed to “change” her “life, the style, the way” she was living. She repeatedly complained to the shop steward. In 2011, Roberts testified, Woodard threatened to take a photo of her with a married male co-worker and send it to the co-worker’s wife, as if to suggest they were having an affair. Roberts reported this to her night manager and her shop steward. The manager told her “do not go to corporate” with this complaint, because “I will handle the situation.” Woodard’s comments then stopped for a while, but in the late summer of 2012 he got started up again, and Roberts renewed her complaints to the shop stewards, who finally brought her to Human Resources, where, apparently, nothing happened.

What finally seemed to get the company’s attention was a call Roberts made on October 23, 2012, to the UPS Corporate Concerns hotline, anonymously. She identified herself as gay and said she felt “intimidated” and “harassed” because Mr. Woodard engages in “religious rants at the job” and makes “derogatory comments...” quoting from In re Roberto de B., 399 Md. At 312-13 (dissent).

Although Judge Nazarian agreed with the result, he concurred in a separate opinion bemoaning the failures of Maryland family law, asserting that the “premise” underlying the Court of Appeals’ rejection of the de facto parenthood doctrine “no longer holds, at least with regard to married same-sex couples. If, as Maryland law now provides,” he continued, “a valid marriage between two women (or two men) has the same legal validity and force as a man-woman marriage, courts should analyze the visitation rights of same-sex spouses the same way they analyze the visitation rights of opposite-sex spouses. I acknowledge that there may well be some challenges in adapting our analyses to accommodate the real-life differences in the way children join same-sex families, but it may not be that hard either, and we have to start somewhere.” He concluded that “the historic treatment of same-sex parenthood is no longer up to the task.”

The next step for Michelle may be an attempt to take this to the Court of Appeals and seek reversal of the precedent that bound the intermediate court to rule against her. In a sense this case is presenting a transitional problem in light of the subsequent enactment of a marriage equality law in Maryland, followed by the Supreme Court’s Obergefell decision. But, on the other hand, same-sex couples, in common with many different sex couples, have children while cohabiting but without marrying under varied circumstances, so it is unlikely that the issues in this case will not arise in future cases, even with the option to marry or to adopt available.
about gays.” A few days later, Roberts met with the local HR representative, a manager, and her shop steward, and an investigation of Woodard was launched. However, the HR representative just cautioned Woodard that “religion has no place in the workplace” but took no other action. Woodard stopped making his comments to Roberts, but she felt the company should have done more, so she sent a letter to corporate headquarters in Atlanta, claiming she was being harassed by Woodard and felt threatened, harassed and stressed because of “this situation.” She asked, “Why is Donald Woodard allowed to Harass, Gay Bash and verbal abuse [sic] his employees and still be employed at United Parcel Service?”

The letter led UPS to open a second investigation, this time by the UPS Human Resources Operations Manager for the District, Beverly Riddick. She met with Roberts for half an hour and told her that UPS was taking her complaint “very seriously.” Riddick met with Woodard, but, according to the trial testimony, although Riddick learned that Roberts’ factual allegations were apparently true, Riddick did not believe that Woodward’s comments violated the law or company policy but were merely “inappropriate.” “Woodard was not told to desist,” wrote Weinstein. Riddick also interviewed the shop steward and two of Roberts’ co-workers. Although these interviews also confirmed Roberts’ allegations about Woodard’s conduct, Riddick concluded that Woodward’s statements did not constitute discrimination or harassment, and so she testified at trial.

When Roberts asked her shop steward about the status of the investigation, he told her that her complaints were “probably unfounded” as Woodward was still supervising her. Shortly after this, Roberts got permission from her immediate supervisors to miss work for a day in order to appear in traffic court and this was noted on her time card. But when she returned the next day, her time card indicated she was absent without calling. She became convinced that Woodard had altered the time card, although he denied doing so. UPS terminated its second investigation. Woodard was not given any written warning and was left in place supervising Roberts, but senior management decided he should be transferred eventually to another facility and would be required to review UPS policies and to complete “two written statements,” which are not described in the court’s opinion.

When she learned about the outcome of the investigation, Roberts filed a complaint with the New York State Division of Human Rights early in December 2012. She informed her shop stewards and union delegate about filing the complaint. Soon after, she suffered injuries when a number of packages fell and hit her face, shoulder, arm and hand. “She looked up and saw Woodard above her,” wrote Judge Weinstein. “He was attempting a UPS procedure called ‘breaking the jam,’ but he had not followed safety protocol, which required notifying everyone in the area and stopping the conveyor belt.” Roberts ended up missing weeks of work while tending to her injuries. She wrote again to the NYS Division of Human Rights, “stressing the adverse impact this and other incidents had on her health.” Woodard received no discipline from UPS for violating work rules but was transferred to another facility in January 2013. Roberts was unable to return to work until mid-February.

Her lawsuit relied on the N.Y.C. Human Rights Ordinance, which provides greater protection for employees than the state or federal employment discrimination laws as a result of an amendment passed in 2005 called the Local Civil Rights Restoration Act. Responding to evidence that state and federal courts were not providing adequate protection against discrimination for employees, the City Council determined to make it clear that interpretation of the city ordinance should not be limited by those federal and state law interpretations. “The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil rights laws, including those laws with provisions comparably-worded to provision of this title, have been so construed,” says the 2005 amendment. This amendment is crucial to the outcome of Roberts’ case, since it is possible that under state and federal precedents, UPS might have been entitled to have some or all of her charges dismissed. Most importantly, New York City precedents make it easier for an employee to prove a hostile environment claim and to challenge employer retaliation.

Judge Weinstein devoted a substantial part of his opinion to a detailed overview of the history of anti-gay discrimination in the United States, quoting extensively from briefs filed with the U.S. Supreme Court in the recent marriage equality case, Obergefell v. Hodges. He also quoted at length from a decision issued by the federal Equal Employment Opportunity Commission, Complainant [Baldwin] v. Foxx (Anthony Foxx, Secretary, Department of Transportation), 2015 WL 4397641 (EEOC, July 15, 2015), explaining why anti-gay discrimination violates the federal ban on sex discrimination. It is not clear why the judge included this material in his opinion, since the case was brought under the NYC Human Rights Ordinance, but he seemed to determine to provide substantial support for the conclusion that gay people have suffered substantial discrimination in the past that needs to be redressed under civil rights laws.

The jury concluded that Roberts proved she was subjected to a hostile environment because she is a lesbian, and that she suffered retaliation after she complained both internally and to the civil rights agency. The jury determined to award her compensatory damages of $25,000 for each claim and punitive damages of $25,000 for each claim, totaling $100,000, as well as awarding her the costs of her litigation. UPS had filed pretrial motions seeking to get the case dismissed, and renewed its motions post-trial, arguing that Roberts had failed to prove a violation of the law and was not entitled to the damages. Weinstein rejected these contentions out of hand.

Weinstein quoted the “guiding principles” that the U.S. Court of Appeals for the 2nd Circuit had
summarized for analyzing claims of discrimination and retaliation under the NYC Human Rights Law in Mihalik v. Credit Agricole Cheuvreux, 715 F. 3d 102 (2013), and then used those principles explicitly to refute every argument UPS made.

“Defendant argues that plaintiff fails to make a prima facie case of hostile work environment because she presents only ‘petty slights and trivial inconveniences,’” he wrote. “To the contrary, Woodard’s continuing discriminatory comments about plaintiff’s sexual orientation, made over a number of years, show adverse differential treatment. So too do the significant failures of supervisors to protect plaintiff against discrimination. There was sufficient evidence for a jury to conclude that a reasonable person — who repeatedly was the target of such comments as plaintiff and repeatedly complained but found no recourse — would consider the comments more than a trivial inconvenience.” Weinstein had noted that because of the more protective interpretation required for claims under the City’s ordinance, this case, which might not have sufficed for a hostile environment claim under Title VII of the Civil Rights Act, clearly qualified.

As to the retaliation claim, Weinstein wrote, “Retaliation may be subtle and hidden and can be hard to prove. Juries are therefore given more leeway in finding retaliation than in finding discrimination. The jury had ample grounds to find retaliation likely to deter a worker from complaining of abuse. Woodard and the defendant’s deliberate adverse conduct – the jury could have found – would likely deter a person from engaging in plaintiff’s protected activity (identifying as a lesbian). First, not only did Woodard harass plaintiff over a course of approximately six years, but he harassed her after she complained repeatedly, to her supervisors and to him, of his ongoing adverse conduct. Second, the jury could find that shortly after the second investigation, plaintiff’s time card was changed by Woodard in any meaningful fashion and allowed him to continue supervising plaintiff for a short period.”

Finally, Weinstein concluded, “Even if plaintiff failed to demonstrate that defendant retaliated because of her complaints by altering her time card and by failing to provide a safe working environment for plaintiff, there was sufficient proof of retaliation in central administration’s cavalier attitude towards plaintiff’s serious charges of harassment.” Thus, she was entitled to punitive damages “as a matter of law” and “the modest award of each claim was appropriate in light of the evidence before the jury.” Weinstein rejected the motion to set aside the verdict, the motion for a new trial, and the motion to reduce damages.

UPS could attempt to appeal this to the 2nd Circuit, but Judge Weinstein was careful to emphasize the 2nd Circuit’s own guidelines for evaluating such claims and to provide extensive sections of the trial testimony to show that the jury had a strong evidentiary basis for its verdict. Also, his characterization of the damages as “modest” seems correct, in light of larger damage awards he noted in other cases. This looks like a verdict that is likely to withstand appeal.

Tameeka Roberts is represented by Alex Umansky, Jessenia Maldonado, Phillips & Associates, PLLC, and Casimir Joseph Wolnowski, New York attorneys. UPS retained suburban counsel from New Jersey. Perhaps they were not too concerned about this case, but Weinstein’s strongly worded opinion is calculated to wake them up! Perhaps some heads need to roll in the UPS Human Resources Department after a judge determines that they have a “cavalier attitude” about unlawful discrimination.

He was equally dismissive of UPS’s claim that the damages awarded by the jury were excessive. $25,000 per claim for compensatory damages and $25,000 per claim for punitive damages struck Weinstein as “modest” and “well within an acceptable reasonable range.”
Colorado Appeals Court Rules against Wedding Cake Baker in Discrimination Case


Charlie Craig and David Mullins planned in 2012 to get married in Massachusetts and then to hold a wedding celebration for family friends in Colorado, where they lived. At the time, the state of Colorado did not recognize same-sex marriages performed in other jurisdictions. They visited Masterpiece Cakeshop and asked the proprietor, Jack Phillips, to design and create a cake for their celebration. Phillips declined, stating to them that he does not create wedding cakes for same-sex weddings because of his religious beliefs. He told them he would be happy to make and sell them other baked goods, but not a wedding cake. The two men left the store and made arrangements with another bakery. Craig’s mother called Phillips to follow up, but he reiterated his position that he would not make wedding cakes for same-sex weddings due to his religious belief, and also because such weddings were not legally recognized in Colorado.

Craig and Mullins filed a complaint with the Colorado Civil Rights Division, invoking the Colorado Anti-Discrimination Act (CADA), which bans discrimination because of sexual orientation by public accommodations. After investigation, the Division noted probable cause and filed a formal complaint, that was tried before an Administrative Law Judge, who ruled in favor of Craig and Mullins, rejecting Phillips’ claimed religious exemption defense. The Civil Rights Commission affirmed the ALJ decision, issuing a “cease and desist order” against Masterpiece, that required the company to (1) take remedial measures, including comprehensive staff training and alteration to the company’s policies to comply with the CADA, and (2) file quarterly compliance reports for two years with the Division describing the company’s remedial measures and documenting all patrons who had been denied service and the reasons for the denial. The court’s opinion does not mention any fine or damages award. Of course, since Craig and Mullins had long since married and held their celebration, there was no need to order Masterpiece to sell them a wedding cake.

Phillips appealed to the courts, claiming, as he had maintained all along, that his refusal to make a wedding cake for the gay couple did not violate the statute, and that he had a right under the 1st Amendment to refuse to create a wedding cake when this act would conflict with his sincerely-held religious beliefs. Phillips claimed that he did not discriminate because of the sexual orientation of Craig and Mullins, but rather because he disapproved of same-sex marriages on religious grounds. He pointed out that he did not refuse to do business with them because they were gay, as he offered to sell them any other baked goods, and sought to draw a distinction between their status and their conduct in having a same-sex marriage. He pointed out, for example, that he would equally refuse to design a cake for two heterosexual men who wanted to celebrate their wedding, to advance his argument that he was not discriminating based on status.

The court rejected this rationalization, observing that “the United States Supreme Court has recognized that such distinctions are generally inappropriate.” Judge Taubman quoted from Christian Legal Soc’y Chapter of University of California, Hastings College of Law v. Martinez, 561 U.S. 661 (2010), in which petitioner contended that it did not exclude individuals from membership because of their sexual orientation, but rather “on the basis of a conjunction of conduct and belief that the conduct is not wrong,” to which the Court replied, “Our decisions have declined to distinguish between status and conduct in this context.” Taubman also cited the majority and concurring decisions in Lawrence v. Texas, 539 U.S. 558 (2003), in which Justice Anthony Kennedy’s opinion said that a law criminalizing homosexual conduct is “in and of itself an invitation to subject homosexual persons to discrimination” and Justice Sandra Day O’Connor’s concurring opinion said, “While it is true that the [challenged sodomy law] applies only to conduct, the conduct targeted
by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is directed toward gay persons as a class.” These comments were directed against the state of Texas’s argument that its “Homosexual Conduct Law” was not specifically anti-gay because it outlawed oral or anal sex between two persons of the same sex regardless of their sexual orientation, an argument analogous to Phillips’ denial that his rejection of Craig and Mullins’ order was antigay. Taubman invoked as well the highest-level judicial precedent to deal directly with the issue in this case, *Elane Photography v. Willock*, 309 P.3d 53 (2013), in which the New Mexico Supreme Court upheld a discrimination ruling against a wedding photography who refused to do business with a lesbian couple for their commitment ceremony. Wrote Taubman, “Masterpiece admits that it refused to serve Craig and Mullins ‘because of’ its opposition to persons entering into same-sex marriages, conduct which we conclude is closely correlated with sexual orientation. Therefore, even if we assume that CADA requires plaintiffs to establish an intent to discriminate... the ALJ reasonably could have inferred from Masterpiece’s conduct an intent to discriminate against Craig and Mullins ‘because of’ their sexual orientation.”

Before addressing Phillips’ religious exemption argument, the court dealt with his argument that creating a wedding cake is an artistic expression, and that the First Amendment’s protection for freedom of expression should shield him from being compelled by state law to create a wedding cake. “Masterpiece contends that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, the Commission’s cease and desist order unconstitutionally compels it to express a celebratory message that it does not support.” The ALJ had rejected this argument, and so did the court. “We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it,” wrote Taubman. “We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.” After all, Masterpiece would be creating the cake because of its legal duty not to discriminate, not because it wishes to convey its own message of approval of same-sex marriages. The court drew an analogy to the Supreme Court’s rejection of law schools’ argument that requiring them to allow military recruiters on campus during the era of “don’t ask, don’t tell” was compelling them to express approval of that policy. “The Supreme Court rejected this argument,” wrote Taubman, “observing that students ‘can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.’”

The court found this case distinctly different from the Supreme Court’s ruling that a parade sponsor’s 1st Amendment expression rights allowed the sponsor to exclude a gay group from openly participating in the parade. The Court saw that as a compelled speech case, holding that a parade is an intrinsically expressive activity whose sponsor has a right to control the views that are expressed, despite a state public accommodations law banning sexual orientation discrimination. “In contrast,” wrote Taubman, “it is unlikely that the public would understand Masterpiece’s sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage.” He noted that the law would not prohibit Masterpiece and Phillips from articulating their objections to same-sex marriage. Furthermore, he noted, “Phillips denied Craig’s and Mullin’s request without any discussion regarding the wedding cake’s design or any possible written inscriptions,” so it is unclear exactly what speech he would be “compelled” to engage in when decorating the cake.

Finally, turning to the religious free exercise argument, the court noted that under established Supreme Court precedent, an individual is not excused by his or her religious beliefs from complying with neutral laws of general application. Under that standard, because the CADA is such a law, no business or individual can claim a religious exemption from complying with it. The only exemption generally recognized under the law is for religious organizations that claim an exemption from anti-discrimination laws, for example, in their selections of employees or contractors to perform religious functions. The court rejected Masterpiece’s argument that CADA was not a neutral law of general application. The law “does not compel Masterpiece to support or endorse any particular religious views,” Taubman pointed out. “The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation,” he continued. Thus, “we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct.”

Having found the law to be neutral as to religion and generally applicable, the court concluded that its application to Masterpiece and Phillips turned on whether the state had a rational basis, the lowest level of constitutional review. “We easily conclude that it is rationally related to Colorado’s interest in eliminating discrimination in places of public accommodation,” Taubman wrote. “The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest. Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination in places of public accommodation has measurable adverse economic effects. CADA creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own ‘kind,’ and ensures
that the goods and services provided by public accommodations are available to all of the state’s citizens.”

Finally, the court rejected Phillips’ argument that the Commission exceeded its authority by imposing a remedy that went beyond the specific complaint of Craig and Mullins, requiring it to change policies and create wedding cakes for hypothetical future customers. The court found that “individual remedies are merely secondary and incidental to CADA’s primary purpose of eradicating discriminatory practices.” Masterpiece had conceded that its rejection of this request to create the wedding cake was pursuant to a company policy, and there was actual evidence in the hearing record that they had also rejected doing business with other same-sex couples, so the Commission’s order “was aimed at the specific discriminatory or unfair practice involved in Craig’s and Mullins’ complaint.”

Shortly after the opinion was released, Phillips’s attorney announced that an appeal to the Colorado Supreme Court would be attempted. That court has control over its docket and is not required to grant review to this unanimous court of appeals ruling, but given the wide public interest in the case, it would seem likely that review would be granted. Numerous amicus briefs were filed with the court from such groups as the National Center for Lesbian Rights, Americans United for Separation of Church and State, groups representing small business associations, religious organizations, the NAACP Legal Defense Fund, and Lambda Legal Defense Fund. Phillips is being represented by Arizona attorney Jeremy D. Tedesco from Alliance Defending Freedom, a so-called “Christian” legal defense group. Craig and Mullins are represented by Paula Greisen of King & Greisen, a Denver firm, with Mark Silverstein and Sara Neel, Denver attorneys, and Ria Tabacco Mar, a New York-based attorney for the ACLU LGBT & AIDS Project. The Commission is represented by the Colorado Attorney General’s office.

**Illinois Enacts Ban on Conversion Therapy for Minors**

On August 20, Governor Bruce Rauner signed into law H.B. 217, Public Act 099-0411, the Youth Mental Health Protection Act, making Illinois the fifth U.S. jurisdiction, after California, New Jersey, the District of Columbia and Oregon, to outlaw the performance on minors of sexual orientation change efforts (SOCE), commonly known as “conversion therapy,” which purports to change an individual’s sexual orientation. The action came just weeks after the American Bar Association’s House of Delegates passed a resolution urging states to enact such measures (see below in *Law and Society Notes*), but shortly after Liberty Counsel, the so-called Christian law firm, filed a petition for certiorari with the Supreme Court, seeking review of a 3rd Circuit decision rejecting a 1st Amendment challenge to the New Jersey law. *Doe v. Christie*, 783 F.3d 150 (3rd Cir. 2015), petition for cert. filed, No. 15-195 (August 13, 2015) (see below in *Civil Litigation Notes*).

Anticipating the likelihood of litigation challenges to the law, the Illinois legislature included in the law an extensive body of legislative findings, reciting in detail the reports and resolutions issued by professional associations opposing the performance of such therapy based upon studies showing the harmful effects upon minors of being subjected to such procedures.

The operative provision of the statute, Section 20, provides: “Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a person under the age of 18.” It also provides that a consumer fraud provision in connection with the marketing and promotion of conversion therapy, making such activity an unlawful practice under the state’s Consumer Fraud and Deceptive Business Practices Act. The measure provides that mental health providers who are found to have engaged in providing such therapy “may be subject to discipline by the licensing entity or disciplinary review board with competent jurisdiction,” and amends the Consumer Fraud Act to specifically provide that a violation of the Youth Mental Health Protection Act is deemed to be an unlawful practice under the consumer fraud act.

Similar bills are pending in other state legislatures, including in New York.
Utah Federal Court Requires Gender-Neutral Interpretation of Donor Insemination Statute

During a hearing on July 15, 2015, U.S. District Judge Dee Benson granted a preliminary injunction against Utah officials on behalf of a married lesbian couple, identified in court papers as Angie and Kami Roe, ordering that Angie’s name be recorded as a parent on the birth certificate of their child, conceived through donor insemination of Kami during their marriage. On August 22 the court issued an opinion explaining its decision. Roe v. Patton, 2015 WL 4476734, 2015 U.S. Dist. LEXIS 96207 (D. Utah). The dispute concerned the interpretation and constitutionality of Utah’s Uniform Parentage Act section on donor insemination, which provides that when a married woman becomes pregnant through donor insemination with the consent of her husband, the husband is treated legally as the father of the child. Utah officials had taken the position that this statute does not apply to lesbian couples, such that Angie would have to go through a stepparent adoption process in order to be recognized as the child’s legal parent.

Angie and Kami were married on December 20, 2013, the first day when same-sex marriages became available as a result of the U.S. District Court’s decision in Kitchen v. Herbert. Although the Supreme Court stayed the district court’s order on January 6, 2014, it was subsequently determined by the federal courts that marriages contracted between those two dates were valid and must be recognized by the state. Angie and Kami decided to have a child through donor insemination, and Kami conceived through that method at the University of Utah Medical School on May 21, 2014, giving birth to their child, L.R., on February 7, 2015. Angie and Kami signed the necessary papers under the statute, but the state’s Department of Health and the Office of Vital Records and Statistics refused to recognize Angie as a parent or to enter her name on the birth certificate, arguing that the statute, by its terms, only provided for recognition of fathers/husbands, not mothers/wives.

Judge Benson found that this distinction raised an equal protection question, especially in light of the Supreme Court’s subsequent decision on June 26 in Obergefell v. Hodges. For purposes of ruling on plaintiffs’ motion for a preliminary injunction, the court had to determine whether plaintiffs made a strong showing that they were likely to succeed on the merits of their equal protection claim, whether the balance of harms favored the plaintiffs, and whether issuing the injunction was in the public interest.

The judge concluded it was unnecessary to decide whether to treat this as a sex discrimination case or a sexual orientation discrimination case, since she concluded that the state had failed to meet the least demanding rational basis test in justifying its reading of the statute.

In light of Obergefell, the judge held that the question before the court was whether the statutes as written comport with the Equal Protection and Due Process clauses of the Fourteenth Amendment? May Defendants extend the benefits of the assisted-reproduction statutes to male spouses in opposite-sex couples but not for [sic] female spouses in same-sex couples? Judge Benson found that “Plaintiffs are highly likely to succeed in their claim that such differential treatment is unconstitutional.” The only state interests that Defendants articulated were concerns about the accuracy of vital statistics records and “making parentage clear,” which Benson brushed aside, saying that the Defendants had been unable to “specify any tangible effect that recognizing a female spouse as a parent would have on the accuracy of those records” or to explain how recognizing a female spouse as a parent would undermine the “clarity of parentage.” Neither struck the court as a rational basis for...
making a female spouse go through the adoption process.

Judge Benson mentioned that the stepparent adoption process imposed expenses and was time-consuming. A filing fee of $360 was required to initiate the adoption petition. Angie would have to undergo a background check by the Utah Bureau of Criminal Identification and the Utah Division of Child and Family Services; she would have to wait for a hearing before a judge to be scheduled; then both women would have to appear in person at the hearing, leaving it to a judge to determine whether the adoption was in the child’s best interest. In the meantime, lacking an appropriate birth certificate, Angie would be unable to prove to third parties that she was a parent of the child or for the child to fully enjoy the “protections and benefits of having Angie as her legally recognized parent.” Money damages after the fact would be inadequate to fully compensate for this, and in general courts consider a deprivation of constitutional rights to itself impose irreparable injury, apart from any other harm. As the state could show no tangible harm if it were ordered to recognize Angie as a parent and issue an appropriate birth certificate, the balance of harms favored the plaintiffs, and the 10th Circuit has recognized that “it is always in the public interest to prevent the violation of a party’s constitutional rights.”

Thus the court concluded that the preliminary injunction sought by the plaintiffs should be issued. The ruling as the first of its kind post-Obergefell and it was not clear whether the state would seek to appeal from a final judgement on the merits in this case. The logic of the decision, in light of Obergefell’s command that same-sex and different-sex married couples be treated the same, is impeccable, so an appeal would undoubtedly be futile and frivolous.

Plaintiffs are represented by John M. Mejia and Leah M. Farrell of the ACLU LGBT & AIDS Project. ■

Nebraska Court Holds Anti-Gay Adoption/Foster Licensing Policy Violates 14th Amendment

Lancaster County, Nebraska, District Judge John A. Colborn ruled on August 5, 2015, that the state’s policy for approving adoptions of state wards and foster care licenses for same-sex couples violated the rights of gay people and same-sex couples under the 14th Amendment of the U.S. Constitution. Ruling in Stewart v. Heineman, Case No. CI 13-3157, the court invoked the U.S. Supreme Court’s decision in Obergefell v. Hodges in support of its ruling, but without explicitly stating why Obergefell compels this result. Nebraska Attorney General Doug Peterson stated on August 6 that he will file a motion to reconsider the decision, sexual orientation or marital status apart from inquiries already included in the licensing application and home study forms. In the summer of 2012, the former Director of the Division of Children and Family Services (CFS), Thomas Pristow, told Service Area Administrators and the Deputy Director of the agency that they should no longer follow Memo #1-95, and that DHHS could place children with gay singles or same-sex couples, provided that he personally approve any such placement. This was after the three plaintiff couples in this case had been turned down under the policy expressed in Memo #1-95. The memo was subsequently removed and a spokesperson for his office said, “The scope of the court’s order makes placements in the best interest of the child unnecessarily more difficult.”

Omaha World-Herald, Aug. 7.

The lawsuit was initiated in 2013 by three same-sex couples who were told during the period 2010-2012 that they could not be certified to be foster parents.

The lawsuit was initiated in 2013 by three same-sex couples who were told during the period 2010-2012 that they could not be certified to be foster parents because of a policy adopted by the state’s Department of Health and Human Services. In January 1995, DHHS issued Administrative Memorandum #1-95, which directs that foster home licenses may not be issued to “persons who identify themselves as homosexuals” or “unrelated, unmarried adults residing together.” DHHS indicated at the same time that the new policy would not affect existing foster placements or placements with a child’s relative, and apparently the intent was to institute a “don’t ask, don’t tell” policy under which staff would not ask about from the agency’s website in February 2015 (after a federal district court had ruled that the state’s same-sex marriage ban was unconstitutional) but the policy was never formally rescinded in writing, Memo #1-95 does not appear on the DHHS website’s page for rescinded or replaced memos, and it has not been replaced with a new written policy statement. Indeed, the current website makes no reference to a DHHS policy on gay individuals or unrelated, unmarried couples. According to evidence introduced by the plaintiffs, some consisting of statements by agency officials at operational levels, it appears that there is considerable confusion within the agency and among agency contractors about the status of this policy, and that gay couples continue to be routinely denied certification as foster parents.

Judge Colborn rejected the agency’s contention that removal of the policy...
What makes this laughable was that only to “prevent bias against those persons.” approving gay applicants was intended that the extra level of scrutiny on agency made the laughable argument the testimony belied that assertion. The wasn’t treating them differently, but fact, he noted, the agency claimed it process,” wrote Judge Colborn. In and heterosexual couples in this review differently than heterosexual individuals individuals and gay and lesbian couples to justify treating gay and lesbian any legitimate governmental interest not argued, nor have they identified, constitutional flaws. “Defendants have testimony, the court found further unwritten policy described in agency Process Clauses.”

Turning to the challenge to the current unwritten policy described in agency testimony, the court found further constitutional flaws. “Defendants have not argued, nor have they identified, any legitimate governmental interest to justify treating gay and lesbian individuals and gay and lesbian couples differently than heterosexual individuals and heterosexual couples in this review process,” wrote Judge Colborn. In fact, he noted, the agency claimed it wasn’t treating them differently, but the testimony belied that assertion. The agency made the laughable argument that the extra level of scrutiny on approving gay applicants was intended to “prevent bias against those persons.” What makes this laughable was that only those applications approved at lower levels are subjected to review at higher levels within the agency. “It is not logical that a procedure could prevent bias when it does not deal with placements that were rejected, or not recommended, during one of the previous four stages of review,” wrote the judge. “If the Defendants wanted to prevent bias against gay and lesbian couples, as well as unmarried adults residing together, Defendants would review denials of placements rather than approvals of placements.” On its face, the extra-tiers-of-review process appears designed to screen out gay applicants, not to prevent bias against them. The court found that the agency had acknowledged that there was “no child welfare interest advanced by treating gay and lesbian persons differently from heterosexual persons in decisions regarding licensing or placement in foster or adoption homes.” That being the case, once again the court deemed the policy inconsistent with the requirements of Obergefell v. Hodges.

The court ruled that the agency must treat gay and non-gay applicants the same, and same-sex and different-sex couples the same. Of course, in the post-Obergefell world, the state and its agencies must treat married same-sex couples the same as married different-sex couples as a matter of constitutional law. The court ordered the agency to formally rescind Memo #1-95, and to replace it with a Memo stating the constitutionally appropriate version of the current policy. (The absence of a written policy clearly creates confusion within the agency and may provide too much unguided discretion to lower level agency functionaries to discriminate against gay applicants.) The court enjoined the agency from “applying a categorical bar to gay and lesbian individuals, gay and lesbian couples, and unrelated, unmarried adults residing together seeking to be licensed as foster care parents or to adopt a state ward.” The court ordered that the same review processes be used for all applicants, and provided that “costs of this action are taxed to Defendants.”

Given the state’s reluctant acquiescence to Obergefell and the stated opposition by Governor David Heineman to gay rights in general and gay parenting in particular, it seemed likely that the state would pursue an appeal of Judge Colborn’s decision.
Georgia Federal Court Parses Discovery Requests in Transgender “Protection from Harm” Case

T
his writer rarely sees published
decisions regarding the nuts
and bolts of pre-trial discovery
in prisoner protection-from-harm
Dist. LEXIS 93376 (S.D. Ga., July 17,
2015), plaintiff Darius Ishun Green,
a transgender inmate, “begged” for
protective custody after repeated sexual
assaults from another inmate, Darryl
Ricard. In response, named parties and
“John Doe” defendants placed Green
“into protective custody with Ricard,
who then raped him.” [Italics by the
court.] United States Magistrate Judge
Green sought a second deposition of a
“designated” official of the Georgia Department
of Corrections under F.R.C.P. 30(b)(6), who could
testify about the incident, name the “John Doe”
defendants, and identify relevant documents,
after the first such witness was so unprepared
she “effectively failed to appear.”

G. R. Smith’s decision discusses both
depositions and documents.

Green sought a second deposition of a
“designated” official of the Georgia Department
of Corrections (“GaDOC”) under F.R.C.P. 30(b)(6),
who could testify about the incident,
name the “John Doe” defendants, and
identify relevant documents, after the first such witness was so unprepared
she “effectively failed to appear.” The
witness could not identify the persons
responsible for Green’s protective
custody or Ricard’s placement in the
same unit, nor could she find some of
the documentation relating to the
events. Although she reviewed
the incident report and interviewed
available witnesses, her investigation
was “largely fruitless.” Judge Smith
deprecated the official’s “we don’t know”
answers were binding on the GaDOC
(but not the individual defendants),
prohibiting it from offering evidence on
the point at trial.

Green also sought to compel
production of: (1) all videotapes of
Green during his entire incarceration;
(2) documents about broken locks in
the protection unit and security audits
at the prison; and (3) documents about
sexual assaults, identifying transgender
victims. Judge Smith sustained
GaDOC’s objection to Green’s “fishing
Green or her assailant, as well as
documents about “systemic security
flaws,” including: (1) faulty locks; (2)
free roaming inmates; (3) rapes and
sexual assaults; and (4) issues with
transportation to protective custody.
If the GaDOC has specific “security
concerns,” they must be addressed in a
particularized motion for a protective
order on those grounds.

GaDOC produced spreadsheets about
sexual assaults, but it said it “had no
way of knowing” who was transgender;
and it did not produce incident reports
about the listed assaults. Judge Smith
accepted that GaDOC could not identify
transgender victims, but he ordered
production of the incident reports,
since “they might help establish that
[the prison’s] administrators knowingly
turned a blind eye to prison sexual
assaults in general,” allowing redaction
for “appropriate” privacy and security
concerns – cautioning that GaDOC
“must not over-redact” and that Green
could move for release of information
in a report that was likely to lead to
admissible evidence.

Although these discovery rulings
establish useful precedent in protection-
from-harm cases, the opinion does not
mention the Prison Rape Elimination
Act, 42 U.S.C. § 15601, et seq., or its
implementing regulations, 28 C.F.R.,
Part 115 (“PREA”) – perhaps because
the events occurred prior to the final
PREA regulations. While courts have
consistently ruled that PREA does
not provide a private cause of action,
the regulations are a fountain of leads
for discovery, mandating: action
plans to reduce sexual assault, audits
of performance, investigation and
reporting of incidents, protection of
witnesses, and retention of documents.
PREA particularly addresses
transgender victims of sexual assault,
and all prisons and jails are now
required by PREA to maintain some
of the documentation the GaDOC was
unable to produce in this case.

Green was represented by Mario
Bernard Williams, Williams Oinonen,
Atlanta. – William J. Rold
Italian Supreme Court Finds Sex Reassignment Surgery Not Always Prerequisite for Legal Gender Reassignment

On July 20, 2015, the Italian Supreme Court (Corte di Cassazione) ruled that sex reassignment surgery (SRS) is not a requirement for completing the legal gender reassignment procedure (No. 15138/15, X v. Minister of Interior & Others).

The ruling follows a jurisprudence of the Supreme Court that is very attentive to the personal dimensions of questions relating to sexual orientation and gender identity. In so doing, it incorporates and combines several principles arising out of both the comparative and the supranational contexts, in particular from the jurisprudence of the European Court of Human Rights (see, for instance, judgments No. 8097 of Apr. 21, 2015 and No. 14329 of June 6, 2013, A.B. et al. v. Comune di Finale Emilia, recognizing the validity of the marriage of a male-to-female transsexual after post-marriage gender reassignment; No. 2400 of Feb. 9, 2015, A.A. & D.P. v. Comune di Roma et al., on the constitutional right to same-sex marriage; No. 4184 of Feb. 15, 2012, Garullo & Ottocento v. Comune di Latina, on the legal protection of foreign same-sex marriages).

The question of an SRS requirement in order to obtain legal gender reassignment has filled Italian courtrooms in recent times and is currently under the review of the Constitutional Court (see also Eur. Ct. Hum. Rgts., March 10, 2015, App. No. 14793/08, Y.Y. v. Turkey). The question is central to Italy’s Law No. 164 of April 14, 1982, regulating gender reassignment, one of the first European laws on the subject. Despite its reincorporation in a reform of 2011 aimed at speeding up the various proceedings that exist in the chaotic and long-lasting world of Italian civil procedure, the Law remained substantially unchanged throughout thirty years.

Its Article 1 establishes that courts have jurisdiction over petitions for gender reassignment “after the modification of sexual characteristics.” In addition, Article 3 provides that “[t]he court authorizes [SRS] after finding that a modification of sexual characteristics is deemed necessary.” At the completion of this procedure, the court orders the registry office in the municipality of residence (Ufficio dello stato civile) to rectify the petitioner’s sex and name(s) in the birth certificate. However, since the Law does not specify which sexual characteristics —primary or secondary — must be modified, courts have interpreted the SRS requirement in different ways.

Whereas some courts have granted the petitioners’ requests for rectification without surgery (e.g., the Tribunals of Rovereto, Messina, Genova, and Rome), others have denied these requests on the ground that, by avoiding SRS, petitioners were allegedly seeking “to vindicate a tertium genus” (e.g., Court of Appeals of Bologna, Tribunals of Vercelli and of Piacenza). Often the former position was based upon a human rights reading of the Law, which privileged the protection of health and the risks arising out of SRS, while courts justified the latter position with the need to respect the letter of the law and prevent interfering with the legislature.

Perhaps to avoid a conflict with the Constitutional Court, the Supreme Court ruling focuses on the interpretation of Articles 1 and 3 of the Law, avoiding any constitutional review. It concludes that “the ‘chirurgical’ correction is not required by the text of the law.” In fact, in recent years medical, psychological and psychiatric sciences have developed new techniques that changed the transition procedure, while at the same time “a culture of human rights” spread throughout Europe. Here the Court mentions the reports of the United Nations and the Council of Europe on the subject, together with the judgments of the Constitutional Courts of Germany and Austria on the same. In this respect, according to the Court, whereas a judicial procedure is needed to protect the public interest to ensure that people’s sex and names are well-

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MARRIAGE EQUALITY

OBERGEFELL RETROACTIVITY – An important transitional issue in the implementation of Obergefell v. Hodges is the question of whether the Supreme Court’s declaration that same-sex couples enjoy a constitutional right to marry should be applied retroactively. This question was forcibly raised in a pair of lawsuits filed by Lambda Legal, Williams v. Colvin in the Northern District of Illinois and Murphy v. Colvin in the District for the District of Columbia, contending that the Social Security Administration (SSA) should apply Obergefell retroactively to recognize same-sex marriages of couples who resided in states that did not recognize their marriages prior to June 26, 2015. These cases involved claims for surviving spouse benefits. In both complaints, wrote Lambda, “Plaintiff seeks to end SSA’s unconstitutional use of discriminatory state laws to deny the spousal status and eligibility for Social Security benefits of spouses, widows, and widowers who validly married partners of the same sex.” Some of these claims predate both U.S. v. Windsor and Obergefell, in which the Supreme Court first struck down as unconstitutional the federal government’s refusal to recognize all same-sex marriages and then the states’ refusal to allow or recognize same-sex marriages. After Windsor, the SSA had taken the position that under existing statutes and regulations it could only recognize same-sex marriages if the couple resided in a state that recognized the marriage. Nonetheless, LGBT advocacy groups advised spouses living in those states with potential social security benefits claims to file applications and appeals in order to preserve their claims in case this restriction was knocked down. The agency had been denying or delaying responding to these claims, most recently asserting that it was waiting on the Justice Department to advise about the issue of retroactive application in light of Obergefell. At a status conference in the federal court in Chicago on August 20, the Justice Department announced that SSA will apply Obergefell retroactively, and will process pending spousal benefits claims for same-sex couples. DOJ attorneys at the status conference stated that this policy will apply to previously filed claims still pending in the administrative process or in litigation. DOJ did not indicate when the new policy will be officially published or implemented, however, and the announcement did not seem to contemplate the possibility that other same-sex spouses could file claims that would not be barred by statutory time limits. Stand by for further developments.

OBERGEFELL DOCTRINAL BASIS – The Supreme Court’s decision in Obergefell has drawn some adverse criticism from LGBT rights advocates due to the Court’s decision to premise its ruling entirely on the right to marry as a fundamental right, avoiding the question whether a statutory classification that discriminates because of sexual orientation is subject to heightened scrutiny under the Equal Protection Clause. Retired Supreme Court Justice John Paul Stevens injected himself into the discussion in remarks he delivered on July 31 to the American Bar Association’s Litigation Section at a function in Chicago. According to his published text, he stated: “Probably the most significant opinion announced during the Term was Justice Kennedy’s explanation for holding that the Constitution protects an individual’s right to marry a person of the same sex. I was surprised by his decision to rely primarily on a substantive due process rationale rather than the Equal Protection Clause but, after reflection, I am persuaded that he was wise to do so. The difference between categories of couples capable of producing children and those completely unable to do so surely provides a rational basis for treating the two categories differently, but the substantive due process doctrine is more appropriate for an all-or-nothing analysis. The right to marry – like the right to decide whether to have an abortion, or the right to control the education of your children – fits squarely within the category of liberty protected by the Due Process Clause of the 14th Amendment. Just as Potter Stewart’s reliance on substantive due process in Roe v. Wade, 410 U.S. 113 (1973), and Justice Harlan’s and Justice White’s reliance on the substantive content of the word ‘liberty’ in Griswold v. Connecticut, 381 U.S. 479 (1965), were far better explanations for those two correct decisions than the concept of ‘privacy’ developed by the majority opinions, I am persuaded that a fair reading of the word ‘liberty’ best explains the real basis for the Court’s holding in the marriage case. The point is strongly reinforced by the dissenting opinions which rely heavily on earlier decisions rejecting the substantive due process analysis in Lochner v. New York, 198 U.S. 45 (1905). But those dissents incorrectly assume that our cases overruling Lochner rejected the entire doctrine of substantive due process, whereas in fact they merely rejected its application to economic regulation. Indeed, it is ironic that all of today’s dissenters (except Justice Thomas) who accuse the majority of improperly resurrecting Lochner, came much closer to committing that sin themselves when they decided to rely on substantive due process as the basis for their conclusion that the Second Amendment applies to the States. It borders on the absurd to assume that the word ‘liberty’ does not include one’s right to choose a spouse but does include a right to possess a firearm in one’s home. . . I endorse the Court’s holding that the Due Process Clause of the 14th Amendment protects an individual’s right to choose his or her spouse but I remain unpersuaded that the Clause also protects an individual’s right to use a gun. The dissenters have things backwards when they argue that
it protects the latter but not the former.” It is worth noting that several lower federal courts disagreed with Justice Stevens’ assertion that the differing reproductive capacities of same-sex and different-sex couples provided a rational basis for treating the two classes of couples differently, in ruling that state bans on same-sex marriage did violate the Equal Protection Clause.

SOCIAL SECURITY CLASS ACTION
– On August 3, U.S. District Judge Percy Anderson dismissed a proposed class action lawsuit on behalf of married same-sex couples who received notices from the Social Security Administration (SSA) during 2014 seeking recoupment for “overpayment of benefits” after the SSA got around to recognizing same-sex marriages in the wake of U.S. v. Windsor, Held v. Colvin, 2015 U.S. Dist. LEXIS 103605 (C.D. Cal.). Under Social Security, a married couple may receive a smaller monthly retirement check than the total of what an unmarried couple will receive as single participants. It took the SSA more than a year to respond to the demise of Section 3 of the Defense of Marriage Act and begin paying out to same-sex married couples (in states that recognized their marriages) at the married couple rate. This was followed by letters to beneficiaries, advising them that they had been overpaid since June 26, 2013, and would have to repay the SSA. Plaintiff Hugh Held received such a letter in September 2014, demanding $6,205.00. Plaintiff Kelly Richardson-Wright received her letter in December 2014, seeking $4,129.88. Rather than formally appeal these determinations within the SSA, Held and Wright, represented by a team of public interest lawyers, filed suit on March 10, 2015, seeking to represent all same-sex spouses who had received or would receive such letters from the SSA. After the suit was filed, SSA quickly determined that it should “waive” these overpayments, and notified Held and Richardson-Wright to that effect. The Act authorized the SSA to waive overpayments to a beneficiary “who was without fault in connection with the overpayment” when recovering the overpayment would “be against equity and good conscience.” Moving to dismiss the lawsuit, the SSA argued that the plaintiffs’ claims were moot and, furthermore, that the class action should be dismissed because neither plaintiffs nor any proposed class members had exhausted administrative remedies. There is a mechanism for beneficiaries to appeal such determinations administratively, and the SSA argued that this is what plaintiffs should have done to receive full relief, as demonstrated by the SSA’s decision to waive the overpayment claims. Judge Anderson decided, based on the exhaustion of remedies argument, that he lacked jurisdiction over the claims and granted the motion to dismiss. When the Supreme Court decided Obergefell v. Hodges on June 26, 2015, this problem would have extended to more same-sex married couples when SSA would then recognize such marriages regardless where the couple is domiciled, but the agency’s action clearly sets a precedent of not seeking recoupment of any “overpayments” that may be attributable to a delay by the agency in adjusting payments to reflect the newly-recognized marital status of the beneficiaries.

INTERNAL REVENUE SERVICE
– Addressing fears voice by some leaders in the religious non-profit sector that their tax exempt status might be at risk if they refused to recognize same-sex marriages, IRS Commissioner John Koskinen stated that religious colleges that would not accept same-sex marriages were not at risk if losing their tax exempt status. The question was put to him at a Senate hearing by Senator Mike Lee of Utah, who cited the example of Bob Jones University, which lost its tax exempt status due to its racial policies in the 1970s. The IRS determined at that time that an organization that imposed racially discriminatory policies on its staff and students could not qualify as a charitable, tax-exempt organization. Koskinen stated affirmatively that he was not going to move to remove the tax-exempt status from religious colleges and universities based on their belief that marriage is only between a man and a woman. Koskinen did indicate that changes in public policy could force the IRS to reevaluate that position in the future, but that would require the administrative procedure of proposing regulations, receiving public comment, and publishing final regulations. Associated Press, July 29. The process would be time consuming and public enough that Congress could intervene if it wanted to do so. Members of Congress, including Senator Lee, are seeking to intervene, as noted below, with their proposed First Amendment Defense Act, which would protect entities from adverse consequences under federal law if they refused to recognize same-sex marriages.

ALABAMA – The Southern Policy Law Center (SPLC) reported that its client, Paul Hard, the surviving spouse of David Fancher, will finally get his share of the proceeds from a wrongful death action. Hard, a professor at a university in the Montgomery area, married David Fancher in a Massachusetts ceremony in 2011. A few months after the wedding Fancher died in an auto accident on Interstate 65 in Alabama. Hard brought a wrongful death action against the trucking company whose vehicle had caused the accident, which settled in July 2014. Because Alabama did not recognize the marriage at that time, the death certificate indicated that Fancher was unmarried. Under Alabama law, proceeds of a wrongful death action. Hard, a professor at a university in the Montgomery area, married David Fancher in a Massachusetts ceremony in 2011. A few months after the wedding Fancher died in an auto accident on Interstate 65 in Alabama. Hard brought a wrongful death action against the trucking company whose vehicle had caused the accident, which settled in July 2014. Because Alabama did not recognize the marriage at that time, the death certificate indicated that Fancher was unmarried. Under Alabama law, proceeds of a wrongful death action. Hard, a professor at a university in the Montgomery area, married David Fancher in a Massachusetts ceremony in 2011. A few months after the wedding Fancher died in an auto accident on Interstate 65 in Alabama. Hard brought a wrongful death action against the trucking company whose vehicle had caused the accident, which settled in July 2014. Because Alabama did not recognize the marriage at that time, the death certificate indicated that Fancher was unmarried. Under Alabama law, proceeds of a wrongful death action. Hard, a professor at a university in the Montgomery area, married David Fancher in a Massachusetts ceremony in 2011. A few months after the wedding Fancher died in an auto accident on Interstate 65 in Alabama. Hard brought a wrongful death action against the trucking company whose vehicle had caused the accident, which settled in July 2014. Because Alabama did not recognize the marriage at that time, the death certificate indicated that Fancher was unmarried. Under Alabama law, proceeds of a wrongful death action.
death action go to surviving spouses or, if the decedent was unmarried, to those who would inherit by intestate succession. Fancher’s mother, Pat Fancher, sought to claim the wrongful death proceeds as Fancher’s only surviving intestate heir. Southern Poverty Law Center filed suit for Hard in the U.S. District Court, seeking to overturn the state’s Marriage Protection Act and Sanctity of Marriage Act in order to establish Hard’s status as a surviving legal spouse. This suit was running in parallel with other lawsuits challenging the Alabama marriage bans. Although Fancher died leaving a will designating Hard as his sole beneficiary, under Alabama law all proceeds of wrongful death actions must be distributed to heirs at law regardless of the existence of a will. After the 11th Circuit denied a stay of the district court ruling in one of the other cases striking down the Alabama same-sex marriage ban, state officials issued a revised death certificate in February 2015 showing that Fancher was married and Hard was his spouse, but because the state had an appeal to the 11th Circuit on file which was stayed pending a ruling in the Obergefell case, the money was not paid out at that time, being held by the clerk of court in an escrow account. Pat Fancher argued after Obergefell that the ruling could not be applied retroactively to this case, as the death occurred long prior to the district court ruling invalidating the Alabama marriage ban, but U.S. District Judge W. Keith Watkins ruled against her on that. On July 29, Judge Watkins signed two orders: one denied a motion by Fancher to set aside a prior ruling that had dismissed her claim, seeking to submit new arguments; the other directed the court clerk to disburse the settlement proceeds from the wrongful death case ($552,956.69 plus interest earned) to Paul Hard through his counsel, SPLC. The case is identified as Hard v. Strange, Case No. 2:13-CV-922-WKW (M.D. Ala., July 29, 2015).

ARKANSAS – Responding to questions posed by State Senator Bruce Maloch, Arkansas Attorney General Leslie Rutledge released Opinion No. 2015-075 (August 5, 2015), drafted by Assistant Attorney General Ryan Owsley, on questions about whether and under what circumstances judges and justices of the peace could refuse to perform same-sex marriages. The opinion notes that Arkansas law does not impose a requirement on such officials to perform marriage ceremonies, but authorizes them to do so, and opines that answers to the questions posed would turn on how an Arkansas court would construe the recently-enacted Arkansas Religious Freedom Restoration Act, a measure adopted recently in response to the marriage equality controversy that has not yet enjoyed any appellate construction from Arkansas courts. The opinion cautiously refrains from addressing whether JPs and judges might be subject to liability in a suit by a same-sex couple in federal court, but opines that the Arkansas RFRA could apply to a suit between private parties and could provide a defense upon a showing that being required to perform a same-sex wedding would impose a substantial burden on the free exercise of religion rights of the JP or judge. The Opinion notes that so long as there are other JPs or judges or other authorized to perform weddings who are willing to do so, requiring a religiously-objecting JP or judge to perform the ceremony would not be the “least restrictive alternative” to imposing an undue burden on the religious objector. The opinion totally evades (by omission) the question whether a JP or judge should properly be characterized as a private party in such litigation, although it notes some question about the basis for a same-sex couple whose request that a particular JP or judge perform their ceremony could maintain any cause of action against them under state law, and thus doesn’t really address the question whether a JP or judge, as a public official, has a right under either the Arkansas RFRA, the state constitution, or federal constitutional law to refuse to perform a public function based on his or her personal religious beliefs. Seeking “cover” for its conclusions, the Opinion cites the “similar conclusion” reached by the Texas Attorney General, Tex. Atty. Gen. Op. No. KP-0025 (June 28, 2015), an opinion that is itself under judicial attack. With due respect to AAG Owsley, who was apparently handed a politically-charged task to produce a document to provide “cover” to his boss and fall in line with the views of the state administration, this Opinion, which hems and haws and hedges at critical points, the letter puts up a brave face in defense of a questionably defensible position.

FLORIDA – The Tampa Bay Times reported on August 21 that state officials plan to remove gender-specific language from marriage and death certificate forms by mid-September 2015, almost a year after a federal court ruling that the state’s constitutional and statutory ban on same-sex marriage is unconstitutional. The state had filed an appeal of that ruling in the 11th Circuit, but the appeal was withdrawn after the Supreme Court ruled on June 26 in Obergefell v. Hodges that state bans on same-sex marriage are unconstitutional. Despite that ruling, state officials have persisted in refusing to apply the parental presumption to same-sex married couples, and a lawsuit was filed on August 13 by three lesbian couples alleging that the state’s refusal to put co-parent names on birth certificates without an adoption proceeding violates their right to equal protection under the 14th Amendment. According to the newspaper report, the state has “filed a motion seeking clarification on how the ruling that legalized same-sex marriage in Florida applies to birth certificates.” The question whether the parental presumption (that the spouse of
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a woman who gives birth is presumed to be the child’s legal parent) should apply to same-sex couples being litigated in several places around the country. Some government officials have objected that the presumption makes sense only in the case of different-sex marriages, arguing that it is physically impossible for a woman to be the biological parent of her wife’s child, and that the presumption was intended to assure legitimacy of children born to married women by presuming that their husbands were the physical progenitors of their children.

With modern reproductive technology, however, it is of course possible for a same-sex female couple to conceive a child who is biologically related to the birth mother’s female spouse by using that spouse’s egg, fertilized in vitro and implanting it in the other spouse, who gestates the fertilized egg and gives birth to the resulting child. . . providing a counter-hypothetical in our Brave New World. In light of the Supreme Court’s holding in Obergefell that married same-sex couples are entitled to be treated the same as married different-sex couples as a matter of due process and equal protection, it seems appropriate to apply the parental presumption and not require same-sex spouses to go through an adoption proceeding in order to be listed as a parent on the birth certificate when their spouse bears a child that the couple intend to raise together. This concept of “intentional parenthood” for same-sex couples has been recognized in California for a decade, and has been embraced is several other states.

* * * The Tampa Bay Times (Aug. 15), reported that Florida Attorney General Pam Bondi was opposing a full award of attorney fees to plaintiffs in the marriage equality case that went to the 11th Circuit on the ground that the state had voluntarily dismissed its appeal after the Supreme Court ruled in Obergefell. Bondi claimed that the plaintiffs’ attorneys should not be compensated at the state’s expense for any work they did at the appellate stage. This is ludicrous, of course. Bondi spoke before plaintiffs’ counsel had submitted a fee request, but it was expected to come in at about half a million dollars, as the state had fought the plaintiffs at every point, requiring extensive briefing and arguments, including seeking clarification of the scope of the court’s order when it was contested by the state.

**IDAHO** – On December 19, 2014, U.S. Magistrate Judge Candy W. Dale awarded $397,300.00 in attorneys’ fees and $4,363.08 in costs to the plaintiff prevailing parties in Latta v. Otter, the challenge to the state’s same-sex marriage ban. Because Governor Butch Otter, the lead defendant, was determined to fight tooth and nail to avoid having to allow same-sex marriage in his state, Judge Dale’s prior merits ruling was not the end of the matter, with appeals being filed to the 9th Circuit and stays being unsuccessfully sought from the Circuit and the Supreme Court. Plaintiffs filed a supplementary motion for fees and expenses to cover representation in the 9th Circuit from May 24, 2014 through January 21, 2015. On August 3, Judge Dale signed a new decision and order in Latta v. Otter, 2015 WL 4623817, 2015 U.S. Dist. LEXIS 102635, granting the plaintiffs more fees and expenses over the protests of defendants. The court ordered the payment of an additional $216,460.00 in fees and $6,730.85 in expenses to cover that period. The opinion goes through the arguments about which hours should be billed and at what rates in excruciating detail.

**INDIANA** – Linda G. Summers, who was dismissed from her employment in the Harrison County Clerk’s office when she refused to process a marriage license application from a same-sex couple due to her religious objections, filed a federal civil rights lawsuit against County Clerk Sally Whitis and Harrison County on July 17, 2015. Summers v. Whitis, Case No. 4:15-cv-93 (U.S. Dist. Ct., S.D. Indiana). According to the complaint, which sets out in detail (including Biblical citations) the religious basis for Summers’ claim, after the Supreme Court refused on November 6, 2014, to review the 7th Circuit’s decision declaring Indiana’s ban on same-sex marriage unconstitutional, Whitis circulated to her staff an email instructing them that it was the duty of the Clerk’s Office to process marriage license applications from same-sex couples. “Even though it may be against your personal beliefs,” said the email, “we are required by state law to process their applications. We are only doing the paperwork and not performing their ceremony.” A same-sex couple applied for a license on December 8 that Summer was “called upon to process,” but she informed Whitis that she could not prepare the paperwork “because of her religious beliefs against same-sex marriage,” and later that day she hand-delivered a letter to Whitis requesting a religious accommodation, pointing out that other employees in the office were willing to process such applications and asking that she be excused from doing so. Whitis terminated Summers’ employment the next day, characterizing her conduct as “insubordination” and citing the County’s personnel policy that provides for discipline or discharge of an employee who refuses to perform assigned work or to comply with written or verbal instructions from supervisors. The complaint charges that Whitis failed to make any attempt to accommodate Summers and her religious beliefs, in violation of Title VII, under which employers are obligated to make reasonable accommodations to the religious beliefs of employees and not to discriminate against or discharge them because of their religious beliefs.

Summers is represented by Earl C. Mullins, Jr., and Richard L. Masters of Louisville, KY, and Chris Lane of New Albany, IN.
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KANSAS – U.S. District Judge Daniel D. Crabtree issued a decision on August 10 in Marie v. Mosier, 2015 WL 4724389 (D. Kans.), the marriage equality case formerly known as Marie v. Moser. (The lead defendant, a state agency head, has automatically been replaced by her successor, who by sheer coincidence has almost the same last name.) Last November Judge Crabtree issued a preliminary injunction, requiring the state to issue marriage licenses to same-sex couples following binding 10th Circuit precedent after the Supreme Court denied review in Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2015) and Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014). The preliminary injunction was not stayed in light of the Supreme Court’s refusal to review those decisions, making marriage equality a binding doctrine within the 10th Circuit, including Kansas. However, state officials – most notably Governor Sam Brownback – proved recalcitrant, licenses were available only in some counties, and state agencies continued to refuse to recognize the marriages. The litigation was expanded to name the heads of various state agencies as defendants, but things remained on hold until the Supreme Court ruled in Obergefell on June 26. Then licenses soon became more widely available, but compliance by state agencies was halting, as attempts by already-married couples to file joint tax returns, put spouses on state employee benefits plans, and get new driver’s licenses with appropriate surnames, continued to encounter obstacles while agencies said they were awaiting legal advice about the impact of the Supreme Court ruling. The plaintiffs asked Judge Crabtree to issue a final ruling on the merits accompanied by injunctive relief, while the state sought to have the case dismissed as moot, claiming that the Supreme Court ruling had decided the only legal issue before the court and that the state was moving to comply with it. Judge Crabtree, taking a tack similar to that articulated a few days later by the 8th Circuit (see above), decided the case wasn’t moot inasmuch as the Supreme Court had only specifically ruled on the constitutionality of same-sex marriage bans in the 6th Circuit, although of course its ruling on the merits created a precedent binding in all lower federal courts. Thus, he found it appropriate to grant the plaintiffs’ motion for a summary judgment on the merits. But he considered the issue of injunctive relief more difficult. Although the state argued that it was now complying with Obergefell, Crabtree acknowledged affidavits filed by the plaintiffs showing that attempts post-Obergefell to get state agencies to treat same-sex marriages equally had not been successful. On the other hand, acknowledging the changing legal landscape, Crabtree concluded it was premature to issue the requested injunctive relief, since the state was contending that it would be in full compliance. Thus, while holding that the failure by the state to comply fully violates the 14th Amendment, he gave the parties until September 15 to “supplement the undisputed facts material to plaintiffs’ motion for summary judgment on their claims for injunctive relief,” gave each side up to three weeks to respond to anything filed by the other side, and indicated he would then make a decision on issuing injunctive relief.

MARYLAND – Marriage equality means equal treatment of same-sex and different-sex marriages for all purposes of law. Such is the premise of Maryland Attorney General Brian E. Frosh’s formal opinion issued in response to an inquiry from a member of the state’s House of Delegates, Luke Clippinger, asking whether the adultery laws would be violated by sexual infidelity by a spouse in a same-sex marriage. Family Law – Divorce – Whether Same-Sex Marital Infidelity Can Qualify as Adultery for Purposes of Family Law

Provisions Governing Divorce, 100 Op. Att’y Gen. 105, 2015 WL 4850421 (July 24, 2015). Assistant Attorney General Patrick B. Hughes and Chief Counsel Adam D. Snyder are also listed on the written opinion. “Although the concept of adultery has significance in both criminal law and family law,” they wrote, “the State’s criminal prohibition against adultery has fallen into disuse, so we will focus on the definition of adultery for purposes of Maryland family law. In our opinion, adultery, as that term is used in the Family Law article, includes a spouse’s extramarital sexual conduct with someone of the same sex. We base this conclusion in large part on the purpose behind adultery laws in the domestic relations context. The primary purpose of adultery as a concept in Maryland family law is to recognize that sexual infidelity is a breach of the marriage vow and causes damage to the marriage, such that the injured party should be allowed to dissolve the marriage more easily than would otherwise be the case. This purpose is implicated to the same degree when an unfaithful spouse has sex with a man or a woman; extramarital sexual activity with someone of the same sex is just as damaging to a marriage as sexual activity with someone of the opposite sex. We accordingly believe that Maryland courts would recognize same-sex sexual infidelity as adultery.” The opinion notes that Maryland courts had in the past taken a broader view than the traditional narrow common law definition, treating as “adultery” situations where a different-sex spouse had engaged in sexual activity with another person of the same sex. “Adultery” is one of the recognized “fault” grounds for divorce in Maryland, making it possible for a couple to divorce without living “separate and apart” for a year as is required for a no-fault divorce proceeding. “Adultery” is also a factor in alimony and child custody determinations. The lengthy opinion provides a detailed history of adultery
as a legal concept, documenting how the concept has evolved to the point where the genders of the parties should not make a difference. While the opinion finds that the plain language of the relevant statutory provisions is not particularly helpful in answering this question, the modern statutory purpose of the concept supports applying it equally to same-sex and different sex marriages, even though a spouse cheating with a member of the same sex doesn’t present the possibility of pregnancy, a key concern in the early history of the concept that was focused on protecting a husband’s patrimony. Noting the recent Obergefell decision, the opinion comments, “The right to civil marriage would ring hollow if states could treat same-sex married couples differently than opposite-sex ones, providing special benefits to, or imposing special burdens on, one category but not the other. . . We think an overly narrow definition of adultery that excludes same-sex sexual activity, and makes it more difficult for same-sex couples to divorce, may raise similar constitutional problems. We need not decide, however, whether a court would ultimately find a constitutional violation if adultery were limited to sexual activity between a man and a woman. Rather, the point is that there is a legitimate question as to the constitutionality of defining adultery to exclude same-sex sexual activity, and this makes it even more likely that Maryland courts would choose a broader definition.”

MISSISSIPPI — In Obergefell, the Supreme Court ruled that same-sex and different-sex marriages are to be treated equally by the states, but some states have been resisting. In Mississippi, for example, the state has insisted on continuing to apply a provision in its adoption laws stating, “Adoption by couples of the same gender is prohibited,” and refusing to incorporate married same-sex couples under a provision allowing married couples to adopt children jointly. On August 12, The Campaign for Southern Equality, the Family Equality Council, and several married same-sex couples filed suit in the U.S. District Court, arguing that the state’s continued application of this provision violates the 14th Amendment. Campaign for Southern Equality v. Mississippi Department of Human Services, complaint available at 2015 WL 4757429. Local counsel representing the plaintiffs from McDuff & Byrd (Jackson, Mississippi) are collaborating with lead counsel Roberta Kaplan and a pro bono team from Paul, Weiss, Rifkind, Wharton & Garrison LLP (New York), and Meghan K. Burke of Brazil & Burke (Asheville, NC). The complaint asserts that “Mississippi is the last state that explicitly bans gay couples from adopting without regard for their qualifications as parents or the best interests of the child,” noting that courts in Arkansas and Florida had stricken such bans even before Obergefell and that the Louisiana Supreme Court had recognized in Costanza v. Caldwell, 2015 WL 4094655 (July 7, 2015), that Obergefell compelled striking down a similar limitation in that state. In addition, a state court in Nebraska had recently struck down a similar ban in Stewart v. Heineman, No. CI 13-3157 (Neb. Dist. Ct., Lancaster Co., Aug. 5, 2015) in response to the Obergefell ruling (see above). Two of the plaintiff couples filed a motion for summary judgment on August 28.

OHIO — The Ohio Supreme Court’s Board of Professional Conduct issued Opinion 2015-1 on August 7, 2015, advising as to “Judicial Performance of Civil Marriages of Same-Sex Couples.” Questions arose after June 26, 2015, when the U.S. Supreme Court reversed the 6th Circuit, thus affirming district court decisions from Ohio holding that same-sex couples have a constitutional right to marry. Judges and a judicial association (acting on behalf of its members) asked the Board for guidance, as some judges with objections to same-sex marriage wanted particularly to know whether and under what circumstances they could decline to perform such marriages. The Board first noted the oath of office taken by judges, swearing to support the Constitution of the United States and to “faithfully and impartially discharge and perform all of the duties incumbent upon me as a judge.” Wrote the Board: “The oath is a reflection of the self-evident principle that the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty.” Continued the Board, “A judge’s unilateral decision to refuse to perform same-sex marriages based on his or her own personal, religious, or moral beliefs ignores the holding in Obergefell and thus, directly contravenes the oath of office.” The Board reviewed various provisions of the state’s Judicial Conduct Rules, observing how they emphasize the requirements of judicial impartiality and avoidance of manifesting bias or prejudice. The Board pointed out that even though judges are not required to perform marriages, a decision by a judge to stop performing any marriages after the Obergefell decision could be seen as grounds for disqualifying the judge “in matters where the sexual orientation of the parties is at issue,” since it would lead to inferences about the biases of the judge. “For example,” wrote the Board, “if a judge who has declined to perform same-sex marriages is later assigned to hear a misdemeanor domestic violence charge involving a same-sex couple, the judge’s ability to follow the law and impartially apply the domestic violence laws could reasonably be questioned. This same result obtains if a judge has maintained a position that he or she will perform only opposite-sex marriages. Under either scenario, if the judge’s refusal to marry same-sex couples equates to
the judge possessing or appearing to possess a personal bias or prejudice towards persons based on sexual orientation, he or she is required under Jud. Cond. R. 2.11 to disqualify himself or herself from the proceeding. As such, a judge’s decision to decline to perform some or all marriage ceremonies, when grounded on the judge’s personal beliefs, may reflect adversely on perceptions regarding the judge’s performance of other judicial functions and duties.” The Board also noted that judicial refusals to perform same-sex marriages could adversely affect the public’s opinion of the judiciary. The Board’s ultimate conclusion: “A judge who performs civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages, based upon his or her personal, moral, and religious beliefs, as acts contrary to the oath of office and Jud. Cond. R. 1.1, 1.2, 2.2, 2.3, 2.4, 2.11, and Prof. Cond. R. 8.4(g). A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class. The judge’s decision also may raise reasonable questions about his or her impartiality in legal proceedings where sexual orientation is at issue and consequently would require disqualification under Jud. Cond. R. 2.11.”

**PENNSYLVANIA** – James D. Schneller, a determined foe of same-sex marriage who tried more than once to intervene in the *Whitewood* case challenging the state’s same-sex marriage ban, was rebuffed by the 3rd Circuit when he appealed from District Judge John E. Jones’s refusal to let him intervene. Schneller was also seeking review of the district court’s merits decision, which was not appeal by the state. In *Whitewood v. Petrille*, 2015 WL 4547750 (3rd Cir., July 29, 2015), the court of appeals rejected all but one of his claims on appeal, affirming the district court’s denial of Schneller’s intervention motions and holding that he lacked standing to appeal the district court’s ruling striking down the marriage ban. However, the court of appeals, ruling *per curiam*, said it was inappropriate for the district judge to have instructed the clerk to refuse to accept any further filings from Schneller. Wrote the court, “A district court is permitted to issue a filing injunction against vexatious litigants under 28 U.S.C. sec. 1651(a) when it believes that the abusive conduct will continue if not restrained. However, this is an ‘extreme remedy which must be narrowly tailored and sparingly used.’ Before issuing such an order, the district court must provide the litigant with notice and an opportunity to respond.” Thus, the district court should not have instructed the clerk without first letting Schneller know that his right to file cases in the future was being challenged and giving him an opportunity to be heard on the question. “Although Schneller has filed numerous meritless actions and has attempted to intervene in many cases (and may very well constitute a vexatious litigant),” wrote the court, “the District Court offered no explanation for its imposition of the order.” Thus, it was vacated, leaving Schneller free to file future vexatious motions and petitions with the district court until his due process rights are respected!

**PENNSYLVANIA** – Bucks County Court of Common Pleas Judges C. Theodore Fritsch, Jr., has granted a petition by Sabrina Maurer to have her 2001 commitment ceremony to Kimberly Underwood, which was followed 12 years of cohabitation, declared a common law marriage, by retroactive application of the Supreme Court’s decision in *Obergefell v. Hodges*. Underwood passed away from heart disease in 2013, before a federal district court ruling in 2014 made same-sex marriage legal in Pennsylvania. Pennsylvania abolished common law marriage prospectively in 2004, but grandfathers common law marriages already in existence as of that date. Maurer sought the judicial declaration so that she could claim the legal status of a surviving spouse, such as exemption from inheritance taxes. According to her petition, “They always hoped that someday they could be married in a ceremony that Pennsylvania law would license and recognize, but unfortunately, the discriminatory aspects of Pennsylvania’s marriage laws were not addressed in time for their homes to become a reality.” The court found that the common-law marriage began on September 2, 2001, the date of their commitment ceremony held in New Jersey, and ended with Underwood’s death. In a brief written order, Judge Fritsch wrote, “Their marriage is valid and enforceable, and they are entitled to all rights and privileges of validly licensed, married spouses in all respects under the laws of the commonwealth of Pennsylvania.” This should also extend to federal recognition, since in light of *Obergefell* and *Windsor* the federal government recognizes same-sex marriages that are valid under state law. Maurer is represented pro bono by Mary Hackett of the law firm of Reed Smith. Hackett told *Legal Intelligencer*, which reported on the ruling on July 29, that there were past cases invalidating opposite-sex common law marriages in Pennsylvania, providing a precedent for this action, but this may be the first judicial ruling to take such a step in a same-sex case. In light of *Obergefell*, refusing to extend the same reasoning to a same-sex marriage would raise equal protection issues. It is relatively well established that a U.S. Supreme Court declaration of a constitutional right is generally considered to have
retroactive application. The Bucks County Courier Times also provided a detailed report about the ruling on July 30. The newspaper reported that Maurer has filed suit against United of Omaha and Dearborn National Insurance Co., which had refused to recognize her as a surviving spouse for purposes of a spousal survivor benefit under a disability insurance policy.

**SOUTH CAROLINA** – U.S. District Judge J. Michelle Childs, determining that any controversy between the parties was moot due to the Supreme Court’s ruling in Obergefell v. Hodges, granted the state’s motion for summary judgment in Haas v. South Carolina Department of Motor Vehicles, 2015 WL 4879268, 2015 U.S. Dist. LEXIS 106415 (D. S.C., Aug. 13, 2015), an action that was filed in October 2014 by three same-sex spouses who were married outside of South Carolina and whose requests to have new drivers licenses issued showing their married names had been denied by state officials, even though the Supreme Court had on October 6 denied certiorari in the Virginia marriage equality case. A few weeks after this case was filed, the U.S. District Court declared South Carolina’s same-sex marriage ban unconstitutional and the state filed an appeal to the 4th Circuit, despite the adverse Virginia precedent. However, the South Carolina DMV did alter its policy in response to the federal district court’s ruling (and denial of a stay pending appeal) and granted new drivers licenses to the plaintiffs. In February 2015 the state filed a motion for summary judgment, arguing that its change of policy and issuance of the requested licenses to the plaintiffs rendered their action for declaratory and injunctive relief moot, and arguing that any claim for damages would be barred by the 11th Amendment. The plaintiffs, conceding the 11th Amendment point, responded that the claims for declaratory and injunctive relief were not moot, pointing out that as of then the state had an appeal on file with the 4th Circuit and was seeking to be able to reinstate its marriage ban. Judge Childs, undoubtedly aware that the Supreme Court had granted certiorari in the 6th Circuit marriage equality case in Jan. 2015, sat on the motion awaiting the Supreme Court’s ruling. In her view, Obergefell, announced on June 26, mooted this case. “This decision not only established the right of same-sex couples to be legally married in all states,” she wrote, “but stated ‘there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.’ With the right to marry comes access to the benefits and obligations of the institution – such as the right to have one’s married name recognized by the state in which one lives – as well. In light of Plaintiffs’ concession that their claim for damages is barred by the Eleventh Amendment, all that is left for the court to grant is declaratory and injunctive relief. With Obergefell foreclosing the possibility that South Carolina’s same-sex marriage ban will be reinstated, there is no longer a pending issue regarding Plaintiffs’ claim, and thus ‘it is impossible for the court to grant any effectual relief.’ This issue is therefore moot, and summary judgment is appropriate.” The plaintiffs are represented by Mary Malissa Burnette, Nekki Shutt, Callison Tighe and Robinson, Victoria Lamonte Eslinger, Nexsen Pruet Jacobs and Pollard, and Susan King Dunn. * * *

Meanwhile, the District Judge Richard Gergel ordered South Carolina Attorney General Alan Wilson on August 10 to pay more than $135,000 in fees and costs to the plaintiffs who had sued in September 2014 to get a marriage license, Colleen Condon and Nichols Bleckley. Wilson had responded to the fee request by arguing it was excessive, noting that the issue had been fully litigated resulting in a 4th Circuit decision in the Virginia case. If that was so, responded Judge Gergel, why did the state file a 57-page brief seeking to get the case thrown out? He insisted that the attorney general “cannot engage in a no holds barred defense and then complaint” that opposing counsel spent lots of time working on a response. startribune, Aug. 10.

**TEXAS** – Attorney General Ken Paxton has requested U.S. District Judge Orlando Garcia to cancel a contempt hearing scheduled for September 10, representing that the state is now in compliance with constitutional requirements in light of Obergefell v. Hodges. Judge Garcia ruled in 2014 in De Leon v. Perry, 975 F.Supp.2d 632 (W.D. Tex.), that the Texas same-sex marriage ban was unconstitutional. The state’s appeal was heard by the 5th Circuit in January 2015, and shortly after the Obergefell ruling, the 5th Circuit issued an order affirming Judge Garcia’s decision on July 1. See De Leon v. Abbott, 2015 WL 4032161, 2015 U.S. App. LEXIS 11505. But Attorney General Paxton appeared to be encouraging defiance or non-compliance with the constitutional requirements to treat same-sex couples the same as different-sex couples in all respects concerning marriage, and responding to new motions detailing specific instances filed with the court, Judge Garcia threatened to hold Paxton in contempt, but delayed a hearing originally scheduled for August 12 in order to give Paxton and Department of State Health Services Interim Commissioner Kirk Cole time to bring state policies into compliance. On August 24, the AG’s office filed a document with the court asserting that the state was in full compliance, referencing new written policies posted on the Office’s website spelling out procedures governing birth and death certificates, the issues that had particularly been contested. * * * In Matter of the Marriage of A.L.F.L. and K.L.L. and...
WEST VIRGINIA — In *McGee v. Cole*, 2015 U.S. Dist. LEXIS 92315, 2015 WL 4366161 (S.D. W. Va., July 16, 2015), U.S. District Judge Robert C. Chambers ruled on the request for attorneys’ fees and costs on behalf of plaintiffs, prevailing parties in a lawsuit challenging the constitutionality of West Virginia’s ban on same-sex marriage. The court was considering pre-trial motions when the 4th Circuit issued its decision in *Bostic v. Schaefer*, affirming a ruling holding Virginia’s ban on same-sex marriage unconstitutional. Thereafter, the court granted summary judgment to plaintiffs in reliance on *Bostic* and enjoined defendant county clerks from enforcing the state’s ban. Plaintiffs sought $342,576.25 in attorneys’ fees. Defendants argued that no fees should be awarded, asserting that the requested amount was shockingly high and that actually this case was expeditiously decided as an application of the *Bostic* ruling without the need for prolonged litigation. “An impressive battalion of lawyers, eleven attorneys from three firms, ably represented Plaintiffs to successfully prosecute an important civil rights claim, for their benefit and that of many other West Virginians,” wrote Chambers, rejecting the idea that there should be no fee award. However, the judge substantially cut down the amount awarded, ruling out compensation for attorney time spent on non-legal matters and reducing the claimed hourly rates. At the end of the process, the fee award was $92,125.00, and the award for costs and expenses was $7,679.64. Plaintiffs were represented by lawyers from Lambda Legal, Jenner & Block (as cooperating attorneys with Lambda Legal), and The Tinney Law Firm in Charleston, WV, local counsel.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

– Conceding that the Supreme Court’s *Obergefell* decision is binding on U.S. territories, Attorney General Edward Manibusan issued a memorandum on June 30 revising the marriage application and record of marriage rules, and on July 22, the mayor of Saipan, David M. Apatang, officiated at a marriage of a Chinese lesbian couple in his office. Apatang, described as a “devoted Catholic,” said that his religion requires him to abide by the law of the land. “I cannot deny them because that’s my legal obligation to perform,” he announced. Somebody should arrange for Apatang to get together with Rowan County (KY) Clerk Kim Davis, who needs a lesson on the obligations of public servants to perform their official duties regardless of their personal religious beliefs. mvariety.com, July 27.

GUAM — The legislature approved Bill 119, which creates equality in civil marriage, and the Employment Nondiscrimination Act of 2015, which forbids discrimination because of sexual orientation or gender identity, on August 12. Governor Eddie Calvo exercised his prerogative to allow the marriage bill to go into law without his signature, indicating that his Roman Catholic religious views kept him from signing it. The local marriage statute will now read: “Marriage means the legal union between two persons without regard to gender.” guampdn.com, Aug. 26.

VIRGIN ISLANDS — On July 27 Lt. Gov. Osbert Potter countersigned Governor Kenneth Mapp’s executive order implementing the *Obergefell* decision, thus allowing same-sex couples to marry in the U.S. territory of the Virgin Islands. All territorial government agencies were ordered to “review all of their respective rules and regulations and bring them into compliance with the ruling,” and to report on compliance to the governor within 15 days. Under local law, the order would be forwarded to the Legislature for review, which was expected to be merely a formality since the Revised Organic Act of 1954 makes the U.S. Constitution, as construed by the Supreme Court, part of the law of the Virgin Islands. Virgin Islands Daily News, July 29.

CIVIL LITIGATION NOTES

SUPREME COURT — Mathew D. Staver of Liberty Counsel, the “religious freedom” litigation group, filed a petition for certiorari seeking review of *Doe v. Christie*, 783 F.3d 150 (3rd Cir. 2015), petition for cert. filed, No. 15-195 (Aug. 13, 2015), in which the 3rd Circuit rejected a 1st Amendment challenge to New Jersey’s statute prohibiting licensed health care professionals from treating minors using sexual orientation change efforts. The 3rd Circuit’s opinion followed on its prior ruling in *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3rd Cir. 2014), cert. denied, 135 S. Ct. 2048 (May 4, 2015), ruling similarly. These 3rd Circuit decision reached the same result as the 9th Circuit in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014),
cert. denied, 2014 U.S. LEXIS 4636 (2014), but on different grounds. The 9th Circuit held that the state’s prohibition was of conduct, not speech, and thus the 1st Amendment rights of practitioners were not abridged by the ban. The 3rd Circuit, disagreeing, found that regulation of talk therapy necessarily implicated speech, but that the rational basis standard of review applied, and that the legislative record showed a rational basis for the regulation. One would think that the Supreme Court’s refusal to review King v. Governor would dissuade the plaintiffs from seeking review in Doe v. Christie, but an intervening event may give them hope: the Supreme Court’s decision in Reed v. Town of Gilbert, 135 S. Ct. 2218 (June 18, 2015), which some lower courts have quickly construed to have greatly broadened 1st Amendment protection against content-based regulations of expressive or communicative activity. Dissents by Justices Breyer and Kagan from the broadly-written opinion for the Court by Justice Thomas raised concern that the Court’s categorical approach automatically applies strict scrutiny to every state regulation that could be characterized as a content-based regulation of expression and could put in danger a wide range of zoning rules and other regulations of conduct that have been presumed constitutional in the past. Whether the court grants review in Doe v. Christie may signal whether at least four members of the Court believe that the 3rd Circuit should have applied strict scrutiny to the New Jersey law.

4TH CIRCUIT COURT OF APPEALS
– The 4th Circuit ruled in Liberty University, Inc. v. Citizens Insurance Company of America, 792 F.3d 520 (4th Cir., July 10, 2015), that the liability insurer for Liberty University was not obligated to provide a defense for the University in a lawsuit brought against it by Janet Jenkins, who alleges that the University through its employees and agents had participated in a scheme to kidnap Jenkins’ daughter in order to disrupt their parent-child relationship. Jenkins is the former civil union partner of Lisa Miller, the child’s birth mother. The child was born while the women were civilly united and, under Vermont law, would be considered the legal daughter of both women. In the course of an action instigated in the Vermont courts by Miller to dissolve the civil union, Jenkins was awarded visitation rights with their daughter. Miller resisted the visitation and, with the assistance of Liberty University Dean Mat Staver, head of Liberty Counsel (a so-called Christian law firm), sought to block visitation in the Virginia courts without success, as the Virginia Supreme Court concluded that the Vermont courts had sole jurisdiction in the matter. Subsequently the Vermont courts confirmed that Jenkins was entitled to visitation and, taking into account Miller’s conduct, to custody. As the case worked its way through the courts of both states, however, Miller fled the U.S. with the daughter, settling in Nicaragua. In her subsequent lawsuit against Liberty, Jenkins alleges a detailed plot in which Liberty and its employees were implicated with assisting Miller in fleeing the jurisdiction with her daughter and encouraging Miller to refuse to comply with court orders. Liberty turned to its insurer, Citizens Insurance, to provide a defense, and Citizens refused. Liberty then sued Citizens in this action. U.S. District Judge Norman K. Moon (W.D. Va.) granted summary judgment to Liberty, concluding that this action was not excluded from coverage under the liability insurance policy. The 4th Circuit reversed, finding that it was excluded. The court of appeals found that the Jenkins complaint, “which only alleges Appellee’s liability for intentional conduct, does not plead an ‘occurrence,’” which is defined in terms of accidents, unanticipated events, and is part of the insurance policy’s coverage requirement. Liberty is on the hook for its own defense against the Jenkins lawsuit.

3RD CIRCUIT COURT OF APPEALS
– The 3rd Circuit ruled on July 16 that the Delaware Elections Disclosure Act does not violate the 1st Amendment as applied to an organization called Delaware Strong Families, which raised money to distribute “voter guides” prior to the 2014 general election. Delaware Strong Families v. Attorney General, 793 F.3d 304. The organization did not want to disclose the identity of its donors in a filing that would be accessible to the public, arguing that this would
deter donations and chill political speech. Although they convinced the district court, which granted the organization a preliminary injunction against enforcement of the disclosure requirement, they failed before the Court of Appeals, which issued an opinion consistent with rulings by other courts about state disclosure requirements applied to organizations seeking to influence the outcome of elections. DSF claimed to be a “neutral” and “non-partisan” organization performing a purely educational function, citing the grant them of tax-exempt, tax-deductible status under section 510(c)(3) of the Internal Revenue Code, but the court held that such tax designation was not preclusion in analyzing the constitutional issues or construing the requirements of the Delaware law.

7TH CIRCUIT COURT OF APPEALS
– The Supreme Court’s decision in Obergefell v. Hodges, 135 S. Ct. 2584 (June 26, 2015), is salient not only to the question whether same-sex couples have a right to marry but also to the broader question of what restrictions, if any, the states can put on any couple’s right to marry. This was brought home in an August 14 ruling by the 7th Circuit Court of Appeals in Riker v. Lemmon, 2015 WL 4863586, in which the court, reversing a grant of summary judgment to the defendant by U.S. District Judge Tanya Walton Pratt (S.D. Indiana), held that a woman formerly employed at a state prison could invoke the constitutional right to marry against a decision by prison authorities denying her right to marry an inmate. Rebecca Riker had been employed by a contractor in the food services department at Wabash Valley Correctional Facility. While employed there, she entered into a romantic relationship with a male inmate (serving a fifty-year sentence for robbery). The relationship included sexual intercourse in a “walk-in cooler” in the facility. Another employer saw Riker kissing the inmate and reported this to prison authorities, leading Riker to quit her job. The inmate then proposed marriage to her, she accepted, but prison authorities refused to give permission to her to come to the prison for a marriage ceremony, claiming security concerns and citing its general rule against allowing former prison employees to visit prisoners. They argued that contractor employees are briefed on prison security policies and that allowing such visits would endanger prison security as a result. Judge Pratt accepted the Department’s argument. Citing Obergefell, Circuit Judge Ripple wrote for the court, “The right to marry includes the right to select one’s spouse,” so the Department could withhold permission only if its decision “was reasonably related to its legitimate penological interests. The fundamental infirmity with the Department’s position,” continued Ripple, “is that it equates Ms. Riker’s one-time request to enter the prison to participate in a marriage ceremony with a request for general visitation rights. The Department’s decision to forbid Ms. Riker’s marriage is premised entirely on its ex-employee visitation policy and the security justifications that support that policy. At bottom, it maintains that any effect on Ms. Riker’s right to marry simply is incidental to the application of its visitation policy. Nothing in the record, however, supports equating general visitation with a single marriage ceremony, and we previously have indicated that a prison’s visitation policy, on its own, does not justify prohibiting an inmate’s marriage.” The court found that “invocation of a general security interest” was not sufficient, standing alone, to support the Department’s decision in this case. The court concluded that the grant of summary judgment to the Department was erroneous and that the case should be remanded for fact-finding and a determination whether the Department’s security concerns could be shown to be sufficient in this case to preclude Ms. Riker’s “request for a brief, one-time visit in order to participate in a marriage ceremony.”

9TH CIRCUIT COURT OF APPEALS
– In Voss v. Commissioner of Internal Revenue, 2015 WL 4664437, 2015 U.S. App. LEXIS 13827 (Aug. 7, 2015), the 9th Circuit, disagreeing with the Internal Revenue Service, reversed a ruling by the Tax Court which had upheld the agency’s determination that an unmarried same-sex couple who were co-owners of real property were subject to the same tax-deduction ceiling that applied to married couples. The dispute involves tax years 2006 and 2007. Bruce Voss and Charles Sophy, then registered domestic partners in California, co-owned two homes as joint tenants, in Rancho Mirage and in Beverly Hills. They purchased the Rancho Mirage home in 2000, taking out a $486,300 mortgage. They refinanced two years later to a $500,000 mortgage, for which they are jointly and severally liable. They bought their Beverly Hills home in 2002 with a $2,240,000 mortgage, which was later refinanced with a new loan in the amount of $2,000,000. They also obtained a home equity line of credit at the same time for $300,000. The total average balance of the two mortgages and the line of credit was about $2.7 million, so the question whether the statutory debt limits applied per taxpayer (so they could deduct interest on up to $2.2 million of debt) or jointly (limiting their deduction to interest on $1.1 million of debt) was at issue. They filed separately in 2006 and 2007, since the federal government did not recognize their relationship, each claiming mortgage interest deductions. The IRS audited them and issued deficiency notices, claiming that they had exceeded the limits. The Tax Court ruled in IRS’s favor, ruling that the $1.1 million ceiling applied per property, not per taxpayer. Disagreeing on what
it characterized as a question of first impression, the 9th Circuit held that the debt limits apply per taxpayer. Thus, for unmarried same-sex couples, the 9th Circuit says that each taxpayer can claim the mortgage interest deduction based on their share of the mortgage debt obligation on each of their co-owned properties, up to $1.1 million of debt for each of them. The opinion by Circuit Judge Bybee is long and detailed, and drew a detailed dissent from Circuit Judge Ikuta. Tax mavens will undoubtedly want to read this. Unmarried same-sex couples who own mortgaged property together will want to recommend the opinion to their tax counsel and/or accountant. Same-sex couples who jointly own lots of expensive real property with associated mortgages might think twice about getting married in light of this decision and their overall tax situation.

ALABAMA – The Birmingham News (Aug. 19) reported that a Jefferson County probate judge had approved the dual adoption of a girl by a same-sex couple on April 28, 2015, according to a copy of an adoption certificate that has been filed as evidence in a pending federal lawsuit seeking the right to dual adoption by same-sex couples. The document was redacted before being submitted in evidence to cover the name of the judge, and requests by reporters to the two Jefferson County probate judges brought a response from one of them that since adoptions are confidential and the records sealed, the judges couldn’t comment on them. Attorneys for the adoptive parents also refused to identify the judge. Their attorney pointed out to the newspaper that the adoption was approved after the federal district court and the judge. Their attorney pointed out to the newspaper that the adoption was approved after the federal district court.

ALASKA – A gay African-American man who was employed by Delta Airlines in Alaska didn’t have the option of suing for sexual orientation discrimination because Alaska law doesn’t forbid discrimination on that basis, so he brought a race discrimination claim. The problem, as the Alaska Supreme Court pointed out in Rodriguez v. Alaska State Commission for Human Rights, 2015 WL 4774430, 2015 Alas. LEXIS 91 (Aug. 14, 2015), is that he did not, in the opinion of the Human Rights Commission as affirmed by the court, present enough evidence to substantiate a race discrimination claim. “Rodriguez’s arguments throughout this case focused on seniority, his sexual orientation, and Nash’s extremely inappropriate behavior, but Rodriguez’s complaint to the Commission alleged race discrimination,” wrote Justice Winfree for the court. “The superior court repeatedly encouraged Rodriguez,” who was pro se, “to point to any evidence of race-based discrimination, but he was unable to do so. And in his brief to us Rodriguez implies that he was furloughed and not rehired in retaliation for providing information about Nash, but this does not establish a reasonable possibility of race-based discrimination.” (Nash, his supervisor at Delta, allegedly constantly harassed Rodriguez, calling him “faggot” and other names. Rodriguez informed Delta about Nash’s conduct, and Nash was eventually terminated.) This case helps to show why the lack of express protection against discrimination because of sexual orientation is needed.

ARIZONA – The Court of Appeals of Arizona, Division 1, ruled in Sheets v. Mead, 2015 WL 5024960 (Aug. 25, 2015), that Maricopa County Superior Court Judge Kathleen Mead erred when she awarded substantial child visitation rights to Bonny Jean Reynolds, former same-sex partner of Lori Lee Sheets, the child’s adoptive parent. Sheets and Reynolds began their relationship in 2000. In 2009, they were approved as foster parents to a 2-year-old child under an adoption plan. Since Arizona did not allow adoption by same-sex couples, they agreed that Sheets would be the adoptive parent. Sheets adopted the child in 2010, but her relationship with Reynolds soon ended. Reynolds maintained a relationship with the child until Sheets “suddenly and arbitrarily” (according to Reynolds) stopped allowing Reynolds to contact or see the child. Reynolds petitioned the Superior Court for equal-time visitation. Judge Mead granted substantial visitation, finding that, as required by Arizona statute, the child was “born or adopted out of wedlock; the Child’s legal parents were not married to each other; and petitioner has a long term in loco parentis relationship with the child.” Judge Mead concluded that visitation was in the best interest of the child. Sheets unsuccessfully moved for a new trial, then sought “relief by special action” from the court of appeals, arguing that a speedy disposition was necessary to settle the issues for the child. Writing for the court of appeals, Judge Peter B. Swann concluded that the trial court’s decision was precluded by statute. Once a child has been adopted, Swann wrote, the child takes on a new legal status and is no longer considered to be “born out of wedlock.” Under the Arizona adoption law, after an adoption takes place the adoptive parent(s) and child will have the same relationship under the law “as though the child were born to the adoptive parent in lawful wedlock.” Thus the statute authorizing non-parent child visitation would not apply, because such a petition only applies to a child that “was born out of wedlock.” The court pointed out that had Reynolds sought
non-parent visitation before Sheets adopted the child, the court could have ordered it. But the legislature’s overriding policy goal in the adoption statute was to assure that adopted children would not be considered as having been born “out of wedlock,” and this must be construed in light of the legislature’s determination to limit non-parent visitation petitions to situations where a child is “born out of wedlock.” The court does not explain the reasoning for this anomaly, and rejects Reynold’s contention that the adoption provision was limited to inheritance issues. Judge Swann wrote that the court recognizes that the visitation statute’s “requirements may lead to counterintuitive results.” “Nonetheless,” he wrote, “the Legislature has decided to ascribe importance to the marital status of a child’s biological parents at the time of birth, and we are bound by the statutes it enacts. Similarly, the Legislature has made an understandable decision to ensure that adoptive parents enjoy a status equal to that of biological parents.” And, in many states, a biological parent who is deemed fit has a constitutional right to control who has contact with her minor children in the absence of exceptional circumstances justifying overriding such right, as the Maryland Court of Special Appeals held the day after this Arizona case was decided (see above). Courts generally do not see same-sex co-parent claims as presenting exceptional circumstances.

ARKANSAS – On August 31, a group calling itself Protect Fayetteville filed a lawsuit in state court challenging the city’s recently enacted Uniform Civil Rights Protection Ordinance 5781, which is the subject of a referendum scheduled to take place during September. The plaintiffs contend that coverage of sexual orientation and gender identity violates the state’s Intrastate Commerce Improvement Act, the euphemistically-titled law intended to prohibit localities from passing laws forbidding discrimination against gay and transgender people. The purported policy reason for the law is the argument that allowing localities to forbid discrimination on grounds not covered by state law creates a patchwork of regulation that is inimical to commerce within the state. The lawsuit also contends that the Ordinance violates the 1st Amendment rights of employers, businesses and other entities whose practices are regulated. Religion Clause, Sept. 1, 2015 WLNR 25893555.

CALIFORNIA – Is this the end of the road for challenges to California’s law against conversion therapy for minors? On July 21, 2015, U.S. District Judge William B. Shubb signed an order granting the state’s motion for judgment on the pleadings in the challenge brought by plaintiffs Donald Welch, Anthony Duk, and Aaron Bitzer, in Welch v. Brown, 2015 U.S. Dist. LEXIS 94985 (E.D. Cal.). Wrote Shubb, “Plaintiffs appear to recognize that the Ninth Circuit’s decision in Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), forecloses plaintiffs’ challenges to SB 1172 based on free speech rights under the First Amendment and substantive due process protections. For the reasons the court previously concluded that plaintiffs were unlikely to prevail on their remaining challenges under the Free Exercise and Establishment Clauses and privacy rights of third parties, the court now finds that those claims fail as a matter of law. See Welch v. Brown, 58 F. Supp. 3d 1079, 1084-91 (E.D. Cal. 2014).”

CALIFORNIA – In Schuett v. FedEx Corporation Retirement Appeals Committee, 2015 WL 4484153 (N.D. Cal., July 22, 2015), U.S. District Judge Phyllis J. Hamilton denied a motion by the defendant to transfer the case to the Western District of Tennessee “for the convenience of the parties and witnesses.” The case concerns a claim by the surviving same-sex spouse of a FedEx employee to benefits due under the retirement plan. The timing of events is unfortunate and ironic. Stacey Schuett, the plaintiff, married Lesly Taboada-Hall, a FedEx employee, in Sonoma County, California, on June 19, 2013. They had lived together for many years, were raising two children together, and were registered domestic partners in California since 2003. Taboada-Hall had worked for FedEx for 26 years and was fully-vested for a pension. She was diagnosed with cancer in February 2010, and by November was on medical leave. In February 2013 Taboada-Hall and Schuett phoned a FedEx HR representative based in Sacramento to find out about Schuett’s rights to benefits if Taboada-Hall died. He told them he didn’t know whether the defined pension benefit would pass to “a partner,” and discouraged Taboada-Hall from taking early retirement at that point. He advised that she list Schuett as solo beneficiary for the life insurance and 401(k) plan. On June 3, 2013, the doctor advised Taboada-Hall that her condition was terminal. Schuett alleges that they reviewed the terms of the pension plan and saw that it incorporated the definition of spouse from the Defense of Marriage Act, and they called FedEx HR personnel to try to determine whether Schuett would be eligible for the pension benefit if they married. On June 13, 2013, they were told that “spouse” under the survivorship provision applied only to opposite-sex partners. They married on June 19. Taboada-Hall died the next day, June 20. Six days later, the Supreme Court declared the Defense of Marriage Act unconstitutional in U.S. v. Windsor. Schuett applied for the benefit and was turned down. She appealed to the Retirement Appeals Committee under the plan, and was turned down again, leading to this law suit, filed in the Northern District of California.
In this motion, FedEx, which is incorporated and has its headquarters in Memphis, argued that the case should be transferred to Tennessee, contending that most of its witnesses (including the three members of the RAC panel who voted down the appeal) and the relevant documents are in that general vicinity. Schuett countered that she had dealt with the HR staff in Sacramento, that her late spouse had lived and worked for FedEx in California, where she earned the pension benefits, and it was where the plaintiff resided.

Judge Hamilton reviewed these and other factors specified under ERISA’s enforcement provisions, and concluded that “defendants have not met their high burden of showing that a transfer of venue to the Western District of Tennessee is warranted.” To this writer, it sounds like typical corporate hardball litigation intended to make it much more burdensome for the plaintiff to pursue her claim, as she would have to obtain counsel admitted in Tennessee and personally travel there if a trial was held, whereas FedEx, which does business everywhere, undoubtedly has relationships with counsel in the Northern District of California, where (as the evidence shows) it has an HR operation that was the contact point with Schuett prior to her spouse’s death.

Schuett had also noted that the relevant documents in the case could easily be shipped to the coast; after all, the defendant is FedEx, for heaven’s sake!!

**CALIFORNIA** – U.S. District Judge Kimberly J. Mueller ruled on Aug. 11 that Nadia Perez-Juarez was entitled to an order dismissing a deportation case against her, due to ineffective assistance of counsel in the underlying deportation proceeding. *United States v. Perez-Juarez*, 2015 U.S. Dist. LEXIS 105517, 2015 WL 4751148 (E.D. Calif., Aug. 11, 2015). Perez-Juarez, a native and citizen of Mexico, had lived in the U.S. since infancy. She pled guilty in state court in 2007 to a charge of voluntary manslaughter, and the federal government initiated removal proceedings against her. Her counsel conceded at the hearing that she was removable, but argued that she was entitled to protection from deportation under the Convention Against Torture. This was a mistake; 9th Circuit precedents hold that a person is not automatically deportable because of a guilty plea to a voluntary manslaughter charge, and there was ground to argue in her case that the conviction should not cause her deportation. Taking the defense counsel’s concession, the immigration ordered removal, denying relief under the Convention against Torture. After being deported, Perez-Juarez managed to reenter the U.S. again, but was quickly apprehended and put in these new deportation proceedings.

This time, her argument was that her prior representation was incompetent in conceding deportability. Judge Mueller agreed, granting defendant’s motion to dismiss the deportation act. She found that “a competent immigration attorney would have been aware of *Purohit v. Holder*, 441 Fed. App’x 458 (9th Circ., 2011), a binding circuit precedent holding that voluntary manslaughter under California law is not categorically a crime of violence for purposes of deportation. The attorney’s concession adversely affected Perez-Juarez’s case, precluding a range of potential arguments for avoiding deportation. “In sum,” wrote Judge Mueller, “the decision to concede defendant’s removability was not a tactical one. Instead, it was the result of a lack of detailed independent research and blind reliance on a prior counsel’s assurances and brief reviews of a quick reference chart. The conduct of defendant’s counsel not only ‘prevented her from reasonably presenting her case,’ but rendered the proceedings fundamentally unfair.” That being so, the court granted the defendant’s motion to dismiss the indictment.

**CALIFORNIA** – We mention *Marks v. LaSalle*, 2015 Cal. App. Unpub. LEXIS 6227, 2015 WL 5066883 (Cal. Ct. App., 4th Dist., Aug. 27, 2015) not because it has any significance in terms of LGBT rights, but because, as Judge Bedsworth writes for the court, “This case has the makings of a classic film noir story, though thankfully, despite animosity so thick between two of the parties the trial judge made a specific finding on it, no one has been murdered. The plaintiff is an actor. The actor has a fiancée. The fiancée has a younger sister. The younger sister has a bad gambling habit. She used to have a domestic partner [same-sex] who enabled that habit. In better days the two were high rollers. They would get free rides on private jets. They owned a fabled black credit card. They drove a Range Rover. The partner owned a Bentley. They lived in a house in Huntington Beach.” And the story goes on, implicating the younger sister’s lesbian partner, Angele LaSalle, in a scheme to steal from the actor by apparently selling him her Bentley, then hiring a Repo Man to take it back…. Anyway, it’s a neat story and a lesbian couple is embedded in it, so we thought it was worth mentioning. Nothing about the lawsuit turns on the defendant’s sexual orientation as such.

**CALIFORNIA** – Reversing a summary judgment awarded to the employer, a panel of the California 4th District Court of Appeal ruled in *Felton v. Hi-Tech Electronic Manufacturing Co.*, 2015 WL 4537459, 2015 Cal. App. Unpub. LEXIS 5266 (July 28, 2015), that even before California amended its anti-discrimination law to make clear that a plaintiff need not prove that a harasser was acting out of sexual desire in a same-sex harassment case, such was the law in California, the amendment merely making explicit prior appellate rulings construing the state’s law. In this case, a janitorial employee claimed to have been sexually harassed by
the CEO of the company, who would regularly make lewd, sexually-oriented remarks and tell gay jokes in his presence. The proverbial “straw that broke the camel’s back” was an incident on March 6, 2012, when the employee, Norman Felton, entered the restroom to find the CEO, Thai Nguyen, and several other Vietnamese employees present. According to Felton’s allegations, as related in the court of appeals opinion by Judge Gilbert Nares, “Nguyen turned to Felton and said, ‘Norman, do you want to make $50?’ Felton replied, ‘Yes, what do you want me to do?’ Nguyen responded, ‘Pull your pants down, bend over, and let me stick my dick in your ass.’ Nguyen and the other men in the restroom laughed, and as Nguyen left the restroom, he walked past Felton and said, ‘I am the CEO of the company. Don’t you know you do what the CEO tells you to do?’ Felton said, ‘I sure did walk into that, didn’t I?’ He testified that he felt threatened because Nguyen and the other men in the restroom were speaking in Vietnamese, and he did not know what they were saying or what they might be planning to do to him.” Felton testified that he was greatly offended by this incident, was sick to his stomach, and felt “dizzy” and “woozy” afterwards. He didn’t report the incident to anybody else at the company because he was unaware that they had an HR department or any policy against harassment. The next day, he filed a report with the EEOC, and by March 15 had decided to quit his job, testifying as to his reason: “Just me as a person and my dignity and my manhood and to have a statement like that directed to you knowing that people don’t say that to people.” Superior Court Judge Richard E. L. Strauss granted summary judgement for the company on Felton’s sex discrimination claim (and all other claims asserted in the complaint), asserting that “proof of sexual motivation or desire is required in order to allege a same-sex sexual harassment claim.” The court of appeal found this erroneous under case law at the time this motion was decided, quoting earlier decisions stating, for example: “Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment.” Nares wrote, “We evaluate the objective severity of the March 6 incident from the perspective of a reasonable person in Felton’s position, considering all of the circumstances, including the social context in which the incident occurred and was experienced by Felton.” Felton was then 70 years old and identified as heterosexual. “Felton’s testimony supports a reasonable inference that Nguyen’s comment about engaging in anal sex with Felton caused Felton to fear that Nguyen and the other men might sexually assault him,” wrote Judge Nares. “A reasonable person in his position could reasonably feel shocked, humiliated, and physically threatened by Nguyen’s lewd proposition and the fact that the other men in the restroom reacted to it by laughing and speaking in a foreign language. Thus, a trier of fact could reasonably find that Nguyen’s conduct was sufficiently severe to alter the conditions of employment and create a work environment that was objectively hostile or abuse to Felton. The requirement that the alleged harassment must be ‘because of sex’ is satisfied because the trier of fact could reasonably find that Nguyen attacked Felton’s identity as a heterosexual male as a tool of harassment.” The court upheld the trial court’s judgment on race discrimination and harassment charges, but reversed as to sexual harassment and related claims, remanding for further proceedings.

COLORADO – In Lafont v. Colorado Athletic Club, 2015 WL 5031981, 2015 U.S. Dist. LEXIS 113136 (D. Colo., Aug. 26, 2015), the court granted summary judgment to the employer on sex, sexual orientation and retaliation claims brought by a lesbian former employee, Camille Lafont, finding that the factual allegations of the complaint were insufficient to meet the pleading requirements to avoid pretrial judgment. Chief Judge Marcia S. Krieger, reflecting the heavy predisposition of federal trial judges to find reasons to toss out employment discrimination claims, minimized the seriousness of Lafont’s allegations, implicitly finding credible all of the employer’s explanations for its actions while criticizing Lafont’s allegations as inadequately specific. This case was originally filed in state court and removed to federal court by the defendant, following the usual strategy of employers seeking the more employer-friendly federal forum. The complaint alleged violations of the sex and sexual orientation discrimination provisions of the Colorado Anti-Discrimination Act, the sex discrimination provision of Title VII, and retaliation provisions of both statutes. The opinions available on line as of Aug. 27 did not identify counsel, and it is unclear whether Lafont was representing herself, but the court does not identify her as pro se. Lafont’s complaint, as summarized by the court, alleges a hostile environment for women and gay people, with particular emphasis on the behavior towards Lafont of one male supervisor which led her to file complaints within the company. Ultimately she was discharged when she got into a physical altercation with another employee, with Lafont’s girlfriend – a fellow employee – also involved and also discharged as well as the other employee for violating the company’s rule against fighting on the premises. She sought to connect the discharge back to the alleged harassing conduct and the company’s reaction to her complaints (which had been determined by an investigator retained by the employer to be unsubstantiated). It is difficult from reading the court’s description of the allegations submitted

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by the parties in support and opposition to the summary judgment motion to reach any conclusions, since so much depends on how the court characterizes the evidence. Federal civil pleading requirements erect a high barrier for discrimination plaintiffs, and this case may be a prime example of how potentially meritorious cases are easily flushed out of the system on pre-trial motions.

CONNECTICUT – U.S. District Judge Victor Bolden has ruled that a lawsuit by a lesbian employee of a health care institution, seeking an order that the employer provide dental and medical coverage for her same-sex spouse, must be dismissed because it may be subject to arbitration under an agreement signed by the employee as a condition of employment. Considine v. Brookdale Senior Living, Inc., 2015 U.S. Dist. LEXIS 110561, 2015 WL 4999897 (D. Conn., Aug. 21, 2015). Gay & Lesbian Advocates & Defenders represents Kerry Considine, who asserted that Brookdale Senior Living violated Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Connecticut Fair Employment Practices Act (which expressly forbids sexual orientation discrimination) by rejecting her application for the benefits for her spouse. She seeks declaratory and injunctive relief, attorney’s fees and costs, although she agreed at oral argument that she would drop any monetary claims in order to maintain her suit in court as seeking purely equitable relief. Brookdale argued that this was the kind of claim covered by the arbitration agreement she signed, which expressly extends to claims of discrimination. Considine responded that her claim for declaratory and injunctive relief is deemed as “not covered” by the arbitration provision, which expressly excludes any claim by an employee “for injunctive or other equitable relief.” Brookdale countered that the arbitration agreement provides that any dispute about whether a claim is subject to arbitration must be submitted to an arbitrator. Catch-22! Judge Bolden agreed that under the Federal Arbitration Act, if an arbitration agreement reserves questions of arbitrability for the arbitrator, they are not to be decided by the court. “The Supreme Court has indicated that the question of whom – the arbitrator or the Court – has the power to decide the threshold issue of arbitrability depends on what the parties have agreed about that particular matter,” he wrote. “Because the parties’ dispute focuses on the scope of the arbitration agreement, it is squarely one of arbitrability.” The court rejected Considine’s argument that Brookdale sought to avoid litigation by raising a “mere ‘flicker of doubt’ or a ‘wholly groundless’ dispute as to whether the dispute may be arbitrated.” Bolden observed that Considine had failed to cite any 2nd Circuit precedent “indicating that courts in this jurisdiction engage in this inquiry. Even if these tests do apply,” wrote Bolden, “the Court is satisfied that Brookdale has raised more than a so-called ‘flicker of doubt’ about the arbitrability of the dispute. Both sides rely on separate provisions of the agreement that, in this Court’s view, do seem to compel opposite results. Because the parties have delegated the issue of arbitrability to an arbitrator, the Court can say no more on the matter.” The case exemplifies the extreme deference to the arbitral process that the Supreme Court has embraced, even in cases where it is clear that the arbitration agreement signed by rank-and-file employees as a condition of employment is, in every instance, a contract of adhesion that throws the employee into a forum with built-in headwinds against an employee victory. Since arbitrators are paid by the parties to decide their disputes, they have every incentive to resolve such issues in favor of arbitrability and then to proceed to rule on the merits, since the usual consequence in this situation is that both arbitrability and the merits dispute will be presented to the arbitrator in the same proceeding unless the parties agree to a bifurcated process, which will be more expensive since arbitrators are normally compensated on a per diem basis. Proposals have been floating in Congress to cut back on the Federal Arbitration Act, which many argue was never intended to apply to the individual employee context when it was enacted in the 1920s, as such agreements were virtually unknown at the time and the context of enactment shows that the main concern was to render commercial arbitration agreements between companies enforceable in federal court. Only decades later did the Supreme Court, eager to lighten federal trial court dockets, “discovery” that the FAA also endowed federal courts with authority to dismiss federal statutory claims under such circumstances, even though language in the FAA appears expressly to exclude such agreements!

FLORIDA – An attempt by students at a Florida middle school (grades 6-8) to form an officially-recognized Gay Straight Alliance (GSA) foundered on U.S. District Judge Wm. Terrell Hodges’s conclusion that Florida law does not regard middle schools as “secondary schools” and thus they are not covered under the federal Equal Access Act, a statute that has served as a vehicle in the past for federal courts to order school districts to authorize the formation of Gay Straight Alliances at public high schools. Carver Middle School Gay-Straight Alliance v. School Board of Lake County, Florida, 2015 U.S. Dist. LEXIS 109489, 2015 WL 4999162 (M.D. Fla., Aug. 19, 2015). Actually, Judge Hodges didn’t even have to get this far into the statutory claim, having ruled that the dispute was not justiciable on grounds that it was not “ripe for decision” and could be characterized as “moot.” Hodges pointed out that at the time the suit was filed, “resolution
of the challenge was not ‘fit’ for adjudication because it depended upon facts that were not sufficiently developed,” which was “attributable to a deliberate choice made by the GSA to proceed with litigation that might well have been avoided through the simple process of resubmitting an enhanced application.” The judge pointed out that the GSA sponsor had agreed that resubmission of the application was “an option,” so litigation was premature. Furthermore, the judge said, the dispute was moot because “it is stipulated that the GSA made no application at all for the now concluded 2014-2015 school year. The net result is that there is nothing to enjoin the School Board to do or not to do. The last submission of an application to the School Board by the Carver Middle School GSA occurred in early December 2013, over a year and a half ago, for 2013-2014. A curious election was made at that time to eschew an amended application in favor of an immediate lawsuit (this case), but there is no explanation at all for not filing an application for the ensuing 2014-2015 school year.” But even had these jurisdictional problems been overcome, the court found the Equal Access Act inapplicable, because it applies to “secondary public schools” and Florida law does not classify middle schools as coming within that category. The court also rejected the GSA’s 1st and 14th Amendment claim. While the court found that denial of the original application did implicate 1st Amendment expressive activity or associational rights, the claim was to be evaluated as pertaining to a “limited open forum” in public schools, so it was not a strict scrutiny case. The court found that the school board was “well within its rights” to “draw distinctions based on differences in maturity levels between elementary schools, middle school, and high schools.” Attorneys for the ACLU of Florida and the ACLU’s national LGBT Rights Project represent the GSA.

ILLINOIS – The Appellate Court of Illinois took up the vexing question of how to deal with disposition of assets upon dissolution of a civil union in Hamlin v. Vasconcellos, 2015 IL App. (2d) 140231 (July 17, 2015). The most significant legal dispute that had to be resolved was whether a court acting to dissolve a civil union pursuant to the Illinois Religious Freedom Protection and Civil Union Act, which went into effect on June 1, 2011, should treat as “civil union property” only that acquired from the date the statute went into effect, or also that acquired from the date the parties contracted their civil union in Vermont, July 20, 2002. There was also an important looming question about attribution of property ownership in a successful business started by one of the civil union partners. The details of the court’s review of the trial court’s disposition of the property are too complicated and drawn out to be dealt with in this brief summary, but the determination of the legal issue is significant beyond the particular property dispute and thus worth recounting. Judge Joseph E. Birkett began his analysis by noting that the Illinois statute specifically provides for reciprocity with other jurisdictions. In this case, in addition to forming a civil union in Vermont in 2002, the parties had gone to Toronto the following year when same-sex marriages became available in Canada and tied the knot again. The Illinois civil union law (since superseded by the new Marriage Equality law enacted in 2013) provided that civil unions and same-sex marriages “legally entered into in another jurisdiction” would be treated as civil unions in Illinois, and provided instructions on division of property for dissolution of civil unions. The dissolution action in this case was initiated shortly after the 2011 law went into effect. After inquiring into the statutory language and the Illinois decisions on prospective and retrospective application of statutes, the court said that “the civil union could predate the effective date of the Act, postdate the effective date of the Act, or postdate the effective date of the Act,” so the Act “operates to recognize, as of the Act’s effective date, any civil union that was, at any time, legally entered into in a foreign jurisdiction.” Furthermore, wrote Birkett, “The Act does not limit the effect of a foreign civil union to the effective date of the Act and thereafter. . . Respondent argues that recognizing their civil union as commencing in 2002 means that we are giving retroactive application to the Act. We disagree. As we have determined, the Act operates only as of its effective date. Thus, it is prospective. However, the Act may operate upon antecedent facts, such as the fact that a civil union was entered into before the Act’s effective date.” Thus, all property acquired subsequent to July 20, 2002, would be considered civil union property for purposes of distribution of assets to the extent appropriate under established rules for assigning ownership rights to property acquired during the course of a legally recognized spousal relationship. Ultimately, the court concluded that the trial court’s disposition of property disputes was not entirely appropriate, and remanded for reconsideration in light of various comments the court made about the trial court’s evaluation of the evidence.

ILLINOIS – In Yap v. Northwestern University, 2015 U.S. Dist. LEXIS 103009, 2015 WL 4692492 (N.D. Ill., Aug. 6, 2015), U.S. District Judge Sara L. Ellis sets out in detail the factual allegations of Jonathan Woon Teck Yap, a graduate student, who sues under Title IX of the Education Act of 1972, alleging sex discrimination, hostile educational environment and retaliation. Mr. Yap alleges that he was the object of unwanted flirtation from Dr. David Engman, then director of the Medical Scientist Training Program in which he
Given the thoroughness of Judge Ellis’s analysis, this opinion should signal an earnest attempt by the university to settle the case, as most of the economic value of Mr. Yap’s claims relate to the disadvantages and delays he suffered in his education after he reported his harassment claim to university officials.

MARYLAND – U.S. District Judge Ellen Lipton Hollander rejected summary judgment motions filed by defendants in Tyndall v. Berlin Fire Co., 2015 U.S. Dist. LEXIS 92999, 2015 WL 4396529 (D. Md., July 16, 2015), in which a straight fire-fighter alleged that he had been subjected to a hostile environment because of his sex in violation of Title VII, and that two co-workers in particular had subject him to intentional infliction of emotional distress. At his deposition, Mr. Tyndall testified that the problem stemmed from an incident when he was in high school. “There was a woman that offered to have sex with me after the prom, and she was intoxicated, and I did not have sex with her. And they had the assumption that I was gay because I did not have sex with her.” From then on, these individuals, who ultimately became members of the Berlin Fire Company along with Tyndall, started to call him names such as “gay boy,” “homo,” “queer” and “faggot,” and this escalated over the years. Tyndall testified that it went beyond teasing to unwanted touching, games and pranks, escalating from “being occasional to being an everyday occurrence,” and his attempts to get them to stop only seemed to aggravate it until it became intolerable, leading him to complain formally to management. That just seemed to make it worse. BFC’s liability insurer has any sense, they will offer a substantial settlement rather than go to trial in light of the detailed deposition testimony quoted by Judge Hollander in the opinion.

MASSACHUSETTS – In Sexual Minorities of Uganda v. Lively, 2015 U.S. Dist. LEXIS 104636, 2015 WL 4750931 (D. Mass., Aug. 10, 2015), U.S. Magistrate Judge Katherine A. Robertson ruled on motions concerning discovery in the ongoing litigation under the Alien Tort Statute by an umbrella organization based in Kampala, Uganda, representing the interests of member organizations advocating for LGBTI rights in that county, against Rev. Scott Lively and his ministry, accused in this case of having worked to promote anti-gay activities and
legislation in that country. The central focus of the discovery dispute concerns information in documents demanded by the defendants that the plaintiffs want to shelter from disclosure – most importantly the identities of individual LGBTI persons in Uganda supporting efforts for LGBTI right and information pertinent to strategies by the plaintiff organizations to obtain repeal of anti-gay legislation there. The defendant argues that documents produced thus far in discovery have been excessively redacted. Plaintiffs sought in these motions, among other things, to limit disclosure of sensitive information even further than already has been done by having the court go beyond an existing protective order to mark selected documents as “attorneys eyes only,” so that the information is not revealed to Lively and his organization, with the fear that it would be communicated further to Ugandan authorities and used to locate and persecute LGBTI people in Uganda. Judge Robertson was amenable to allowing redactions of personal information about organizational members, finding that plaintiffs had made a prima facie showing. “It is uncontested that ‘on past occasions, revelation of the identity of [LGBTI individuals in Uganda] has exposed these [individuals] to economic reprisal, . . . threat of physical coercion [and arrest], and other manifestations of public [and official] hostility,” she wrote, adapting language from the leading U.S. Supreme Court ruling protecting the identity of organizational members in discovery, NAACP v. Alabama, 357 U.S. 449 (1958). “Defendant claims in conclusory fashion that Plaintiff’s redactions require action by this court to preserve his ability to investigate, develop and mount his defense,” she continued. “He has not demonstrated that the previously undisclosed identities of donors, supporters, and affiliates of Plaintiff are crucial to his defense; nor has he made such a showing with respect to email addresses for list-serves used by Plaintiff and its associates; or personal telephone numbers of potential witnesses for whom business telephone numbers have been provided. It follows that Plaintiff is entitled to redact this information from its document production.” However, the court did not see the necessity for placing an “attorneys eyes only” limitation on documents that were already subject to a protective order restricting their use to litigation purposes, and of course already heavily redacted. While the court concluded that plaintiffs could also redact or withhold anything that clearly fell within the category of attorney client privilege, it also pointed out that redaction or omission on grounds of “relevance” had been construed too broadly by the plaintiffs in prior tussles in this case over document production. “Redaction of documents that are responsive and contain some relevant information should be limited to redactions of privileged information when, as in this case, there is a protective order restricting and use and dissemination of other sensitive information,” she wrote, ordering that “to the extent that Plaintiff has made redactions from documents it produced on the grounds that the redacted information was not, in its view, relevant, those documents will be produced without redactions except to the extent that those documents contain privileged material.” The action was filed on March 14, 2012, withheld early motions for dismissal, and has become bogged down in discovery.

MICHIGAN – U.S. District Judge Patrick J. Duggan denied a motion to stay enforcement of an arbitration award concerning a domestic partner benefits dispute at Spirit Airlines while the employer goes to the 6th Circuit seeking reversal of the district court’s order enforcing the arbitration award. Spirit Airlines v. Associate of Flight Attendants, 2015 U.S. Dist. LEXIS 105743, 2015 WL 4757106 (E.D. Mich., Aug. 12, 2015). Spirit offered a domestic partnership benefit plan for healthcare to its flight attendants. Married flight attendants could select from among four different plans, but only one plan was offered for partnered flight attendants. The union challenged the disparity and won a ruling from the arbitrators that Spirit was required to offer the same choices to partnered flight attendants as married flight attendants. Spirit sought judicial review, but lost when Judge Duggan issued an order on June 17, 2015, enforcing the arbitration award. In seeking a stay pending appeal, Spirit argued that it would incur significant cost and inconvenience if it had to comply and then the 6th Circuit ruled in its favor, allowing it to go back to the challenged benefits program. Judge Duggan found that this did not constitute irreparable injury, since the losses could be monetized. He also found that although Spirit’s appeal on the merits was not hopeless, it failed to meet the standard necessary for a stay, as it had not shown that the likelihood of success on appeal was great. After all, federal courts are generally very deferential to arbitral rulings, as commanded by the Supreme Court in its cases establishing the legal framework for judicial review of labor arbitration awards. The court rejected Spirit’s argument that a delay in implementation of the award would cause slight harm to the union, noting that a stay would mean that partnered flight attendants would be limited to one plan choice during the annual open enrollment period in November 2015. “The elimination of a choice of employer-sponsored health care plans during the next open enrollment period, regardless of whether a choice of plans was historically offered, constitutes clear harm,” wrote Duggan. He also noted Spirit’s concession that the public interest factor in this case “does not weigh heavily in either direction.” Thus, on balance, the four factors prescribed by the Supreme Court for deciding stay
Robert was 69, already retired from full-time employment. Their adult sons were incarcerated due to their conviction of attempted robbery of a former girlfriend during which they pistol-whipped her friend. The trial judge found that the decision to prefer the gay couple was not arbitrary or capricious, in light of the good job they were doing with the twins, who had improved substantially with therapy and with whom the gay couple had bonded psychologically, and in light of the drawbacks presented by the relatives’ petition. On appeal to the court of appeals, the Bakers for the first time pressed the argument of racial/ethnic competency and a statutory preference that children be raised by relatives, but the court of appeals pointed out that under the arbitrary and capricious standard it should defer to the decision by the superintendent of MCI. “The trial court was only required to find that Johnson had one good reason to withhold consent in order to deny petitioners’ Section 45 motion,” wrote the court. “Therefore, because we find that the first reason advanced by respondent was not arbitrary and capricious, we need not consider the additional reasons supporting his decision.” The MCI superintendent had also referred to the advanced age of the petitioners, pointing out that by the time the twins reached their teens, Mr. Baker would be over 80, and also expressing reservations about Mrs. Baker’s attitude toward the criminal convictions of her sons. The court of appeals, characterizing these as secondary reasons, said it had reviewed all the reasons given by the superintendent, not just the first, and still found no clear error in the trial court’s determination. The court found that the family preference doctrine did not apply to this sort of proceeding, that the best interest of the child standard under the Child Custody Act was not applicable, and that the “ethnic and cultural interest” argument could not be first raised on appeal and was not accompanied by any evidence “upon which the trial court could make a factual finding.” The court ended its decision was a paragraph expressing empathy for the petitioners, and expressing a non-binding wish that “the petitioners are able to remain a part of the twins’ lives in some capacity as they move forward in life.”

MISSISSIPPI – U.S. District Judge Louis Guirola, Jr., dismissed a pro se complaint filed by Cedric Jerome McCullum, an inmate at the Jackson County Adult Detention Center, who claimed his rights had been violated when he was incorrectly diagnosed HIV positive at Singing River Hospital Center in 2007. During his current incarceration at Jackson County Adult Detention Center, he was administered a new blood test and was negative for HIV. He filed a federal constitutional claim accompanied by state tort claims. The court dismissed sua sponte, finding that a misdiagnosis that somebody was HIV-positive did not state a constitutional claim. McCullum claimed that the misdiagnosis was harmful to his reputation, but the court found that “there is no constitutional right to be free from defamation or slander.” The court dismissed the federal constitutional claim with prejudice, but the state law claims without prejudice, so that McCullum could refile them in state court. *McCullum v. Singing River Hospital System*, 2015 WL 4899750 (S.D. Miss., Aug. 17, 2015).

MISSOURI – Ruling in a dispute between lesbian co-parents over child custody long predating the recent round of marriage equality litigation, a three-judge panel of the Court of Appeals of Missouri, Western District, affirmed a ruling by Clay County Circuit Judge Kathryn E. Davis dismissing Melissa McGaw’s motion “to determine parent-child relationship, custody, and visitation” with the twins who were born in 2004 to Angela McGaw. *McGaw v.
We reported in the Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (which was decided after this case was submitted), couples like Melissa and Angela are now able to marry if they choose. We anticipate that in the wake of Obergefell, situations like this one, in which important issues involving children must be decided outside the established legal framework applicable to married couples, will occur less frequently. But, of course, that does not mean they will never occur, so this decision, rejecting various common law causes of action asserted by Melissa, is consequential for same-sex couples in Missouri. The court found that Melissa’s complaint fell short in terms of alleging a breach of contract claim, lacking the necessary specificity to provide the court with a basis for determining the terms of the parties’ alleged agreement. (Melissa had argued that such an agreement could be enforced if the court found that it was in the best interest of the children.) The court noted that it was bound by existing Missouri case law from applying theories such as in loco parentis, equitable estoppel or equitable parentage in this case. The court explained that there is a Missouri statute under which Melissa could pursue a separate third-party parent claim, Section 452.375.5(5), but that she had not asserted a claim under the statute in the case before the court. Concurring in part and dissenting in part, Judge Robert M. Clayton III agreed that Melissa had a right to pursue an independent action under the statute if she could prove the necessary facts, but argued that the trial court’s dismissal should be reversed and the case remanded for a full hearing on the merits, asserting that “in light of the United States Supreme Court’s decision in Obergefell, I believe this matter should be transferred to the Missouri Supreme Court to determine whether, under the circumstances of this case, the above-referenced statutory scheme is ‘plainly inadequate,’ in accordance with Cotton v. Wise, 977 S.W.2d 264, 264 (Mo. banc 1998), demonstrating a need for the court to exercise its equity powers.”

**NEW YORK** – We reported in the Summer issue of Law notes that U.S. District Judge Jed S. Rakoff (S.D.N.Y.) had issued a bench ruling on June 26 refusing to dismiss a lawsuit challenging New York’s refusal to provide Medicaid coverage for many medical procedures associated with gender reassignment on grounds that they were merely “cosmetic” and thus not “medically necessary.” On July 29, Judge Rakoff issued a substantial written opinion explaining his ruling, Cruz v. Zucker, 2015 WL 4548162, 2015 U.S. Dist. LEXIS 99323. The state’s motion to dismiss had argued that the court did not have jurisdiction over the claims asserted for a variety of reasons, and Judge Rakoff’s opinion was devoted to refuting this contention, particularly in finding that individual have a right to sue in federal court for a determination that a state Medicaid program’s refusal to cover a particular medical procedure violated the state’s obligations under the Medicaid statute. The introductory paragraph of the court’s opinion nicely summarizes what was at stake in ruling on the motion. “The intersection of our cognition with our emotions is both the essence of our humanity and the source of our anxiety,” wrote Rakoff. “According to the plaintiffs in this class action, someone who is born with the physical equipment of one sex but emotionally identifies as someone of the opposite sex suffers severe anxiety and emotional distress that may, however, be materially alleviated by available medical procedures. Plaintiffs further contend that New York wrongly denies Medicaid coverage for many such procedures, regarding them as merely ‘cosmetic’ or the like. The immediate question before the Court is whether the plaintiffs here can sue for redress of this alleged wrong. The Court concludes that they can.” The dispute is not about whether New York must fund the central elements of sex reassignment surgery, as the state has recently ended its long-time refusal to do so, in response in part of the initial filing of this lawsuit. The issue is whether the state can limit its coverage to breast and genital removal surgery, or is also required to fund various other procedures intended to conform the individual’s physical appearance to their preferred gender. According to the court’s opinion, the disputed procedures include “breast augmentation, facial feminizing surgery, chondrolarngoplasty
NEW YORK – U.S. District Judge Joanna Seybert granted a motion to dismiss a Title VII/NYS Human Rights Law complaint against a hospital for refusal to hire a transgender woman, but gave leave to file an amended complaint with more factual detail. Carr v. North Shore-Long Island Jewish Health Systems, 2015 U.S. Dist. LEXIS 99792, 2015 WL 4603389 (E.D.N.Y., July 30, 2015). The plaintiff, a transgender woman and a member of the Unitarian Universalist Church, was a student at Sanford Brown Institute studying for an Associates degree in Applied Sciences to qualify as a medical assistant. In the summer of 2012, she was one of a group of students serving in a medical assistant extern position at the hospital, and she was informed that students who successfully completed the externship were normally offered employment after graduation. She alleges that she was dropped from the program due to her sex and religion, claiming that she “sometimes heard ‘chatter,’ or sometimes received ‘stares’ from other employees when she attempted to use the female employee restroom” but, wrote Judge Seybert, “Plaintiff does not describe the contents of this chatter, its speakers, or which employees inappropriately stared at her.” She did relate one incident in support of her claim; overhearing her extern supervisor (whom she accuses, without any specifics, of “routinely” disparaging her in the presence of others) telling a patient’s mother “that Unitarian Universalist is not a religion that is recognized by Jesus, and the heshes . . . and the gays will need to answer to Jesus someday.” This was offered as evidence of discriminatory animus by the supervisor, whom plaintiff alleged “executed a systematic attack against Plaintiff by shaming her and then privately being nice to her, with the objective of Plaintiff being terminated before the externship concluded in order to preempt her employment with Defendant.” Plaintiff received an email on September 25, 2012, from the employee who had initially interviewed her for the externship, telling her not to return to the externship, to which she responded the next day, raising the issue of her supervisor’s alleged mistreatment of her, to which she did not receive a response until she received a copy of the supervisor’s evaluation of her dated October 3. One defense raised by the hospital was that it could not be accused of a discriminatory refusal to hire when the plaintiff had never applied for a job, but the court accepted the allegations about the externship program being a channel to employment as sufficient to bring this case within the ambit of a refusal to hire. However, Judge Seybert agreed with the hospital that the complaint was deficient in factual specifics in light of the pleading requirements under Title VII. Apart from the overheard “stray remark,” the plaintiff hadn’t made specific allegations about specific statements by specific employees, and the one overheard remark was not deemed by Judge Seybert as sufficient to ground a Title VII claim. However, Judge Seybert noted, the court had discretion to grant leave to amend the complaint, and “the Court finds that there is at least some indication that a valid claim might be stated,” so such permission was granted in this case. Plaintiff Tina Carr is represented by Lance D. Simon of Simon Law Group in Riverhead, N.Y. The question now is whether Carr can recall enough specifics to flesh out the factual allegations sufficiently to state a Title VII claim up to the “plausibility” standard.

NEW YORK – Despite the EEOC’s recent holding that sexual orientation discrimination claims are cognizable under Title VII, federal district courts routinely cite earlier decisions holding to the contrary in dismissing Title VII claims. In Harder v. New York State Office of Children & Family Services, 2015 WL 4614233 (N.D.N.Y., Aug. 3, 2015), U.S. District Judge David N. Hurd followed this path. The plaintiff, Harry A. Harder, a former employee of OCFS (Youth Division Aid), alleged that various comments made by a fellow trainee and then staff member who had initially been assigned as his roommate during the training course had created the false impression among co-workers and clients that Harder was gay, leading to various incidents and confrontations on which he based his discrimination claim. After he complained to supervision about the co-worker’s comments, Harder claimed that he suffered retaliation in the form of adverse job assignments. He left the agency to take a position in another state agency, but also apparently to escape his deteriorating situation at OCFS. Harder filed discrimination claims with the NY State Division of Human Rights and the EEOC, neither of which panned out for him, but he followed up by filing a pro se federal lawsuit against the agency and the co-worker under Title VII, alleging discrimination on the basis of misperceived sexual orientation and retaliation for filing complaints with management. After dismissing the case against the co-worker on the ground that only employers can incur Title VII liability, Judge Hurd turned to Harder’s
allegation of unlawful discrimination. He found that Harder had failed the first step of pleading a prima facie case, protected class membership. Hurd wrote that “Harder cannot satisfy the first prong of this test, since Title VII ‘provides no remedy for discrimination based upon sexual orientation,’” citing decisions by other federal district courts from 2011 and 2014. “This same ‘protected class’ limitation also applies to Title VII claims brought under theories of a hostile work environment and constructive discharge,” Hurd continued. “Accordingly, defendants are entitled to judgment as a matter of law on these claims.” Turning to the retaliation claim, Hurd was willing to accept the argument that Harder’s good faith belief that he was complaining about unlawful conduct could be sufficient to ground a retaliation claim, but found that Harder’s factual allegations were insufficient to show that the job assignments he was protesting were a response to the complaints he filed, so this claim also had to be dismissed. The employer credibly showed that they were just luck-of-the-draw assignments based on staff availability and coverage needs at the particular time. Had Harder been represented by competent counsel, perhaps the court would have been presented with the handful of federal district court rulings finding sexual orientation claims actionable under Title VII, leading to a different outcome on the discrimination claim, but in the current state of legal developments, a pro se plaintiff without access to information about these new developments is not well positioned to survive a dismissal motion. General public opinion polls show that a substantial majority of the general public mistakenly believes that sexual orientation discrimination is already against federal law, so it is not surprising that pro se plaintiffs bring such claims in federal court. The EEOC has launched an undertaking to bring cases in federal court to establish useful precedents supporting its view of Title VII coverage, but generating appellate precedents will undoubtedly take some time, and then ensuring that district courts are aware of them in the context of pro se cases needs to be part of the campaign.

NEW YORK – U.S. Bankruptcy Judge Stuart M. Bernstein has dismissed a bankruptcy petition filed by David Frances Charles Reyes, the surviving same-sex partner of Gerald Arthur, who died in February 2011 leaving a rather complicated situation with regard to the ownership of his real property, located at 149 East 29 Street in Manhattan, and other assets. In re Reyes, 2015 Bankr. LEXIS 2575, 2015 WL 4624156 (U.S.B.C., S.D.N.Y., Aug. 4, 2015). According to Judge Bernstein’s summary of the facts, Arthur executed a will in 2002, leaving the property to one Abraham Pelotin, and designating David Caraway as executor. After the will was executed, Reyes became Arthur’s domestic partner. Reyes claims that Arthur decided to make a new will in 2007, leaving the property and other assets to him. Instead, however, the lawyer he retained, Jo Anne Simon (now a NY State Assemblymember), drafted a Trust document, naming herself as trustee, giving the trust title to Arthur’s property and other assets with the mandate to pay Arthur’s expenses during his lifetime. Reyes claims that Arthur had not requested this arrangement, and was hospitalized, in pain and taking medication, when he executed the Trust and a power of attorney naming Simon on October 6, 2008. The next day, Simon exercised the power of attorney to deed the Property from Arthur to herself as trustee, and recorded the deed on November 21, making the Trust the owner of the property. (Reyes claims that the Trust, the Power of Attorney and the deed were all back-dated.) Reyes claims that Arthur tried to revoke the Trust in writing in August 2009, but that Simon ignored his attempt. After Arthur died controversy ensued, of course. Reyes claimed the Trust was invalid or had been revoked, and that he had an equitable interest in the Property because Simon had not drafted the will that Reyes claims Arthur intended to execute, leaving the property to Reyes. Caraway presented the 2002 will for probate and was appointed temporary administrator of Arthur’s estate. Pamela Green, claiming to be an intestate heir of Arthur, claimed (as did Reyes) that the 2002 will had been revoked, and she asserted a claim to Arthur’s property in default of a valid will. While the various claims were pending in Surrogate’s Court, Green and Reyes filed a separate action in Supreme Court, NY County, joining all the claimants, seeking a judgment that Green owned the property or, alternatively, that Reyes was the beneficiary of a constructive trust over the property. Reyes also sought damages from Simon and sought an injunction against New York City to delay a possible tax sale of the Property. The Supreme Court action was then transferred to Surrogate’s Court, which tried to move things forward by scheduling a hearing on Simon’s proposal as trustee to sell the Property. Reyes filed a bankruptcy petition (Chapter 11) on November 24, 2014, for the purpose of staying the scheduled hearing in the Surrogate Court. Reyes claimed substantial debt (mainly accumulated real estate taxes on the property as well as money he owned to Medicaid) exceeding his stated income of $800 a month, which he claimed just met his living costs, and the Property was the main asset whose sale could be used to settle his debts. Of course, if he didn’t own the Property, he would not be liable for the real estate property taxes, which were the lion’s share of his claimed debt. In dismissing the bankruptcy petition, Judge Bernstein found that it was premature for Reyes to have filed it, and concluded that it was filed by Reyes and his attorney for strategic purposes; they professed concern that because of Simon’s
political office (and her committee assignment, which gave her some sway over the Surrogate Court’s budget) they could not expect the Surrogate’s Court to render an unbiased decision on Reyes’ pending claims. However, the judge refused to sanction Reyes and his attorney, Brian M. DeLaurentis, for bad faith, or to award attorneys’ fees to Simon on her successful motion to get the bankruptcy petition dismissed.

The entire thing is quite tangled up, and cannot be fully explained within the space constraints of this newsletter, but Bernstein’s opinion is published for anybody interested in the details.

NEW YORK — The New York Post reported on August 21 about a case of “gay family planning” with interesting consequences. According to the article, a lesbian actress, Gigi Carrier, was adopted by her girlfriend, Shirley Cowell, in 1979. Cowell, then 57, became the legal mother of Carrier, then 41. Cowell, who had substantial assets from a family business, died intestate in 1979. Carrier survived her, inheriting her fortune as her legal daughter, living in their expensive River House apartment and driving a fancy European sports car. According to the article, Carrier’s biological brother Leonard Carrier and his wife Claire remained close to Gigi Carrier, who passed away in 2009, also intestate and leaving no legal heirs. Claire, now 79, alleges that Carrier, who had socialized with Leonard and Claire extensively and gave them expensive gifts during her lifetime, would have wanted her to inherit the money. Leonard died in 2014 and Claire has filed a claim in New York County Surrogate’s Court seeking the assets left by Gigi, a process that Leonard had initiated prior to his death with a demand on the public administrator appointed for her estate, attorney Peter Schram. The administrator rests on a New York statute providing that the biological family members of a person who is adopted may not inherit as legal heirs, since adoption terminates the legal family ties. The Post quotes from a filing in the case by a court-appointed attorney, Linda Kordes, stating: “Leonard claimed his right to inherit survived the adoption because the basis of the adoption was to create a non-traditional family comprised of Shirley and the decedent at a time in our history when same-sex couples could not marry.” Kordes was appointed for search for living relatives Cowell may have had who would be entitled to inherit from the $25 million estate, but Kordes has found nobody thus far and recommended that the funds be paid over to the New York City Commissioner of Finance, who oversees an unclaimed funds account, as the search continues; alternatively, if Surrogate Judge Rita Mella rules in favor of Claire Carrier, the Commissioner could pay out the funds to her. Public Administrator Schram argues that the funds should not go to Claire. In a filing opposing her claim, he stated, “The right to inherit under New York law does not depend upon one’s personal relationship to the decedent,” only to a legal relationship. A decision was expected soon from the Surrogate.

MAINE — The Supreme Judicial Court of Maine has rejected an argument by the National Organization for Marriage that it should not have to comply with Maine’s financial campaign disclosure requirements while NOM appeals an administrative ruling finding that it is required to disclose the identities of individuals and organizations that donated funds through NOM to influence the outcome of a 2009 ballot question concerning marriage equality. National Organization for Marriage v. Commission on Governmental Ethics and Elections Practices, 2015 ME 103, 2015 WL 4622818 (Aug. 4, 2015). The Commission had concluded that NOM is a “ballot question committee” within the meaning of the state’s campaign disclosure law, and that NOM had violated the registration and reporting requirements in connection with a November 2009 people’s veto referendum. The referendum prevented a marriage equality bill approved by the legislature from going into effect. (Subsequently a 2012 referendum resulted in the affirmative enactment of a marriage equality law by the voters of Maine.) NOM argued that the Commission’s decision was “automatically stayed” pending its appeal to the courts and, if not, that the court should grant a stay under its equitable authority, because denying a stay pending appeal would render the appeal superfluous, inasmuch as it would result in disclosure of the identities of NOM’s donors. The court pointed out that a provision of the relevant statute specifically states that “the filing of a petition for review shall not operate as a stay of the final agency action pending judicial review.” While finding that NOM had indeed demonstrated that denying its request for a stay would impose an irreparable injury by, in effect, letting the cat out of the bag, the court nonetheless found it inappropriate to stay the Commission’s ruling because it was highly unlikely that NOM could prevail on the merits of its appeal. NOM has been litigating about this issue since 2009 and has lost a constitutional challenge to the disclosure requirements before the 1st Circuit Court of Appeals, with the Supreme Court refusing to inject itself into the case. “Because NOM has not advanced any persuasive constitutional challenges to section 1056-B [the pertinent provision at issue here] or any convincing arguments regarding errors of law or fact committed by the Commission in reaching its decision,” wrote the court per curiam, “it has not met its burden of demonstrating a likelihood of success on the merits.” The court found that the public “has an interest in the release of information
about the donors behind ballot initiatives,” but that so much time has gone by since the 2009 referendum that a stay would not harm the public interest at this point. The court found that “the sine qua non” of the stay request was a showing that it was possible NOM would prevail on its appeal. As far as the court was concerned, “there clearly is no substantial probability that NOM will succeed on the merits of its claims.”

“The circumstances underlying the Commission’s decision occurred almost six years ago,” the court continued, “and the decision has successfully withstood federal and state court challenges during that time. NOM now asks us to decide many of the same issues and has failed to sufficiently show that it has a likelihood of succeeding on the merits. Accordingly, we deny NOM’s motion for a stay pending appeal.” * * *

* The Portland Herald Press reported the identity of NOM’s donors on August 24 when its filing was made public: Among them were Richard Kurtz, Sean Fieler (the largest single donor, who is helping to underwrite a national campaign against transgender rights), John Templeton, Terrence Caster, the Knights of Columbus. The only donor resident in Maine was Mr. Kurtz, a major contributor to the Republican Party in Maine who also sent a donation to the 2008 California Proposition 8 campaign. The article said that seven major donors gave more than $2 million to NOM, which funneled the donations to “Stand for Marriage Maine,” the local PAC that was the “public face” of the campaign.

**CIVIL LITIGATION**

PENNSYLVANIA – With two members of the seven-member court dissenting, the Pennsylvania Commonwealth Court (an intermediate appellate court) ruled on August 7, 2015, that the public transit agency for the Philadelphia metropolitan area was entitled to a declaratory judgment that it is not subject to the City of Philadelphia’s anti-discrimination ordinance, only to the state’s Human Relations Act. Southeastern Pennsylvania Transportation Authority v. City of Philadelphia, 2015 WL 4680775, 2015 PA Commw. LEXIS 361. The majority of the court concluded that in chartering SEPTA, the legislature did not intend to subject it to various differing local human rights ordinances, which would place an inappropriate burden on the agency. SEPTA was formed out of a consolidation of local transportation companies in southeastern Pennsylvania in 1963. This litigation was sparked by the filing of discrimination claims against SEPTA with the Philadelphia Human Rights Commission, some of which asserted claims of sexual orientation or gender identity discrimination. Such claims would be viable under the city ordinance, which expressly covers these grounds, but not under the state’s law, which omits them. This case had previously gone to the Pennsylvania Supreme Court, which ruled in 2014 that although SEPTA is a Commonwealth rather than a local agency, it was necessary for the Commonwealth Court to resolve the issue of legislative intent as to whether it enjoyed immunity from local laws. The Commonwealth Court noted that the legislature had expressly waived SEPTA’s sovereign immunity as against claims brought under the state human rights law. “In order to make SEPTA also subject to the [Philadelphia] Fair Practices Ordinance,” wrote the court, “the legislature would have had to ‘specifically’ waive SEPTA’s immunity from actions brought under local anti-discrimination ordinances. It did not do so.” President Judge Dan Pellegrini, dissenting, rejected the contention that SEPTA, a provider of transportation services, is performing traditional governmental functions such that its employment policies should be exempt from regulation by the communities it serves. “SEPTA is subject to charges of discrimination brought under Philadelphia’s anti-discrimination ordinances because it is clear under the Constitution and the legislative scheme that Philadelphia’s interests in eliminating discrimination are paramount under the grants of power given to it as compared to the powers given to SEPTA by the General Assembly,” he wrote. Also dissenting, Judge Robert Simpson argued that the case should have been remanded to the Common Pleas court for the receipt of evidence and initial fact-finding, rather than being decided on remand by the Commonwealth Court, inasmuch as the trial court had never conducted such procedures, having disposed of the case with pretrial motions. He pointed out that the Supreme Court, in its remand, had “clarified the analysis which is to be undertaken in resolving the preliminary objections. That analysis includes a consideration of the consequences of subjecting SEPTA to the City’s anti-discrimination ordinance,” which he argued could not be resolved “by an examination of the current complaint.”

PENNSYLVANIA – In Downs v. Schwartz, 2015 U.S. Dist. LEXIS 106147, 2015 WL 4770711 (E.D. Pa., Aug. 12, 2015), U.S. District Judge L. Felipe Restrepo responded to summary judgment motions in a case brought by a gay attorney against two law firms alleging sexual orientation discrimination, defamation, and retaliation. The court granted the motions in part, eliminating from the case Jeffrey S. Downs’ discrimination and defamation claims, but ruling that Downs was entitled to jury consideration of his retaliation claims against both firms. Downs was an associate at Anapol Schwartz, P.C. from July 2008 through March 2012, and his gay sexual orientation became known to the firm during the course of his employment. He claims, and the firm denies, that there was a hostile environment affecting his employment, leading him to make internal complaints about...
some comments made by members of the firm. Downs did most of his work at the firm for a partner named Mark LeWinter. LeWinter decided to leave Anapol Schwartz to join the firm of Raynes McCarty, P.C., and suggested to the Raynes firm that they hire Downs as well. Downs was offered and accepted a position with the Raynes firm, anticipating joining them when LeWinter made his move. During his interview at Raynes McCarty, Downs was told that they knew he was gay but that this “didn’t matter.” Raynes McCarty took various tangible steps in anticipation of hiring Downs. A few days before he was to leave Anapol, Downs went to the lead name partner of the Anapol firm seeking to negotiate an exit package including a substantial severance payment, asserting in particular his right to be bought out on client business he had procured for the firm. During the course of that conversation, the content of which is disputed between the parties, Mr. Anapol concluded that Downs was threatening to charge the firm with a hostile environment claim in order to extract the severance payment. Downs denies he had that intention. Downs asked Mr. Anapol not to tell LeWinter about their meeting, but the word got back to LeWinter, who says his confidence in Downs was shaken. LeWinter decided to leave the firm for a partner named Mark LeWinter. LeWinter took various tangible steps in anticipation of hiring Downs. A few days before he was to leave Anapol, Downs went to the lead name partner of the Anapol firm seeking to negotiate an exit package including a substantial severance payment, asserting in particular his right to be bought out on client business he had procured for the firm. During the course of that conversation, the content of which is disputed between the parties, Mr. Anapol concluded that Downs was threatening to charge the firm with a hostile environment claim in order to extract the severance payment. Downs denies he had that intention. Downs asked Mr. Anapol not to tell LeWinter about their meeting, but the word got back to LeWinter, who says his confidence in Downs was shaken. LeWinter’s concerns were communicated to the Raynes firm, which subsequently withdrew its offer of employment from Downs. Downs filed a state court action against the firms, but a jury ruled against his claim that the Anapol firm and LeWinter had “engaged in an intentional action with the specific intent to cause the prospective contractual relationship between Plaintiff and Raynes McCarty from being entered into.” Articles about Downs’ litigation with both firms surfaced in the legal press in Philadelphia, including a letter from the Anapol firm that Downs considered defamatory. Downs, a New Jersey resident, filed a diversity case against both firms in federal court, alleging sexual orientation discrimination, defamation and retaliation. Ultimately, the judge concluded that Downs’ allegations of sexual orientation discrimination and defamation could not survive the summary judgment motions, but that there remained plausible retaliation claims, as it was possible that a jury could conclude that adverse actions against Downs by both firms were caused by his raising allegations of hostile environment at Anapol because of his sexual orientation and their belief that he intended to take legal action on such allegations. We’ve undoubtedly oversimplified the facts in order to be brief; those interested in the full details should consult the court’s opinion, which is long and detailed.

PENNSYLVANIA – Dismissing a claim of hostile environment sexual harassment under Title VII and the Pennsylvania Human Relations Act in Betz v. Temple Health Systems, 2015 WL 4713661 (E.D. Pa., Aug. 7, 2015), U.S. District Judge Jerry Pappert found that “an uncouth, unprofessional, and offensive workplace” by itself could not serve as the basis for a sex discrimination claim. Ellen Betz, a registered nurse employed by Temple Health Systems, was doing just fine her first six years on the job, but then was transferred to a different floor at Jeanes Hospital where her female coworkers “regularly engaged in offensive and inappropriate conduct. Other nurses would regularly ‘joke’ with each other by ‘licking, groping, making gestures or pretending to grope each other’s breasts and genitals.’ This behavior occurred ‘on nearly a daily basis.’ For example, one day a nurse complained about having been stopped for a traffic violation. The other nurses made suggestions about how the nurse could have avoided a ticket, such as ‘show him some cleavage’ and ‘blow him.’ In another instance, a coworker displayed photos ‘exemplifying the sexually offensive behavior of touching each other’s breasts and genitals’ that was regularly on display at Jeanes. Betz was also offended that two nurses named Helene and Anthony would ‘passionately and openly kiss each other and rub each other’s genitals’ in Betz’s presence.” She complained about this continuing conduct and refused to join it, earning a reputation as a “rat” and “snitch.” Management seemed unconcerned, never addressing her complaints and she was eventually discharged “for a reason that she alleges was pretextual.” In her lawsuit, she pushed the hostile environment claim, but the judge found no grounds for it, because she failed to show that she was discriminated against because of her sex. “Betz asks the court to go too far,” wrote Pappert, finding that she did not allege facts that would support an inference that she was being discriminated against in any way, much less because of her sex. “Betz does no more than allege that her female coworkers engaged in sexually explicit behavior that she found offensive and refused to participate in. This bare allegation is insufficient to allow the Court to infer that Betz’s female coworkers believed that Betz did not conform to a gender stereotype.” The court cited Justice Scalia’s famous dictum in Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) that Title VII is not a “general civility code for the American workplace,” probably the most cited phrase from that opinion. * * * To similar effect is the U.S. District Court decision in Eckert v. Quality Associates, 2015 WL 5083329 (D. Md., Aug. 26, 2015).

PENNSYLVANIA – Ruling in a dispute between a decedent’s former domestic partner and surviving relatives over the right to life insurance proceeds, a unanimous panel of the Pennsylvania Superior Court reversed the trial court’s grant of summary judgment to the surviving relatives, holding that there
CIVIL LITIGATION

were material issues of fact that could not be resolved on summary judgment. *Estate of Gallagher*, 2015 Pa. Super. Unpub. LEXIS 2313 (July 23, 2015). Stephen T. Gallagher was an employee of the University of Pennsylvania who was covered by group health and life insurance plans at the time of his death on May 27, 2011. Joseph Hallman began to live with Gallagher early in 2005, and in May 2005 they executed a document adding Hallman to Gallagher’s residential lease. They later purchased a home jointly, taking out a mortgage to finance the purchase. They registered as same-sex domestic partners with the University in 2006, after which Gallagher added Hallman to his medical insurance. They separated in late 2008 or early 2009, but apparently remained friends, as Hallman testified that he cared for Gallagher’s dogs while Gallagher was away on business and he drove Gallagher home from the hospital after Gallagher had surgery. However, after Hallman moved out Gallagher went into the electronic system that administered the Penn benefits plans and removed Hallman from the medical insurance coverage. On the same date, he added his mother as a contingent beneficiary on his life insurance plan, but made no change on his primary beneficiary designation. At the time of his death, the system showed that Hallman was his primary beneficiary, and Hallman submitted a claim. However, surviving relatives of Gallagher, including his brother Michael, who is executor on the will (which does not cast light on this dispute) made inquiries about the life insurance proceeds, and a contest developed. Although the computer showed Hallman as the primary beneficiary, there was no indication in the computer (and no written record) showing when Gallagher made such a designation. The Gallagher claimants, who sought to claim the proceeds for Gallagher’s surviving parents, hypothesized that the computer program had automatically listed Hallman as the primary beneficiary at the time Gallagher add him to the medical insurance policy, and that this was not intended by Gallagher. Hallman rested on the fact that the computer system listed him as the beneficiary and that when Gallagher changed the medical designation and add his mother as contingent, he made no change on the primary designation. Indeed, a screen capture showed Hallman as the designated beneficiary in 2007, prior to the time when Gallagher made the other changes in 2008. Aetna decided not to pay out the benefits to anybody without court authorization, filing an interpleader action. The trial court ruled in favor of the Gallagher family claimants on a summary judgement motion last year. The Superior Court concluded that this was error; there are central disputed material facts that require trial. The court noted the fact that Hallman remained co-obligor on the mortgage, with a substantial balance outstanding, and presumably the life insurance proceeds would be crucial to his ability to meet this obligation. (Although the issue is not surfaced in the opinion, it may be logical to hypothesize that Gallagher retained Hallman as primary beneficiary in light of the outstanding mortgage obligation, particularly if the termination of their domestic partnership was, as Hallman’s testimony implies, amicable and there was no desire to sell the home, pay off the mortgage, and share any proceeds at that time.) The court rejected Hallman’s argument that Aetna had violated its fiduciary duty under ERISA by not paying out the proceeds to him in light of their computer records showing him as the primary beneficiary, finding that Aetna had acted reasonably in light of the dispute in seeking a court order before disbursing the funds. The Gallaghers contacted Aetna to inquire about the insurance proceeds before Hallman had supplied the necessary documentation about Stephen Gallagher’s death. This brief summary drastically generalizes about a procedurally complicated case that has been going on for several years. The bottom line is that the case gets remanded to the trial court for further proceedings.

TENNESSEE – American National Property and Casualty Company (ANPAC) is seeking a declaratory judgment that it is not liable to its insureds, the Stuttes, a lesbian couple, after their house burned down. ANPAC claims that the Stuttes intentionally set the fire. The Stuttes deny this and argue that a neighbor, Janice Millsaps, or somebody else, set the fire. They claim to have received homophobic threats prior to the fire. Ruling on evidentiary motions in *American National Property and Casualty Co. v. Stute*, 2015 U.S. Dist. LEXIS 96969, 2015 WL 4487997 (E.D. Tenn., July 23, 2015), U.S. District Judge granted in part and denied in part ANPAC’s motion in limine to exclude from evidence the deposition testimony of a proposed witness, Chelsea Walle. The fire took place in 2010. “In or around April 2015,” wrote U.S. District Judge Leon Jordan, “the Stutes learned of a witness, Chelsea Walle, with purported knowledge of who burned their house,” and a deposition of her was taken on June 18, 2015, in which she testified that she lived in the area from December 2012 to October 2014, during which time she became friends with Katie Millsaps, who she thought was a relative of Janice Millsaps. Walle testified that Krie referred to Janice as a “bad Millsaps” who “does things on her own terms” and that the Millsaps family had a bad reputation. Walle also testified that she heard Janice made “derogatory comments about homosexuals,” and that Katie Millsaps had shown her the site of a burned house and related a story about a fire being deliberately started there after a party. It is uncertain whether the site visited by Walle and Katie Millsaps was the site of the Stutte house. The Stuttes were planning to present Katie
In Arredondo v. Estrada, 2015 WL 4523545 (S.D. Texas, July 27, 2015), U.S. District Judge Nela Gonzales Ramos refused to grant summary judgment to the employer on a Title VII sex discrimination claim brought by three male former employees from an all-male worksite, asserting sexual harassment charges against a male supervisor, Joey Estrada and the employer. The three men were subjected to physically harassing conduct. They didn't file formal complaints with the company because they feared retaliation. After two of the men had left their jobs, an anonymous complaint was submitted about the conduct, and a subsequent company investigation led to the discharge of Estrada and other employees who assisted him in his assaults of a sexual nature on the plaintiffs. There was also retaliatory conduct against the plaintiff who was still employed at that time, and who eventually was effectively forced to leave the company. There was evidence that various supervisors witnessed some of the physical attacks launched by Estrada and just laughed them off. The company asserted that none of Estrada’s actions were actionable against the company as sex discrimination because there was no evidence that Estrada was gay or motivated by sexual desire or general hostility toward male employees. Judge Ramos agreed with the plaintiffs that the typical fact patterns for same-sex harassment spelled out by the Supreme Court in Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998), were not exclusive and that the plaintiffs were entitled to advance “alternative theories by which Estrada’s admittedly sexual, vulgar, abusive, and even assaultive acts are discriminatory.” “Plaintiffs’ deposition testimony paints a picture of Estrada and other employees targeting them as weaker crew members and using male domination techniques to have Plaintiffs perceived as less manly and thus less worthy as crew members,” wrote the judge. “They did this by referring to them as ‘bitches,’ restraining them in passive sexual positions, and Estrada placing his nub in or near their orifices in a symbolically phallic manner that Plaintiffs found humiliating and threatening to their masculinity.” (Estrada was missing part of a finger, and allegedly used the remaining “nub” of his finger as an assault weapon in a procedure he called “nubbing.”) “Vulgar words, physical acts with sexual connotations, horseplay, and ‘locker room’ behavior with explicit sexual components do not necessarily state a Title VII gender discrimination claim,” the judge continued. “More commonly, sexual harassment involves humiliation related to sexual desire. However, humiliation based on gender stereotyping meant to separate those who are deemed less manly from the rest of a crew is actionable.” The court found that the other elements of a Title VII sex discrimination claim had been sufficiently pleaded to present jury questions precluding summary judgment. Judge Ramos held that plaintiffs could also maintain their assault claim against the employer under a vicarious liability theory for the actions of Estrada, but not their intentional infliction of emotional distress claim, because damages for emotional distress were alternatively recoverable under the other viable causes of action. The court dismissed various negligence claims against the company, finding them barred by the Workers Compensation Act.

VERMONT — In a case whose facts could serve as a first-year Contracts exam question, U.S. District Judge William K. Sessions III ruled on August 6 in Cressy v. Proctor, 2015 WL 4665533, 2015 U.S. Dist. LEXIS 102956 (D. Vt.) (not reported in F. Supp. 3d), a dispute incident to the break-up of the nineteen-year relationship between Ronald Cressy and Kevin Proctor. Cressy was married to a woman from 1988 through 1993, when he came out as gay to his wife and she filed for divorce. At around that time he met Kevin Proctor. Cressy moved into Proctor’s home in Long Beach, California, in mid-1993, and soon after took mental health leave from his job as a warehouse manager with a women’s clothing company, a job he eventually quit in 1994. Proctor owned a small advertising business operated out of his home with a few employees, and Cressy began working in the business, initially as a volunteer, but after the woman who was, in effect, the main administrative employee left in 1994, Cressy gradually took over that role, essentially working full-time. He was never paid a salary by Proctor, but Proctor supported the two of them out of the proceeds of the business, which grew to be quite substantial, with about $300,000 net annual income at a high point. Proctor decided in 1996 that he wanted to relocate to the northeast for a variety of reasons, and he and Cressy made several trips to Vermont looking over potential property purchases. The real estate agent who dealt with them testified that Proctor was her client, and Proctor was the sole legal owner of the real estate that was purchased over the ensuing years. Cressy and Proctor
also enjoyed collecting antiques (which Proctor paid for), accumulating a large collection which they spoke about providing the basis for a retirement business. Cressy continued to work in the business after they relocated to Vermont, and also helped with chores on the farm that Proctor had purchased (out of proceeds and savings from the business). All kinds of interesting gay family law developments were happening in Vermont over the ensuing years, but Proctor and Cressy never formed a civil union or entered into any kind of domestic partnership agreement, although Cressy suggested they marry after Vermont legislated in favor of same sex marriage. They did not produce any of the documents that lawyers were then recommending for partners, such as powers of attorney, living wills or living-together agreements. Proctor wound down his advertising business in 2008, and thereafter they lived off Proctor's savings and remaining funds from the business, which were depleted in 2012. By then they were coming to a parting of the ways, with Proctor asking Cressy to be contributing to pay household bills out of his own savings. Cressy left and the relationship ended.

Judge Sessions estimated that Proctor's total assets exceed $1 million, and a substantial portion of his personal and real property was purchased out of the funds of his business. When Cressy left, wrote Sessions, "he had less than $500 in his bank account and no assets." Cressy sued on theories of implied contract, promissory estoppel and quantum meruit, claiming that he was entitled to a substantial payment from Proctor for the value of Cressy's room and board. Sessions calculated what Cressy would have earned in salary, comparing to what Proctor had been paying other employees, and also seems to have taken the value of the antiques collection into account. Judge Sessions concluded that Cressy was entitled to receive $173,685, and, based on his factual findings, ruled against Proctor on various counterclaims involving relatively small amounts. Cressy is represented by Davin McLaughlin of Langrock, Sperry & Wool LLP, Middlebury (the firm that litigated the Vermont case that resulted in passage of the Civil Union Law in 2000). Proctor is represented by Richard T. Cassidy of Hoff Curtis, Burlington.

CRIMINAL LITIGATION NOTES

U.S. COURT OF APPEALS, 4TH CIRCUIT – A unanimous three-judge panel of the 4th Circuit rejected a claim that a federal statute making it a crime for a U.S. national to engage in an illicit non-commercial sexual act with a minor after traveling in foreign commerce was unconstitutional. Ruling in United States v. Bollinger, 2015 U.S. App. LEXIS 14542 (Aug. 19, 2015), the court upheld the conviction and 25 year prison sentence imposed on Larry Michael Bollinger, a Lutheran minister who admitted engaging in sexual activity with teenage girls (some as young as 11 years old) while administering a large ministry outside of Port Au Prince, Haiti. Bollinger claimed that the girls “came on” to him and there was testimony that poor children would offer to provide sexual services in Haiti in exchange for food and shelter. Bollinger’s acts came to light when, after returning to the U.S., he and his wife sought marital counseling and he told the counselor about his sexual activities in Haiti. The counselor reported Bollinger’s admissions to law enforcement authorities, and the government instituted a prosecution, seeking a 60 year prison term for the 68 year old minister in response to his conditional guilty plea to two counts under the statute. Bollinger pled guilty after the court had denied a pretrial motion to dismiss the case against him. The judge’s sentence of 25 years was a substantial downward departure from the maximum authorized under sentencing guidelines of 60 years (up to 30 years on each of the two counts), which the government had sought. Most of the opinion by Circuit Judge Roger Gregory was devoted to countering Bollinger’s argument that the statute is unconstitutional. The court found that Congress has authority under the “foreign commerce clause” to enact such legislation. “Instead of requiring that an activity have a substantial effect on foreign commerce,” wrote Gregory, “we hold that the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such commerce.” The court concluded, “It is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry,” and he noted international treaties and conventions dealing with sexual exploitation of children to support the point. “In that light,” wrote Gregory, “it is reasonable for governments to determine that the non-commercial abuse of children is a factor that contributes to commercial sexual exploitation, and to regulate non-commercial conduct accordingly.” The court also deemed significant “the consequence of a contrary holding.” “In that case,” wrote Gregory, “a citizen
could effectively avoid all police power by leaving U.S. soil and traveling to a nation with weak or non-existent sexual abuse laws. The citizen would be free to act with impunity—a reality that could undoubtedly have broad ramifications on our standing in the world, potentially disrupting diplomatic and even commercial relationships. Of course, the Tenth Amendment reserves unenumerated powers to the states and the people. But the Constitution does not envision or condone a vacuum of all police power, state and federal, within which citizens may commit acts abroad that would clearly be crimes if committed at home.”

The court rejected Bollinger’s argument that the sentence was excessive in light of his age, constituting a virtual life sentence. “Here, the sentence imposed by the district court—representing a 60% downward variance—was not unreasonable when considered in light of our deferential standard of review,” wrote Gregory, “the heartrending victim-impact statements in the record, the powerlessness of the victims, and the minister’s heinous abuse of authority. Notably, Bollinger cites no authority for the proposition that a defendant’s advanced age renders unreasonable a sentence that would otherwise be reasonable. Nonetheless, the district court expressly considered Bollinger’s age in imposing a sentence well below the 6-year Guidelines. That sentence should stand.”

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS—In light of Lawrence v. Texas and its application in military sodomy prosecutions as explicated in United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), a military judge erred in charging the court martial panel that consensual sodomy was a lesser-included offense on a forcible sodomy charge, held the U.S. Navy-Marine Corps Court of Criminal Appeals in United States v. Bass, 2015 WL 4910958 (Aug. 28, 2015). In Marcum, a military appeals court established that the military could continue to criminalize consensual sodomy when particular factors from the military environment justified distinguishing it from civilian life, in which the Supreme Court had ruled in Lawrence that consensual sodomy between adults could not be criminalized absent certain aggravating factors (conduct in public, conduct involving minors, conduct where consent was questionable). In this case, the male defendant was charged with sexual harassment, wrongful sexual conduct and sodomy in his relations with two female military members, including sexual conduct on board a military ship. Pursuant to the military judge’s instruction, the court martial panel refused to convict on a forcible sodomy charge, but convicted on the “lesser included offense” of consensual sodomy. The defendant objected that the charge was defective in failing to require the prosecutor to show that one or more Marcum factors existed in the case. Failing such proof, the conviction would be unconstitutional under Lawrence and Marcum. The appeals court agreed, and vacated the sodomy conviction on this ground. Defendant was also convicted on other charges. The court concluded that vacating the sodomy charge substantially reduced the maximum penalty that could be applied in the case, and remanded for a rehearing on sentencing. The court had previously issued an opinion in this case, United States v. Bass, 2015 CCA LEXIS 221 (May 27, 2015), but granted panel reconsideration and substituted the opinion issued on August 28, which the court said did not change the outcome of the case, merely some wording in the explanation of the court’s result.

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS—Cutting short what may have been a promising career as a Naval officer, the court upheld the dismissal of a recent Naval Academy graduate, a lieutenant junior grade, who exhibited the poor judgment of kissing a handsome young man from his unit on the lips while on shore leave, and following up by performing oral sex on the guy in a secluded area. Lt. Hernandez noticed that another enlisted man had seen the kissing, and asked this person not to “report him,” appealing to ethnic solidarity. But evidently the report was made, and the young sailor testified that as a result of what happened, he felt “alone and isolated, that he lost trust in others, that he was wary of officers, that he suffers flashbacks to the night of the offenses, and that his parents and sister also experienced stress.” The court martial convicted Hernandez of one specification of fraternization (inappropriate conduct with a person of lesser military rank) and one specification of obstruction of justice (for asking the other sailor not to “report” what he had seen). He was sentenced to a formal reprimand, total forfeiture of pay and allowance, and dismissal from the service. The appeals court, after summarizing the evidence, wrote that “in light of the circumstances of this case we find the sentence, and in particular the imposed dismissal, to be fair and just.”

The court also noted that Hernandez had not affirmatively raised sentence disparity as an issue, although his brief quoted a retired officer’s good military character letter opining “that similar heterosexual episodes of fraternization were resolved via Captain’s or Admiral’s Mast.” (That is, by the commanding officer exercising discretion to impose a minor punishment.) The court said that Hernandez “had not met his burden of demonstrating that any cited cases are ‘closely related’ to his case and that his sentence, therefore was ‘highly disparate.’” After all, prior to Lawrence v. Texas and its explication in the military context in United States v. Marcum by a military appeals court,
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Under current military interpretation of the Uniform Code of Military Justice sodomy provision, criminal liability would not attach to consensual gay sex between military members of the same rank in private. However, the court martial evidently concluded that the victim was not sufficiently sober to consent, and that it was irrelevant to the charges on which they convicted him as to whether Davis was mistaken about the victim’s competency and/or interest in having sex. If he was actually not capable of consenting at the time, then the sex was non-consensual, violating the military code. Much of the opinion by the court of appeals is devoted to Davis’s argument about evidentiary rulings and challenges to the arguments made by the prosecutor. As to the latter, it seems that Davis’s defense counsel was not sufficiently aggressive in raising objections. The court wrote: “Trial counsel’s argument did, at times, interject his personal beliefs and opinions into the case and appears to vouch for the credibility of some of the government’s evidence. Similarly, his references to the appellant’s testimony and veracity do stray close to being a personal attack. However, even if trial counsel’s comments here crossed the exceedingly fine line which distinguishes permissible advocacy from improper excess, the comments were not so obviously improper as to merit relief in the absence of an objection from counsel when considered within the context of the trial as a whole. The panel clearly was not swayed by trial counsel’s findings argument. Lastly, in addition to not objecting, trial counsel raised the possibility of asking for an instruction on certain aspects of trial counsel’s argument but then expressly chose not to ask for the instruction. The lack of a defense objection to trial counsel’s argument is some measure of the minimal impact of the argument.”

DISTRICT OF COLUMBIA COURT OF APPEALS – The District of Columbia Court of Appeals affirmed the conviction of Girma Aboye of “making bias-related threats to do bodily harm after he confronted a gay couple with homophobic slurs and threatened to kill them with his dog,” wrote Judge Glickman for the panel in Aboye v. United States, 2015 WL 4717153, 2015 D.C. App. LEXIS 360 (Aug. 6, 2015). The appeal called for the court to address a question of first impression: whether the District’s Bias-Related Crime Act extended to threats. In this case, the victims, Michael Eichler and Zachary Rosen, a gay couple, would walk their dog small dog Nico in the Adams Morgan neighborhood where they lived. Aboye, who owned a store in the neighborhood, would walk his dog, Tarzan, a “brindled pit bull mix.” When the dog walkers would encounter each other, Tarzan “usually was rather unsociable and even hostile to Nico.” On one such encounter in the fall of 2012, when Eichler perceived Tarzan to be friendly, he attempted to lead Nico forward so the dogs could interact, but Aboye jerked Tarzan back, declaring, “My dog doesn’t like homosexuals. You are a homosexual, right?” When Eichler answered affirmatively, Aboye repeated, “My dog doesn’t like homosexuals; my dog doesn’t like faggots.” On the evening of March 11, 2013, Eicher, Rosen and Nico were sitting on the patio outside a restaurant adjacent to Aboye’s store. Aboye came outside to speak to somebody on the sidewalk and although Eichler and Rose couldn’t hear the conversation clearly, they heard the word “faggot” several times and Rosen said, “You know we can hear you.” Aboye heatedly yelled, “Shut up you faggots; I’m going to kill you with my dog. I’m going to have my dog kill you.” Eichler called 911 on his cell phone, as Aboye went back into his store and returned with Tarzan on a leash. The dogs barked at each other as Aboye walked Tarzan down the street. Before he returned, a
police officer arrived in response to the 911 call and detained Aboye for having threatened Eichler and Rosen. Eichler, Rosen and the officer all testified that Tarzan was not acting aggressively at the time. At trial, Aboye was convicted of bias-related threats to do bodily harm. He appealed, pointing out that threats were not specifically listed in the Bias-Related Crime Act. The court of appeals rejected this argument, pointing out that the list of “designated acts” subject to bias enhancement was defined to mean “‘a criminal act, including....’,” followed by a long list of substantive crimes. The court opined that “including” meant, as elsewhere explicated in the D.C. Code, including but not limited to, and that a threat to assault could be subsumed into the list. “Underscoring the immateriality of the particular type of offense to the Act’s coverage of hate crimes,” wrote Judge Glickman, “the [legislative] Committee explained the terms ‘bias-related crime’ and ‘designated act’ as referring simply to ‘a criminal act’ without substantive qualification.” The court also found that the facts adduced in the trial record were sufficient to support the conviction. “An ordinary hearer in this situation reasonably could fear that Tarzan might become vicious and attack if directed by his master to do so,” wrote the court. “And even if Tarzan was friendly and tame, appellant’s death threat was not. Appellant’s words and demeanor could cause a reasonable hearer to fear that appellant imperiled his physical safety even if appellant’s dog did not.”

CALIFORNIA – The California 4th District Court of Appeals held that Superior Court Judge Margie G. Woods did not err while instructing the jury in connection with a defendant’s argument that his girlfriend had consent to his physical assaults and threats in connection with BDSM activities. People v. Davidson, 2015 WL 4751166 (Aug. 12, 2015) (unpublished opinion). Ryan Davidson’s former girlfriend (now wife), C.C., fled from their apartment and reported domestic violence to a neighbor, her family, emergency room personnel, and police, but by the time of trial, she had recanted these statements, testifying that she had consented to the infliction of injuries as part of a consensual BDSM relationship. Judge Woods instructed the jury on the defense of reasonable belief in consent, stating: “The defendant is not guilty of torture, corporal injury to spouse or criminal threats if he did not have the intent or mental state required to commit the crime because he reasonably did not know a fact or reasonably and mistakenly believes a fact. If the defendant’s conduct would have been lawful under the facts as he reasonably believed them to be, he did not commit [the charged offenses]. If you find that the defendant believed that [CC] consented to being battered and threatened if you find that belief was reasonable, he did not have the specific intent or mental state required for [the charged offenses].” Thus charged, the jury convicted Davidson of torture, corporal injury to a cohabitant, and criminal threats. On appeal, Davidson argued that the consent instructions fell short; he asserted that the court had a duty to instruct that there was no crime if CC actually contended to being battered, tortured or threatened and that the absence of consent was an element of the offenses that the prosecution had to prove beyond a reasonable doubt. The court of appeals rejected these arguments, and particularly rejected Davidson’s argument that the conduct for which he was charged, if consensual, was constitutionally protected under Lawrence v. Texas, the Supreme Court’s 2003 sodomy decision. Wrote Acting Presiding Justice Haller, “To support his position that broad consent principles apply here, defendant contends he and the victim ‘had a constitutionally protected interest in participating in BDSM, which by its nature involves consent to being battered, tortured or threatened,’ citing Lawrence v. Texas (2003) 539 U.S. 558. In Lawrence, the court recognized a constitutional right to engage in consensual adult homosexual activity, and accordingly invalidated a state statute criminalizing this behavior. The Lawrence court reasoned the government should not set boundaries on consensual adult intimate relationships “absent injury to a person,” and underscored that the case before it did not “involve persons who might be injured.” Unlike the circumstances in Lawrence, the conduct at issue in this case involves serious physical injury and terrorizing behavior. Lawrence does not provide authority for defendant’s position. (State v. Van, 688 N.W.2d at p. 615 [Lawrence did not extend constitutional protection to physically injurious sexual activity].) Defendant has presented no persuasive argument to support that voluntary participation in sadomasochistic behavior warrants allowing seriously injurious and criminally threatening conduct to be broadly subject to a consent defense akin to offenses that involve no such injurious or threatening behavior. As stated, public policy dictates otherwise.” In this case, CC had showed up at the emergency room with serious injuries. The court’s opinion apparently leaves open the possibility that consensual BDSM activities that do not involve infliction of serious injury would be constitutionally protected. Davidson also argued that the verdict should be set aside because defense counsel had “abandoned” him, premising his argument on statements made by defense counsel during the trial that Davidson argued were insufficiently supportive of his position. The court rejected this argument, stating that “even if the portion of defense counsel’s closing argument cited by defendant is deemed an unreasonable tactical approach, it did not rise to a complete failure to subject the case to meaningful adversarial testing so as to constitute abandonment.”
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CALIFORNIA – Recommending against the grant of a habeas corpus petition, U.S. Magistrate Judge Alka Sagar rejected 8th and 14th Amendment claims asserted by a man who was sentenced to 30-year-to-life for conduct committed when he was 16 years old after conviction by an Orange County Superior Court jury on one count of sexual penetration with a foreign object by force, one count of aggravated assault on a child, and two counts of forcible lewd act on a child under 14 years of age. His victims were all within a few years of his age. He was sentenced under California’s “one strike” law, which mandates such a prison sentence for anyone tried as an adult who is convicted of the specified offense, regardless of the lack of any past criminal record. The petitioner suggested that this mandatory sentencing scheme violated the 8th Amendment (cruel and unusual punishment) and the 14th Amendment (equal protection) because it precluded the trial judge from taking his age and immaturity into account in deciding on sentencing, but Judge Sagar found that under federal statutes governing habeas proceedings the court had to recommend against granting the petition because there was no U.S. Supreme Court decision establishing that this sentencing scheme violates the constitution as applied to sentencing a minor for criminal acts. Perez v. McDowell, 2015 WL 4698431 (C.D. Cal., Aug. 5, 2015).

CALIFORNIA – California trial judges continue to overuse their statutory authority to order HIV testing in criminal cases, to judge by the latest in a long line of cases questioning such testing orders: People v. Barajas, 2015 WL 4642510 (Cal. Ct. App., 1st Dist., Aug. 5, 2015) (not officially published). The defendant was found guilty in Alameda Superior Court on several counts of “lewd conduct” with a child under 14. None of the charges alleged oral or anal sex. One count concerned kissing, and Barajas was not convicted on that count, so it is not established as fact that the alleged kiss took place. Nonetheless, the trial judge, evidently blissfully ignorant about the mechanics of HIV transmission, premised an HIV testing order on the kiss. Barajas did not challenge his convictions on appeal, but did challenge the HIV test and various aspects of the sentencing. Amazingly, the Attorney General defended the HIV testing order based on the kiss, citing a 1990 California case, Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, to support the contention that the possibility of HIV being transmitted in saliva is sufficient to justify HIV testing of sex crime defendants. That was a case in which the defendant inflicted a deep bite that drew blood from a deputy sheriff’s arm. “In the present case,” wrote the court, “the slight evidence of a ‘kiss’ provides no reason” for a belief that transmission was possible. “There is no indication that defendant kissed Jane Doe on the mouth, and the context of her testimony seems to suggest that the kiss, which she resisted, was brief, possibly on her cheek, and was unlikely to have transferred any saliva. This is not substantial evidence sufficient to establish probable cause that bodily fluid was transferred to Jane Doe.” The court agreed with the Attorney General, however, that the proper remedy here was to remand the case to the trial court, quoting from a prior decision: “Given the significant public policy considerations at issue, we conclude it would be inappropriate simply to strike the testing order without remanding for further proceedings to determine whether the prosecution has additional evidence that may establish the requisite probable cause.” Given the amount of time that has passed since the misconduct occurred in 2010 through 2012, there is no need to test the defendant if Jane Doe has not seroconverted; why not just test her to put her mind at ease? Indeed, if she has been waiting for years to get the defendant’s test results, she is being poorly advised by her doctor.

DISTRICT OF COLUMBIA – The Washington Blade (July 22) reported that D.C. Superior Court Judge Yvonne Williams called a special hearing on July 15 to explain her reasoning in reducing the sentence of a woman convicted by a jury in her court of an anti-gay hate crime. People v. Lucas. The case involved a violent assault on a gay man by a group of young people, including 22-year-old twins, a straight man and his lesbian sister. Trial testimony supported a finding that “Christina Lucas slashed the victim’s face with a sharp object while he was lying on the ground, causing him to suffer a permanent facial scar just below his eye, after she called him a ‘faggot motherfucker.’” The victim is related to the defendants through his uncle. Although the jury convicted the twins on hate crime charges, the judge sentenced them far below the level recommended by the prosecutor, four years, and then after imposing sentence issued an order reducing the prison time to one year for the brother and six months for Christina, suspending the remaining sentences. At the July 15 hearing, she explained that in her view there were different levels of hate crimes, and compared to the injuries she had seen in other cases, this appeared minor. Furthermore, she felt that there was a domestic element in this case, while in her view the hate crime law was really aimed at people being injured at random because of their race or sexual orientation, not family disputes. Finally, she felt that since Lucas was a lesbian, it was unlikely that she would be going out and attacking people because of their sexual orientation, and similarly her brother, due to his close relationship to her, was unlikely to target gay people at random. One lawyer who attended the hearing told the reporter for the
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*Blade* that this was a case of judicial nullification of a jury verdict. Another lawyer, disagreeing, said it was up to the judge to exercise discretion in setting an appropriate sentence.

**KANSAS** – The Court of Appeals of Kansas ruled on August 21 that a man serving two concurrent life sentences with no possibility of parole before 25 years, after being convicted on two counts of aggravated indecent liberties with a child under age 14, is entitled to obtain post-conviction DNA testing in his attempt to challenge his sentence. *State v. Kelsey*, 2015 WL 4965898. A Kansas statute affords a right to post-conviction DNA testing for anybody convicted of murder or rape, but does not authorize it for other offenses. A trial judge denied Kelsey’s motion for DNA testing, since Kelsey had not been convicted of either of the crimes specified in the statute. Appealing the ruling, Kelsey pointed out that he is a “similarly situated offender” with persons convicted of those two crimes, as the statutes authorize the same sentences upon conviction. Consequently, he argued, denying him the opportunity for DNA testing violated his right to Equal Protection. The court of appeals agreed with Kelsey. Although it found that Kelsey’s challenge to the statute should be evaluated using the rational basis test, it could hypothesize no rational basis for denying DNA testing to Kelsey, inasmuch as the penalty imposed on him was the same penalty that would be imposed on a person convicted of murder or rape, so the interest at stake for Kelsey was identical. A concurring judge criticized the majority’s focus on whether Kelsey was “similarly situated” to persons convicted of murder or rape, arguing that the “similarly situated” concept had somehow crept into Kansas equal protection jurisprudence, but that such a finding was not necessary to a valid equal protection challenge.

**KANSAS** – A prison disciplinary board convicted Chelsea Manning, a transgender woman serving a 35-year espionage sentence at Ft. Leavenworth, for violating various prison regulations and sentenced her to be deprived of recreational activity for three weeks. She had faced a maximum sentence of indefinite solitary confinement. Enlisted in the Army as Bradley Manning, she had leaked classified information about the war in Iraq, leading to her prosecution. During that process she came out as transgender, and is serving her time in Ft. Leavenworth as a transgender woman after a bit of a struggle with the Defense Department about how she would be treated in prison. Among her offenses: possessing a copy of Vanity Fair with the cover and feature story about Caitlyn Jenner, formerly known as Olympic athlete Bruce Jenner, and having an expired tube of toothpaste, in violation of drug possession rules. (This story is bound to have people looking for a “high” carefully studying the expiration dates of toothpaste tubes in their local drugstore; evidently the military sees serious security problems when inmates use expired toothpaste, but we can’t imagine what they are.) *Christian Science Monitor*, Aug. 19; *Boston Globe*, Aug. 20.

**MASSACHUSETTS** – On August 28, the Massachusetts Supreme Judicial Court affirmed a ruling by Superior Court Judge Timothy Q. Feeley that the City of Lynn’s residential restrictions on registered sex offenders exceeded the city’s home rule powers, finding the restrictions invalid. *Doe v. City of Lynn*, SJC-11822. Judge Feeley found that the restrictions on second and third-degree offenders extended to 95% of the city’s housing stock, so it was really a virtual exclusion of all registered sex offenders in those categories from residing in the city, clearly raising serious constitutional issues. But Judge Feeley avoided constitutional issues, as did the SJC, by finding that the state’s comprehensive regulatory scheme for dealing with registered sex offenders had occupied the field in Massachusetts, leaving no room for cities to impose additional restrictions. Wrote the court, the statutory scheme “evinces the Legislature’s intent to have the first and final word on the subject of residency of sex offenders. In addition, insofar as the ordinance effects a wholesale displacement of sex offenders form their residences, it frustrates the purpose of the registry law and, therefore, is inconsistent and invalid under the home rule provisions.” The case was started when the city began to implement its law by mailing 30-day-vacate letters to all the registered sex offenders living in the city. The court noted that 40 municipalities in Massachusetts had legislated additional residential restrictions on sex offenders, and that the state Attorney General’s office has been approving them, apparently in a pro forma sort of way, so the opinion is likely to run shock-waves through the law enforcement establishment in the state.

**MONTANA** – In *Marble v. State*, 2015 MT 242, 2015 Mont. LEXIS 414 (Aug. 14, 2015), the Montana Supreme Court ruled that the 4th District Court erred in denying Cody Marble’s petition for post-conviction relief. Marble was convicted in 2002 of sexual intercourse without consent with another boy when both were inmates at the Missoula County Detention Center for juvenile offenses. The victim, then 13 years old, testified at Marble’s trial that Marble, then 17, forced him to submit to anal intercourse in the shower room. The victim had not gone to the police; other inmates reported to Detention Center authorities that Marble had raped the victim in the shower, and they and the victim testified against Marble at the trial. Marble claimed that he was the victim of a “set-up” by the other inmates, and that the
incident never occurred. A jury found Marble guilty, and he was sentenced to 20 years, 15 suspended. He consistently maintained his innocence and has sought post-conviction relief numerous times. In late fall of 2009, he contacted the Montana Innocence Project with rumors he had heard that the victim had told others that Marble hadn’t raped him. The Innocence Project contacted the victim, then incarcerated, who verbally recanted in several interviews but balked at doing so in writing. Finally, he hand-wrote a recantation statement in July 2010, saying that other inmates had told him to say Marble raped him. A Project attorney typed it up, incorporating various statements the victim had made in interviews with the attorneys, and the victim signed the typed version after making some hand-written changes. He said in the statement, “I’m coming forward now because I’m in prison on a sex crime and know what it is like. So I don’t want him to be charged with one when innocent. When I was in jail, I was the youngest & smallest and I was pressured into going along with it.” Marble sought to use the written recantation to reopen his case for a new trial, but the District Court denied his petition for post-conviction release after the victim testified in a deposition that the rape did occur and that he was just telling Innocence Project lawyers what they wanted to hear in hopes that they would help him with his legal problems. The District Court’s denial was predicated on its conclusion that the recantation did not “affirmatively and unquestionably establish” that Marble was innocent. The victim then got into an encounter with the police while out on parole and committed suicide on April 7, 2014, so he would not be available to testify at a new trial. The Supreme Court concluded that a district court presented with a post-conviction petition based upon newly discovered evidence shall determine whether the “newly discovered evidence, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct” for which he was convicted. It would be up the district court to decide “whether the proof and evidence will be weighed by the court itself, whether discovery and a hearing should be conducted, whether the matter should be remanded for a new trial, and even whether the defendant should be released on bail or discharged.” However the district court dismisses the petition, the court should “issue an order setting forth the facts and legal rationale supporting its decision,” which is necessary in case the petitioner seeks judicial review of denial of the petition. The case was remanded for reconsideration of Marble’s petition.

NEW YORK – New York City Criminal Court Judge Armando Montano denied a motion to dismiss criminal charges in the interest of justice by Serge Mathurin, a transgender woman who was arrested after a dust-up with police officers in the Bronx. People v. Mathurin, 2015 WL 4509539, 2015 N.Y. Slip Op. 51110(U)(Bronx Co. Crim. Ct., July 13, 2015) (published in the New York Law Journal on August 3, 2015). The facts are heavily contested. Mathurin, claiming to be the victim of a hate crime, says that she entered a bodega to shop when store employees referred to her as a “batiman” (identified by the court as Jamaican slang for “homosexual”) and ridiculed for dressing as a female. Mathurin claims that store employees assaulted her with a baseball bat and chased her out of the store. While running away she was pursued by people who turned out to be police officers, who jumped on her and arrested her. She had a pair of scissors, which she was charged with possessing and using as a weapon. According to the arresting police officer who would be the witness in the case against her, she was wielding the scissors and resisting arrest; the officer did not see anybody chasing Mathurin with baseball bats. Mathurin pointed out that the D.A. had offered a plea bargain, which she had turned down, preferring to seek a motion to dismiss in the interest of justice and reciting the difficulties of her life. She pointed out that the state had lost contact with various potential witnesses, so the case would come down to the police officer’s testimony. The court reviewed the factors that are normally examined in determining whether to dismiss criminal charges in the interest of justice, and found that they did not support Mathurin’s motion. “Here, defendant essentially asks to receive preferential treatment from this Court because she is a transgendered [sic] woman who has suffered a lifetime of abuse and vitriol from society. This Court does not doubt that defendant has faced numerous hardships through her life. However, due to the serious nature of the offenses charged, this Court cannot justify an outright dismissal” which, wrote Montano, “would only serve to demonstrate to defendant that she is deserving of preferential treatment in the eyes of the law.” Montano continued, “The importance of the even-handed dispensing of justice cannot be overstated,” wrote Judge Montano. “The fairness of the criminal justice system is part of the bedrock upon which our government was founded. Consistent application of the law not only reinforces the notions of fairness and order, but also sends a clear message to the public as to what conduct is deemed acceptable in our society. In short, dismissal of the instant case would only serve to undermine the public’s confidence in the criminal justice system... In rendering this decision, this Court in no way seeks to diminish the hardships defendant has undoubtedly faced as a transgendered [sic] woman. However, after considering the enumerated factors set forth in CPL Sec. 170.40, it cannot be said that this case ‘cries out for fundamental justice beyond the confines of conventional considerations.’

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Accordingly, defendant’s motion to dismiss the instant action in the interest of justice is denied.” Mathurin is represented by Vanessa Burdick of the Legal Aid Society.

**NEW YORK** – New York County Criminal Court Judge Steven M. Statsinger ruled in *People v. Marian*, 2015 N.Y. Slip Op. 25231 (N.Y. County, July 13, 2015), that a barrage of emails sent to a woman at her office email address by her former girlfriend did not come within the prohibiting of N.Y. Penal Law Section 120.45(3), which provides that “A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct (3) is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person’s place of employment or business, and the actor was previously clearly informed to cease that conduct.”

The court found that the phrase “place of business” refers only to a “physical location.” “It would stretch the ‘fair import’ of the phrase beyond all recognition to consider a complainant’s work email address as her ‘place of employment or business’” for purposes of the stalking statute, wrote the judge. However, he refused to dismiss other counts against the defendant, including for her false report that the victim had assaulted her and a claim under subsection (2) of the stalking statute, which concerns situations where the defendant “causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person, a member of such person’s immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct.” The defendant, in addition to the barrage of communications, also lingered outside the victim’s home and showed up at various public places where the victim was present, stating “I won’t leave you alone. I’ll never stop.”

**TENNESSEE** – The Tennessee Court of Criminal Appeals backed up the refusal of Sevier County Circuit Judge Rex Henry Ogle to allow Allen Anthony Hammett to withdraw his “best interest” guilty plea to charges of aggravated sexual battery, and violating the sex offender registry. *State v. Hammett*, 2015 WL 5015790 (Aug. 25, 2015). Hammett, a convicted sex offender who was HIV-positive, was charged with violating the sex offender registry and committing aggravated sexual battery when he rented hotel room together with a female minor and engaged in activity that involved contact with her genitals. He complained that he was deprived of HIV meds while incarcerated awaiting trial on these new charges. He pled guilty in a well-documented hearing during which he was recorded as saying that his plea was voluntary and he was afforded an opportunity to ask questions. Seeking approval from the court to withdraw his plea and go to trial, Hammett claimed that his plea was not voluntary and was affected by deprivation of his medications. He also believed that newly-discovered exculpatory evidence made it appropriate for him to go to trial. The appeals court rejected his arguments, finding that the transcript of the plea hearing was quite regular and documented his voluntary plea. The court also found that the testimony given by his defense counsel in this proceeding showed that he had received adequate representation and was well-advised of the consequences of a guilty plea.

**WASHINGTON** – A Spokane County jury acquitted Derrick G. Moore, a local minister, of an anti-gay hate crime charge, apparently accepted his self-defense plea. Antonio Moore, who turned 21 in April, had “come out” to his parents, was told not to come back to the house. A few days later, Rev. Moore’s wife (Antonio’s stepmother), awoke to the sound of the shower and told her husband that she suspected Antonino had brought a friend home, according to Moore’s attorney, Tim Note. Moore listened at the bathroom door, where Antonio and a friend were allegedly engaged in sex, then broke in, a scuffle ensued, during which Antonio’s friend was punched by Moore and pushed into the wall, and both men were roughly expelled from the house. They both claimed that Moore had used an anti-gay slur while dragging them out of the house. Antonio’s friend contacted the police and requested that charges be filed. Moore was prosecuted for a hate crime, arguing in defense that the men had been trespassing and he didn’t “remember” saying what he alleged to have said. The 12 member jury acquitted Moore, who could end up filing a substantial motion for compensation for wrongful prosecution. *Spokane Spokesman-Review*, Aug. 12.

**PRISONER LITIGATION NOTES**

**ARKANSAS** – This is another of what might be called a “verbal harassment plus” case, implicating the Eighth Amendment when prisoners are harassed because of their sexual orientation. U.S. District Judge Susan O. Hickey adopted the Report and Recommendation [R & R] of U.S. Magistrate Judge Barry A. Bryant in *Baker v. Tallant*, 2015 WL 4716311 (W.D. Ark., August 7, 2015), which denied motions to dismiss by multiple defendants (not clearly identified) in Lee Baker’s *pro se* lawsuit arising in an
Arkansas jail. Except for one time when a guard joined in verbal harassment, all of the incidents were perpetrated by other inmates, albeit with staff knowledge on multiple occasions. The R & R put the claim succinctly: “Plaintiff alleges he was verbally harassed and sexually assaulted by other inmates due to his sexual orientation, and the Defendants allowed this conduct to happen.” While in general population, Baker was bullied, “made fun of,” verbally assaulted, propositioned for oral sex and other “sexual favors,” had his “pants pulled down in front of other inmates and [jailors],” had his “ass smacked by inmates,” was called “faggot” [sic] and “lii mama,” and was “dry humped.” Baker alleged that defendants witnessed the conduct, that he filed multiple grievances that were ignored, and that he remained in general population at the jail. Defendants argued that verbal threats are not actionable and that “sexually suggestive acts” cannot support a constitutional violation. Judge Bryant recognized that inmates have a constitutional right to be protected against violence at the hands of other prisoners, citing Farmer v. Brennan, 511 U.S. 825, 834 (1994), but, he wrote, “name calling and verbal threats regarding his sexual orientation, while offensive, do not rise to the level of a constitutional violation in the context of a prison setting.” Here, however, the verbal harassment was “accompanied” by acts, including mock sexual intercourse, slaps, and disrobing that “clearly surpass verbal harassment” and “these physical interactions coupled with the verbal sexual harassment do implicate the constitution.” The R & R relied on two Eighth Circuit cases and distinguished a third one. See Seltzer–Bey v. Delo, 66 F.3d 961, 962–63 (8th Cir.1995) (a prison guard’s sexual comments coupled with daily strip searches and rubbing of the prisoner’s buttocks with his night stick implicated the Eighth Amendment); and Watson v. Jones, 980 F.2d 1165, 1165–66 (8th Cir.1992) (guards daily pat-down searches, tickling, and deliberately examining genital area implicated the Eighth Amendment); and compare Berryhill v. Schriro, 137 F.3d 1073, 1076 (8th Cir.1998) (one brief unwanted staff touching with no sexual comments or banter not actionable). Here, Baker endured “multiple physical alterations of a sexual nature all accompanied by continuous sexual comments, threats, taunts, and name calling.” Unfortunately, the R & R confuses two lines of cases: Farmer and its progeny, which involve protection against inmate-on-inmate assault; and assaults against inmates by staff, which were the subject of all of the Eighth Circuit cases cited in the R & R. Baker’s case involved the former, but it was essentially allowed to proceed under the latter. The analysis will diverge as the case proceeds and discovery addresses notice, state of mind, supervisory liability, and legitimate penological interests. For a new federal appellate decision relaxing standards for liability for staff homophobic assaults, see Crawford v. Cuomo, 2015 WL 4728170 (2d Cir., August 11, 2015), in this issue of Law Notes. William J. Rold

ARKANSAS – Pro se prisoner Alan Doering sued for damages for violation of his civil rights during a two-week period of incarceration in a county jail, during which he was allegedly denied HIV medication, placed in solitary confinement in a strip cell without clothing or a mattress, a blanket, or adequate food, denied mental health services, and endured a rape from which he contracted hepatitis C. United States Magistrate Judge Mark E. Ford’s decision relaxing standards for liability for staff homophobic assaults, see Crawford v. Cuomo, 2015 WL 4728170 (2d Cir., August 11, 2015), in this issue of Law Notes. William J. Rold

CALIFORNIA – Transgender prisoner Ramon Murillo filed a pro se lawsuit in 2012 about a five month odyssey of transphobic beatings, mistreatment, and harassment by some sixteen California corrections officers in the Donovan Correctional Facility. United States District Judge William Q. Hayes found
that Murillo stated a claim in Murillo v. Rucker, 2013 U.S. Dist. LEXIS 149135; 2013 WL 5670952 (S.D. Cal., October 15, 2013), reported in Law Notes (December 2013) at page 432. The case also alleged retaliation and prevention of Murillo from filing grievances; but, later, Judge Hayes dismissed the claims without prejudice for failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA], which Murillo appealed to the Ninth Circuit. Less than a month later, Murillo started another initial action in the Southern District of California, with a different defendant as lead party and naming a new defendant, but making the same allegations about dates, events, and the other defendants. Although the court originally allowed Murillo to start the new action in forma pauperis, the defendants filed a motion to dismiss the case as duplicative of the first action still pending on appeal. Judge Hayes granted the motion with prejudice in Murillo v. Taylor, 2015 U.S. Dist. LEXIS 96371, 2015 WL 4488060 (S.D. Calif., July 22, 2015). In so doing, Judge Hayes repeats the egregious facts alleged in both complaints, which include beatings accompanied by slurs, denial of medical care, threats, retaliation, and in-your-face transphobic bias. Nevertheless, all of this was apparently in the first case; and its dismissal under the PLRA was appealed. It is basic civil procedure that a plaintiff cannot circumvent an adverse ruling on appeal by starting over with a new case founded on the same facts. Changing the case name by flipping party defendants in the caption changed nothing, and the new defendant was sufficiently “in interest” with the other sixteen that for civil procedure purposes his presence did not alter the finding of duplication. William J. Rold

CALIFORNIA – Pro se prisoner Garland Aaron Jones sued after a corrections officer labeled him “a predator and stalker because he is gay and he argued with a heterosexual,” alleging that this conduct “landed him in the hospital.” Screening the complaint under 28 U.S.C. § 1915A(a), United States Magistrate Judge Michael J. Seng dismissed the case in Jones v. Tolson, 2015 WL 4716409 (E.D. Calif., Aug. 7, 2015), because “mere verbal harassment” does not generally violate the Eighth Amendment, citing Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir.2004); and Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir.1996). Judge Seng noted that verbal harassment “calculated to... cause [the prisoner] psychological damage” might state an Eighth Amendment claim, citing Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir.1987), amended by 135 F.3d 1318 (9th Cir.1998). He granted Jones leave to amend to show that “these statements were unusually harsh even for the prison setting or that they were made with the intent to cause him psychological damage.” He also allowed Jones to replead an Equal Protection Claim, if he could show suspect class or intentionally disparate treatment without rational basis, without discussing heightened scrutiny of sexual orientation discrimination claims under Smithkline Beecham Corporation v. Abbott Laboratories, 740 F.3d 471, 480-81 (9th Cir. 2014), which would be a binding precedent in his district. See Crawford v. Cuomo, 2015 WL 4728170 (2d Cir., August 11, 2015), in this issue of Law Notes, for a discussion of a new 2nd Circuit decision expanding claims arising from verbal abuse of prisoners, when they are accompanied by actions motivated by sexual harassment. William J. Rold

CALIFORNIA – Sometimes a case is more interesting not for what it does but for what it chooses to reserve. In Marquette v. Negouchi, 2015 U.S. Dist. LEXIS99199 (E.D Calif.,July 29,2015), pro se prisoner Robert Marquette, suing about retaliation against him and his same-sex prisoner partner based on their sexual orientation, sought an injunction preventing the transfer of either during the pendency of the 42 U.S.C. § 1983 case. United States Magistrate Judge Dale A. Drozd denied the request for the injunction as moot because Marquette has been paroled. Although Judge Drozd recited boilerplate language about the standards for a preliminary injunction (likely to succeed on the merits, irreparable injury, balance of equities, and public interest), he did not include language about deference to correctional administration and lack of due process protections regarding inmate transfers – see Sandin v. Connor, 515 U.S. 472, 484 (1995); and Meachum v. Fano, 427 U.S. 215, 25 (1976). He did note that a court has authority under the All Writs Act, 28 U.S.C. § 1651(a), to enter orders “in aid of its own jurisdiction” and to “prevent threatened injury that would impair the court’s ability to grant effective relief in a pending action.” After denying the injunctive request as moot, Judge Drozd wrote: "Therefore, the court makes no finding and expresses no opinion as to whether plaintiff can state a cognizable, valid legal claim based on the threatened transfer of his same-sex partner to another prison.” While plainly dicta, this reservation may be helpful in future cases raising First Amendment associational claims for LGBT prisoners or seeking relief against phobic retaliation. William J. Rold

list. Singletary sued the warden, the chief medical officer, and the receiver appointed to oversee California’s prison medical care, seeking damages and an injunction. After extensive discussion about the receiver’s amenability to suit, Judge Newman found him entitled to quasi-judicial immunity as an appointee of the court. He granted Singletary leave to file an amended complaint about the warden and the chief medical officer, with instructions to show an “actual connection or link” between the constitutional violation and the acts of the defendants, citing Rizzo v. Goode, 423 U.S. 362 (1976). Judge Newman wrote: “Plaintiff has not alleged that defendants were personally involved in the constitutional deprivation or that they instituted the allegedly deficient policy. Plaintiff will be given leave to cure this deficiency.” Although the case would seem to present such issues, there is no discussion of the Americans with Disabilities or Rehabilitation Acts; and Judge Newman did not appoint counsel.

William J. Rold

GEORGIA – Plaintiff Samson Eugene James, an “openly gay” prisoner, filed pro se papers alleging various claims under 42 U.S.C. § 1983, including complaints of denial of appropriate medical care, retaliation, and excessive force in James v. Masse, 2015 WL 4249370 (M.D. Ga., July 13, 2015). He also requested an order that he be transferred for his safety. United States Magistrate Judge Stephen Hyles reviewed the claims under 28 U.S.C. § 1915A(a). He found claims against a doctor and a nurse, occurring in a hospital in Gainesville, were unrelated to James’ claims in the Baldwin County Jail, and hence improperly joined under F.R.C.P. 20(a). He recommended that they be transferred to the Northern District of Georgia, since 42 U.S.C. § 1406(a) allows such transfer in the “interest of justice,” and they might otherwise be time-barred, if dismissed.

The Baldwin County Jail claims arose when two sergeants locked him in segregation for complaining about past police misconduct, denied him food, and doused him with pepper spray without cause. Judge Hyles allowed these claims to go forward for “further factual development” under the First and Eighth Amendments. He recommended that claims against the Baldwin County Sheriff be dismissed for lack of specific allegations against him. Although James alleged that he was gang raped in the past and that he was beaten recently for “talking about who raped and molested him,” he does not identify the attackers or plead any failure-to-protect claims. Judge Hyles held that transfer relief “is not available in a § 1983 action,” citing the pre-Eleventh Circuit case of Moye v. Clerk, DeKalb County Superior Court, 474 F.2d 1275, 1276 (5th Cir. 1973), and the deference to prison classification under Meachum v. Fano, 427 U.S. 215 (1976), writing: “If Plaintiff feels as though he is in danger of serious physical injury, he should follow administrative procedures available to him and may file a writ seeking such relief in the state courts. Plaintiff’s Motion in this Court, however, must be DENIED.” [Injunctive relief is available under 42 U.S.C. § 1983. It would have been perhaps more accurate to say that James failed to plead the elements of a protection-from-harm case or the prerequisites for a preliminary injunction arising from those facts. Judge Hyles did not explain the protection from harm cause of action or how it might apply to James’ situation, although he issued various housekeeping orders, including service, discovery, and the consequences of failure to adhere to rules.] William J. Rold

GEORGIA – Law Notes has reported several times on litigation brought by Ashley Diamond, a transgender Georgia prisoner, concerning her conditions of confinement, most recently seeking hormone treatments and safer housing. On August 31, the state rid itself of this problem releasing her! The parole board decision was made on August 1 to discharge her early, even though Diamond’s next scheduled parole hearing was to be held in November. Southern Poverty Law Center was providing support and representation for Diamond’s latest suit against the Georgia prison system, and the U.S. Justice Department has also weighed in, claiming that Georgia prison policies for transgender inmates violate the federal constitution. Perhaps Georgia officials were inspired by the example of California, which decided to avoid paying for an inmate’s sex-reassignment surgery that had been ordered by a federal judge (with the 9th Circuit denying a stay motion) by paroling the inmate. A spokesperson for the State Board of Pardons and Paroles denied that the early release had anything to do with the most recent pending lawsuit, stating that the board had decided that her release is “compatible with the welfare of society and public safety.” Diamond’s allegations in the pending lawsuit included that she had been sexually assaulted eight times in male prisons and was denied hormone treatments that she had been receiving for 17 years prior to her incarceration. She claimed that prison officials retaliated against her for filing suit by transferring her to a maximum security prison with “more dangerous inmates,” increasing the risk that she would be assaulted and seriously injured. In a recent ruling, a federal judge had ordered prison officials to take additional steps to ensure her protection, according to a September 1 report in the Atlanta Journal-Constitution.

ILLINOIS – A gay prisoner lost on summary judgment in Foster v. Broward, 2015 U.S. Dist. LEXIS 100457 S.D. Ill., July 31, 2015, after he failed to show
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in his deposition or otherwise that the defendant correctional lieutenant knew of a substantial risk to his safety, the first prong of a protection from harm claim under Farmer v. Brennan, 511 U.S. 825, 833 (1994). In an earlier screening decision United States District Judge J. Phil Gilbert allowed pro se plaintiff Sidney Foster to proceed against the lieutenant (but not against the warden) on the face of his complaint of failure to protect. See Foster v. Roeckman, 2014 U.S. Dist. LEXIS 12725 (S.D. Ill., Feb. 3, 2014). Now, after discovery, United States District Judge Nancy J. Rosenstengel found that Foster failed to present a triable issue on the claim, because there was no evidence that the lieutenant knew in advance that Foster was at risk of assault. Foster approached the lieutenant requesting cell reassignment after Foster’s cellmate told him he did not want to share a cell with a gay man. The lieutenant agreed to move Foster “in three days,” but he did not do so for several weeks. In the meantime, the cellmate assaulted Foster on several occasions, allegedly choking and beating him while he was recovering from heart surgery (although Foster failed to offer medical substantiation of these details). Foster said he told “all the officers” on his unit about the assaults, but Judge Rosenstengel found that the claims against the lieutenant boiled down to a single conversation involving the lieutenant that occurred prior to any assaults, in which Foster did not express fear for his safety. “There is no evidence that Defendant had any knowledge that Plaintiff’s cellmate was violent or that he was particularly violent towards gay persons,” wrote the judge. The opinion repeatedly mentions that the lieutenant was “told” that Foster was trying to be moved to be nearer his “lover.” Although Judge Rosenstengel’s summary judgment decision did not rely on this tiresome chestnut in LGBT protection from harm cases, its appearance nevertheless reinforces the notion that somehow LGBT plaintiffs’ genuine fears are less worthy of belief if they have a mixed motive: to escape danger and to be near someone who cares about them. William J. Rold

LOUISIANA – United States District Judge Ivan L.R. Lemelle approved the Report and Recommendation [R & R] of United States Magistrate Judge Karen Wells Roby dismissing pro se inmate Michael M. Shelton’s complaint alleging denial of HIV medication for some five months because Shelton failed to exhaust administrative remedies under the under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(a) [PLRA], before starting a federal suit. Shelton v. Gusman, 2015 WL 5060980 (E.D. La., Aug. 18, 2015). After an answer and a “Spears hearing” – Fifth Circuit proceeding to determine “legal basis” for prisoner claims under Spears v. McCotter, 766 F.2d 179 (5th Cir.1985) – Judge Roby found that Shelton failed to exhaust because he filed more than ten repeated grievances to the parish sheriff, when he should have started at a lower level and then appealed through the three-tiered grievance system for the parish jail (which ended with the sheriff), the existence of which Judge Roby judicially noticed from other Eastern District of Louisiana cases. It was immaterial that defendants did not answer any of the grievances; that all defendants in fact knew about Shelton’s HIV medication needs; or that Shelton’s state sentencing judge had ordered the sheriff to appear and explain to her the denial of Shelton’s medications (or that the sheriff had Shelton transferred to a different parish to avoid the order). The R & R makes no new PLRA law, but the teaching moment bears repeating: inmates must follow the institutional grievance system as prescribed, appealing denials or failures to respond to the next level, until there is nothing left to exhaust, prior to filing a federal case. Judge Roby’s dismissal was without prejudice, but it is unclear whether Shelton, who is no longer at the jail, can “exhaust” at this point. William J. Rold

MISSISSIPPI – U.S. Magistrate Judge F. Keith Ball held that for pre-trial detainee Timothy Allen McCoy had potentially valid claims to have been subjected to unconstitutional conditions while detailed at Newton County Jail, refusing to grant summary judgment to the defendants on some of the claims. McCoy v. Newton County, 2015 WL 4726977 (S.D. Miss., Aug. 10, 2015). McCoy was arrested on sexual battery charges and detained in the county jail while awaiting trial. He informed jail officials that he was HIV positive and was taking prescription drugs, but pursuant to the usual policy followed by correctional institutions, they did not allow him to bring medication into the facility. He alleges that during the first six months of his detention, he was denied HIV meds and placed into segregation, denied any out-of-cell recreational activity. He was allowed to shower only once or twice every two weeks, he claims, and denied soap, deodorant, toothbrush or toothpaste. He alleges there was no intercom in his cell, guards only checked on him every eight hours on shift changes, and that he was not allowed to use a phone except to call his lawyer. Magistrate Ball found that it was legitimate for the prison to place an HIV-positive detainee who had been arrested for sexual battery into segregation in order to protect other inmates and prevent the spread of HIV, and that the denial of out-of-cell recreation was not unconstitutional. However, he found that denying medication to an inmate with a serious medical condition could state a claim, as could denying various hygienic necessities, in the absence of any legitimate, non-punitive purpose for failing to meet adequate personal hygiene requirements. However, the court rejected McCoy’s statutory claim

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under the Americans with Disabilities Act, finding that McCoy had not alleged “that his HIV status was the reason for the conditions under which he was housed or Defendant’s failure to provide him with his medication.” The court dismissed as against certain of the individual defendants on the grounds that they did not bear personal responsibility for McCoy’s mistreatment, but refused to dismiss as against the sheriff and the jail administrator. Since the sheriff is the final policymaker on administration of the county jail, the court found that if the sheriff is ultimately held to have violated McCoy’s constitutional rights, the county would be liable as well. The court also rejected an attempt by the defendants to assert qualified immunity, finding that they had not made any argument that they are entitled to qualified immunity because the right claimed by McCoy was not clearly established.

NORTH CAROLINA – A gay state prison inmate who was pressured by a Case Manager at the prison to have sex with him may maintain an action for sexual assault against the Case Manager, but not against the superintendent of the prison or other management officials, ruled Chief Judge Frank D. Whitney in Karrick v. North Carolina Department of Public Safety, 2015 U.S. Dist. LEXIS 106123, 2015 WL 4756963 (W.D. N.C., Aug. 12, 2015). According to Jesse Lee Karrick’s allegations, he was sexually assaulted after certain correctional staff and inmates informed the case manager, Christopher Nivens, that Karrick was gay. Karrick says that Nivens threatened to ship him to a different institution if he did not engage in sexual activity with Nivens. The activity began in April 2012 and continued into August, when Karrick told Nivens “that things were getting out of control and that they were going to get caught.” Nivens assured him they wouldn’t be caught and offered him contraband tobacco in exchange for more sex. But Karrick felt that “pressure was getting to” him, and he decided to tell Superintendent Susan White, who he alleges didn’t believe his allegations. He was then placed in segregation and two investigators spoke with him about his allegations. He was then transferred to a different prison, where his new case manager read him the confession that had been signed by Nivens, who was apparently convicted subsequently on the charge of sexual offense by a custodian and sentenced to serve seven years, but whose projected release date was sooner. Judge Whitney noted that Nivens was incarcerated as of the writing of this opinion. Judge Whitney found that Karrick’s allegations against Nivens “are substantial when accepted as true at this stage of the proceedings,” and would state a claim against Nivens. However, Whitney found no valid claim against Superintendent White, pointing out that it was appropriate in light of Karrick’s own safety concerns for White to have him placed in segregation after he reported the sexual activity to her. Since there was a subsequent investigation, Nivens was discharged and prosecuted, and Karrick was sent to a different prison where this history would not dog him with fellow inmates and staff; Karrick had no valid claim against White or other prison officials whom he named in the complaint as defendants, and as to whom he presented no evidence concerning their knowledge about any of this. Prison officials are generally not subject to respondeat superior liability in prisoner tort suits.

TENNESSEE – Gay pro se prisoner Justin Keith Hill sued (among other things) for lack of medical attention and threats of sexual assault at the Hickman County Jail, naming the Jail and its contractual health provider, Southern Health Partners, but no individual defendants. United States Chief Judge Kevin H. Sharp dismissed the case – Hill v. Hickman County Jail, 2015 WL 5009301, 2015 U.S. Dist. LEXIS 110865 (M.D. Tenn., Aug. 21, 2015) – on initial screening under the Prison Litigation Reform Act, 28 U.S.C. § 1915A, for failure to state a claim. Hill had attempted suicide with a razor, after which he was given a paper gown and placed in a “holding cell.” An officer bandaged his wound and gave him band-aids for a dressing change. Hill remained in the cell for five days, during which time he alleges denial of adequate food, clothing, phone calls, showers, and a blanket. Judge Sharp wrote: (1) that Hill “never saw a nurse or other medical professional for a physical- or mental-health assessment despite the wound, the plaintiff’s long history of suicide attempts and hospitalizations, and his documented diagnoses of Borderline Personality Disorder and Bipolar Disorder”; but (2) that he does not allege “any detriment to his health.” On what Judge Sharp calls “a different occasion,” Hill complained that another inmate was touching him inappropriately, threatening him sexually, and telling him he would be moved to share a cell with him, whereupon he would force sex. Hill said jailers responded by saying his “sexual preference is of no concern”; that he should “keep it to yourself”; and that, “if you weren’t so openly gay, you wouldn’t have those issues.” Judge Sharp noted that the threats were verbal only and that Hill said the other inmate was “not moved until 2 or 3 days later.” Judge Sharp wrote: “This ambiguous statement does not indicate that the other inmate was moved into the plaintiff’s cell, nor does the plaintiff suggest that he actually suffered a sexual assault by the other inmate that jail officials could have but failed to prevent.” Judge Sharp first holds that neither defendant is a proper civil rights party: the jail, because it is a building not a person; and Southern Health Partners, because it is a corporation, whose liability must be premised on a
pattern or practice of misconduct, not respondeat superior. [Note: On this last point, as Judge Sharp mentions in a footnote, the widespread requirement of pattern and practice allegations for privatized correctional providers’ liability under Section 1983 has been questioned in lengthy dicta in *Shields v. Ill. Dept’ of Corrs.*, 746 F.3d 782, 789 (7th Cir.2014), cert. denied, 135 S.Ct. 1024 (2015).] Judge Sharp dismissed the case in its “entirety,” denying leave to amend to allege proper defendants or pattern and practice, because the facts did not state a constitutional violation in any event. The medical/mental health issues were not “sufficiently serious” in presentation or outcome (the wound did not become infected, and placement in the holding cell “arguably” was “treatment”), and the sexual threats never materialized. Judge Sharp’s disregard (read: ratification) of the dangerous practices in this jail is shocking. The total denial of medical and mental screening of prisoners attempting suicide and placed in isolation violates every standard for suicide prevention of which this writer is aware. See, e.g., National Commission on Correctional Health Care, Essential Standard J-G-05, requiring “prompt evaluation by health personnel” of risk determination and documented monitoring of suicidal inmates every 15 minutes. The absence of same would surely constitute a “pattern and practice” of either the jail administration or Southern Health Partners. As to the assault, it is unclear because of the unresolved “ambiguities,” but it appears that Hill and the potential defendants were just lucky there was no escalation. In either case, Judge Sharp’s judicial gauze is sufficiently thick to be similar to that of a person who insists to a safety inspector that she always stored turpentine and paint rags by the furnace but has never had a fire. *William J. Rold*

**TEXAS** – *Pro se* federal prisoner Jeremy Pinson has filed over 100 lawsuits. While some cases have survived screening, Pinson has accumulated more than the “three strikes” from prior “failure to state a claim” dismissals to preclude future filings in *forma pauperis* under the Prison Litigation Reform Act (PLRA). In *Pinson v. Samuels*, 2014 U. S. App. LEXIS 15000 (D.C. Cir., August 5, 2014), as reported in Law Notes (September 2014) at 391-2, Pinson tried to prevent transfer to a federal “Special Management Unit” prison in Alabama, arguing that it posed a risk because he was homosexual and a former gang member. The court denied in *forma pauperis* status, hold that the exception to three strikes (“imminent danger”) – see 28 U.S.C. § 1915(g) – based on a facility’s “reputation,” was insufficient to trigger the exception. Now, Pinson, identifying as transgender, in *Pinson v. Santana*, 2015 WL 4270022 (N.D. Tex., July 14, 2015), fails to convince a Texas federal court to prevent transfer to the “Super-Max” federal institution in Florence, Colorado, despite arguments that the institution has no history of treating transgender people and that it houses inmates hostile to her. United States District Judge Barbara M. G. Lynn accepted the Recommendation of United States Magistrate Judge David L. Horan that the PLRA “imminent danger” exception be denied and the case “summarily dismiss[ed]” under the “three strikes” bar because Pinson failed to allege “specific facts” or to show that the harm was “imminent or occurring at the time the complaint is filed.” Pinson also failed to sue the proper defendants: officials at Florence, responsible for safety; rather than administrators in Texas, responsible for placement. Earlier, Pinson had succeeded *pro se* in moving claims to trial (involving a correctional counselor, a lieutenant, and a warden), for failure to protect him from assault in *Pinson v. Prieto*, 2014 WL 7339203 (C.D. Calif., December 9, 2014), reported in Law Notes (February 2015) at page 53. *William J. Rold*

**FEDERAL** – The Republican National Committee voted to endorse the First Amendment Defense Act, S. 1598, a measure introduced by Senator Mike Lee of Utah, holding individuals or organizations with religious beliefs against same-sex marriages harmless against any adverse action by the federal government for refusing to recognize or deal with such marriages. The measure would specifically protect the tax exempt status of entities holding and effectuating such views, as well as benefits eligibility under federal programs, and would require the federal government to ignore any action depriving a person of professional certification or credentials because of their view that marriage should be limited to different-sex couples or “that sexual relations are properly reserved to such a marriage.” The bill calls for broad construction to protect free exercise of religious beliefs and moral convictions “to the maximum extent permitted by the terms of this Act and the Constitution.” In other words, the statute would create a broadly-sweeping religious exemption from any adverse consequence under federal law for any individual or entity that suffer such consequence because of their opposition to same-sex marriage or sexual activity occurring other than between married different-sex couples. As such, it is totally out of touch with the sexual morality of an overwhelming majority of the public in the United States and an embarrassment to our country that such a measure would be introduced as proposed legislation.

**FLORIDA** – Osceola has become the 11th county in Florida to prohibit discrimination because of sexual orientation or gender identity. County Commissioners voted unanimously
to adopt the proposed new Human Rights Ordinance on August 17. The ordinance covers housing, employment and public accommodations. The measure exempt religious groups from its ban on discrimination because of religion, but was opposed by some members of the public who argued that religious organizations should be allowed to discriminate because of sexual orientation and that individuals should be free to refrain from providing services based on their religious beliefs. A doctor testified against the measure, stating that he would refuse to provide Viagra or fertility assistance or adoption assistance to gay couples. Orlando Sentinel, Aug. 17.

ILLINOIS – Chicago Mayor Rahm Emanuel announced on August 5 that the City of Chicago will remove the existing exclusion of gender reassignment services from the city’s health care benefits program. The change will be unilateral for non-union employees, and will be proposed to municipal unions. The change would go into effect on October 1, 2015. windycitymediagroup.com, Aug. 5.

INDIANA – In the wake of the state’s RFRA debacle earlier this year, proposals to amend local ordinances to provide protection against discrimination due to gender identity or sexual orientation have been debated in several municipalities. In Elkhart, a measure originally proposed by Mayor Dick Moore was withdrawn at his request in a letter he sent to the City Council members on July 27. Moore said he was asking city staff to propose a comprehensive overhaul of the city’s human relations ordinance rather than just the narrowly-focused measure he had previously introduced. He said that the proposed overhaul should include sexual orientation and gender identity protection, but did not suggest when the revised proposal would be unveiled. The Elkhart Truth, July 28. * * * Similarly, in Goshen, a proposed amendment to the city’s civil rights ordinance was tabled at the proposal of Mayor Allan Kauffman, who said that there was “much misinformation and confusion about what will be the consequence of amending the civil rights ordinance.” Kauffman said that there was a lack of “good consensus” on the proposal, and did not indicate when it would be reintroduced or in what form. Kauffman’s statement said more time was needed to get “good information to replace bad information, and how these civil rights protections have worked in other cities/states.” Indianapolis Star, Aug. 5. * * * What is odd in reading press accounts about the public hearings on these kinds of proposals is that every legislative body acts as if it is reinventing the wheel, proceeding in blatant ignorance of the experience of other jurisdictions under such laws. For example, even though many municipalities and states have banned gender identity discrimination in employment and public accommodations for many years, opponents of the measures still raise scare arguments about the possibility that men masquerading as women will take advantage of the ordinances to invade restroom facilities to attack women or invade their privacy, even though jurisdictions that have adopted such laws have not experienced such repercussions.

KENTUCKY – The Jefferson County Public School Board in Louisville voted 6-1 on August 24 to approve a non-discrimination policy for the school district that forbids gender identity discrimination against students and staff. This was similar to a policy that was approved by the Fayette County Public School Board in 2012. A similar proposal had been defeated in 2007, at the time the Jefferson board voted to add “sexual orientation” to its non-discrimination policy. Fairness Campaign News Release, Aug. 24.

MARYLAND – On August 25, Attorney General Brian E. Frosh issued a memorandum to law enforcement officials on the subject of profiling, stating that law enforcement officers “may not consider race, ethnicity, gender, national origin, religion, sexual orientation, disability or gender identity to any degree during routine police operations.” In a press release, the A.G.’s office stated, “The memorandum we are issuing today is meant to put an end to profiling of all kinds, which will help repair the frayed relationships between police and many in the community by making mutual respect the norm in everyday police encounters.” Carroll County Times, Aug. 26.

MICHIGAN – Saginaw Valley State University has updated its nondiscrimination policy to add gender identity and genetic information as prohibited grounds for discrimination. The university’s public relations spokesperson stated that “The gender identity protection applies to transgender individuals and those seeking to change their gender.” The policy applies to faculty, staff and students. Saginaw News, July 25.

MONTANA – The Kalispell Public Schools Board of Trustees voted to add “gender identity, sexual orientation or gender expression” to the list of forbidden grounds of discrimination as part of the district’s Equal Education, Nondiscrimination and Sex Equity Policy on August 11. The policy change followed months of debate and public discussion, and was addressed in response to a recommendation to Montana public school boards by the
NEW JERSEY – Governor Chris Christie has for a second time vetoed a bill that would make easier the ability of transgender people to change the sex marker on their birth certificates. Christie’s veto statement asserted: “Birth Certificates unlock access to many of our nation and State’s critical and protected benefits such as passports, driver’s licenses, and social services, as well as other important security-dependent allowances. Accordingly, I remain committed to the principle that efforts to significantly alter State law concerning the issuance of vital records that have the potential to create legal uncertainties should be closely scrutinized and sparingly approved. Unlike many other states that require court intervention, which can be prolonged and expensive, New Jersey already affords applicants an expedited administrative route to process requests for changes to birth certificates based on gender. To appropriately balance that streamlined practice, further changes to current standards must also include safeguards to prevent against fraud, deception, and abuse.” Christie objects to individuals being able to secure these changes without proving that medical gender reassignment procedures have been followed. The measure had received overwhelming approval in both houses of the legislature in June. *Huffington Post*, Aug. 10.

NEW YORK – The Troy City Council voted unanimously on July 23 to amend the city code to ban discrimination because of gender identity or expression, ancestry, military status, sexual orientation, LGB, transgender, and military and/ or veteran status. Troy is following the lead of Albany County and the city of Albany in adding these categories of protection against discrimination. The council also voted to ask the Rensselaer County Legislature to add these categories to its policy, and called on the state legislature to approve GENDA, the pending gender identity and expression amendment to the state Human Rights Law, which has been approved several times in the Assembly but is stalled in the Senate. *Albany Times Union*, July 24.

OHIO – State legislators are considering a bill, H.B. 296, which would shield from liability businesses that refuse to provide goods or services for same-sex weddings. The bill’s sponsor, Rep. Ron Young, Leroy Township Republican, stated that it is intended to “let people who sincerely feel that participating in a same-sex ceremony hurts their conscience to opt out.” He opined that few businesses would select this option, since their goal was to make money, but he wanted to protect religious freedom. Critics observed that this measure was expressly targeted at allowing discrimination against gay people, unlike the Indiana RFRA that was taken from a similar measure so expressly targeted. It would have that effect but was not so expressly targeted. *Cleveland Plain Dealer*, Aug. 7. Of course, the proposal is clearly unconstitutional.

PENNSYLVANIA – As past attempts to enact a statewide ban on sexual orientation and gender identity discrimination have fallen to obstructionist tactics in the legislature, 34 municipalities in the state have adopted ordinances forbidding discrimination, including all the largest municipalities (Philadelphia, Pittsburgh, Lancaster, Erie, Harrisburg, Scranton), and the overwhelming majority of Pennsylvanians tell pollsters that they support passage of such a measure. Hope springs eternal. On August 27 a bi-partisan coalition of state legislators introduced the Pennsylvania Fairness Act in the General Assembly, which would add sexual orientation and gender identity to the forbidden grounds of discrimination in employment, housing and public accommodations. With both Republican and Democratic co-sponsors in each house and the momentum of marriage equality and the passage of local ordinances, proponents hope that in this session the obstructionist games will cease and the measure can be enacted.

TENNESSEE – On July 21 the Chattanooga City Council gave final approval to a resolution adding sexual orientation and gender identity to the city’s anti-discrimination ordinance, voting 5-2. The majority rejected an attempt by two members to have the final vote delayed because of an analysis provided by the University of Tennessee’s Municipal Technical Advisory Service, contending that the ordinance “might be difficult to enforce and too vague,” according to a July 22 report in the *Chattanooga Times*. Deputy City Attorney Phil Noblett countered this by pointing out that the language of the ordinance was taken from a similar measure passed in Knoxville in 2012, and, said Noblett, “That ordinance has not been held to be vague or improper in any way.” The original version of the ordinance had also included “gender expression,” but this was removed in response to arguments that it was “too broad.” The ordinance was to go into effect two weeks after passage. The overall ordinance was approved on July 22, after it had been amended to protect “religious freedom,” according to an August 19 report in the same newspaper.

WASHINGTON – The Seattle City Council voted on August 10 to require all city-controlled and privately
occupied public accommodations to designate existing and future single-stall bathrooms as all-gender facilities, according to a report by the Seattle Post-Intelligencer (Aug. 10). The legislation applies to restaurants, coffee shops, hotels and stores as well as to government facilities. The single-occupancy facility must have signage that is not gender-exclusive. It amends the Municipal Code so that single occupancy restrooms will not be restricted by sex or gender. Proponents of the measure pointed out that Philadelphia had adopted a similar requirement last year.

FEDERAL CONTRACTOR RULES – A coalition of 130 organizations sent a joint letter to President Obama on August 20, requesting that the administration undertake review and reconsideration of a Memorandum issued on June 29, 2007, by the Office of Legal Counsel, opining that religiously-affiliated organizations receiving grants under the Juvenile Justice and Delinquency Prevention Act could claim a religious exemption from the non-discrimination requirements under that Act as an application of the federal Religious Freedom Restoration Act. The letter points out that the OLC Memorandum has been relief upon by various federal agencies to exempt religiously-affiliated or identified contractors from complying with non-discrimination provisions, and that this interpretation takes on particular salience in light of the President’s action a year ago amending EO11246 to require that federal contractors not discriminate because of sexual orientation or gender identity. The OLC Memorandum was issued late in the Bush Administration, articulating that administration’s general approach of extending broad leeway to religious organizations that provide services to the public under federal contracts. The letter points out that the President’s campaign platform in 2008 specifically promised to put an end to federally-funded hiring discrimination, and argues that the 2007 memo has undermined this goal. Copies of the letter are available on the websites of many of the signatory organizations, which include the ACLU, Gay & Lesbian Advocates & Defenders, Lambda Legal, the National Center for Lesbian Rights, and the National Center for Transgender Equality.

DEFENSE DEPARTMENT – Press reports on August 26 described a leaked internal Defense Department memorandum setting out a “draft plan” to end the ban on military service by transgender individuals by May 27, 2016. The plan would include a “pilot program” to provide leaves of absence for members being treated with hormones undergoing sex reassignment surgery. One Defense Department official told a reporter for USA Today that Army and Air Force leaders knew of about twenty transgender members in each of those services. The Pentagon was also reportedly considering looking into past discharges of transgender members. The Williams Institute estimates that there are more than 15,000 transgender individuals serving either on active duty or in the National Guard and Reserves. Huffington Post, Aug. 26.

CATHOLIC SCHOOL HIRING – Catholic schools have been relying on the ministerial exemption and free exercise of religion claims over the past few years as they fired LGBT staff members upon learning that the individual was marrying a same-sex partner. One such school, St. Mary’s Academy in Portland, Oregon, received so much negative blowback when it was announced that the school withdrew a job offer from a lesbian applicant because she was planning to marry her partner that the board of the school
voted to change its position, adding sexual orientation to its EEO policy. The applicant in question, Lauren Brown, had been offered a counseling position at the school; details are fuzzy whether she had actually signed and returned a written contract order before the job was “rescinded.” However, it was reported that she had verbally accepted a job offer. Major donors who carried significant weight with the school administration apparently stepped in to express their displeasure about the withdrawal of the job offer and the ensuing bad publicity about the school, and students mounted a rare summertime protest. Oregonian, Portland Aug. 26. * * * Two Christian colleges – Eastern Mennonite University and Goshen College – caused consternation in the world of religious educational institutions by announced on July 20 that they would change their hiring procedures to permit hiring faculty members who are in same-sex marriages, reported InsideHigherEd.com (July 21). Some other members of the Council of Christian Colleges and Universities have maintained policies under which all faculty members who are not in different-sex marriages are expected to maintain celibacy in accord with Biblical sexual morality rules.

In a twist that seems to defy logic, Eastern Mennonite and Goshen will still insist that faculty members who are not married be celibate, regardless of their sexual orientation. The announcement came shortly after the Mennonite Church USA, while voting down a proposal to authorize same-sex marriages, approved a “forbearance resolution” calling for tolerance, calling on “those in Mennonite Church USA to offer grace, love and forbearance toward conferences, congregations and pastors in our body who, in different ways, seek to be faithful to our Lord Jesus Christ on matters related to same-sex covenanted unions.” A local newspaper, The Elkhart Truth, reported on July 21 that Goshen College has also added sexual orientation and gender identity to the school’s non-discrimination policy, and indicated that it would offer spousal benefits to individuals in same-sex marriages.

HIGHER EDUCATION – The University of Oklahoma at Norman has changed its Equal Opportunity Statement to add “gender identity” and “gender expression” to the list of forbidden grounds of discrimination. The policy extends to employment, admission, financial aid, and educational assistance. University Wire, Aug. 26.

HOW TIMES CHANGE – The New England Journal of Medicine published an article by Doctors Caren G. Solomon and Timothy Wilkin, titled “Primary Care for Men Who Have Sex with Men,” in its August 27, 2015, issue (Vol. 373, Issue 9). It would be difficult imagining such an article being published in this venue a generation ago.

HIV TREATMENT – Researchers from the University of North Carolina at Chapel Hill reported at the 8th International AIDS Society Conference in Vancouver, Canada, that the most up-to-date medications, if faithfully used, virtually halt the transmission of HIV. Said AIDS researcher Myron Cohen, “If people are taking their pills reliably and they’re taking them for some period of time, the probability of transmission in this study is actually zero.” The study involved more than 1700 sero-discordant couples who were studied over a decade to determine the level of transmission when the infect member of the couples was faithfully taken anti-retroviral medication. newsobserver.com, July 20.

TRANS GENDER IN THE WHITE HOUSE – The White House has hired an openly transgender person for its full-time staff for the first time. On August 18, Raffi Freedman-Gurspan, previously employed as a policy advisor at the National Center for Transgender Equality, became outreach and recruitment director in the Presidential Personnel Office. This office oversees the selection process for presidential appointees and recruits candidates for service in the executive branch departments in positions requiring presidential appointments. The president has appointed several openly-transgender people to positions in the administration, but Freedman-Gurspan is the first in history to receive a full-time White House staff appointment. WashingtonBlade.com, Aug. 18.

INTERNATIONAL NOTES

UNITED NATIONS – The United Nations Security Council held its first ever meeting on the issue of violence and discrimination against LGBT people on August 24 at UN headquarters in New York. It was reported that 13 out of the 15 member nations had representatives at the meeting, including all of the permanent members. Those absent were Chad and Angola. The event was organized by representatives from Chile and the United States. It included testimony by gay refugees from the Middle East, who spoke about anti-gay campaigns initiated both by the governments and by dissident Islamic groups such as The Islamic State (ISIS). Based on its own reports and claims, ISIS appears to have executed at least thirty people on grounds of engaging in homosexual sodomy, with some of those executions having been filmed and posted on youtube.com and other internet platforms.
INTERNATIONAL

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS – On July 27, a three-member panel on the Court of Arbitration for Sport in Lausanne, Switzerland, ruled that a 19-year-old Indian sprinter, Dutee Chand, could compete as a woman despite having a testosterone level higher than that authorized for female competitions by the IAAF. She had been banned from competing as a woman the previous year after having won two gold medals at the Asian Junior Athletics Championship, even though she had tested negative for doping. Tests show that she has a high level of natural testosterone. The Court of Arbitration ruled that limiting female competitors based on testosterone levels had not been shown as necessary to ensure fair competition, reported buzzfeed.com on July 27. The Court gave the IAAF two years to attempt to prove this wrong, but in the meantime women will be allowed to compete as women despite high testosterone levels that are not attributable to doping.

AUSTRALIA – Same-sex marriage was a much-discussed topic in the media and by political figures during the summer, with high drama as Prime Minister Tony Abbott faced defections from party discipline as he maintained a strong stance against taking any action on the subject until after the next parliamentary elections. Abbott warned of retribution if any front bench members (people in leadership positions) were to buck the party line, and there was speculation about him losing his position with the party to move things forward prior to the next election. Abbott’s “promise” at this point is to hold a national vote after the election, without specifying exactly when.

BOTSWANA – The Court of Appeal in Gabarone ruled on August 26 that the government must provide anti-retroviral therapy (ARV) to foreign prison inmates, overturning a government policy that limits availability of the medication to inmates who are Botswana nationals. The court dismissed an appeal by the government from a 2014 order by the High Court. Under the ruling, the government must provide anti-retroviral therapy (ARV) to foreign prison inmates, overturning a government policy that limits availability of the medication to inmates who are Botswana nationals.

CHINA – A female college student, using the alias Qiu Bai, filed a lawsuit against the Education Ministry for describing homosexuality in educational materials as a “disorder that should be treated.” On May 14, she wrote to the Ministry complaining about statements she found in books in the library when she sought answers to her doubts about her sexual orientation. She found that almost every book she consulted categorized homosexuality as a “mental disorder,” and some suggested using electroshock therapy as a cure. When the Ministry did not respond to her letter, she filed the lawsuit in the Beijing Municipal No. 1 Intermediate People’s Court. He complaint states, according to a report posted on August 20 by Indo Asian News Service, “Homosexuals are already under great pressure. Additional stigma

CAYMAN ISLANDS – The Cayman Islands constitution and statutes expressly forbid same-sex marriages, and the Legislative Assembly agreed unanimously to keep it that way during a meeting in August, approving a motion for “Preservation of Traditional Marriages.” The sponsor of the measure invoked the nation’s tradition of Christianity, and a supporter seconding the motion said that he “shouldn’t be expected to support legislation that would allow sin.” The Cayman Reporter, August 18. The Cayman Islands is a British crown colony, but enjoys local government autonomy and is not bound by England’s marriage equality statute.

CANADA – Calgary Transit decided for the first time to get in the spirit with a forthcoming Gay Pride parade by decorating a bus with rainbow signs and a Ride with Pride slogan, but one of their bus drivers, an anti-gay fellow named Jesse Rau, has raised objections, stating it violates his religious freedom to be assigned to drive a bus bearing such a message. Wedding photographers? Florists? Bakers? Celebration sites? What’s next? Rau publicly declared that he would refuse to drive the “rainbow-bedecked” bus, even if it meant he had to quit his job. This was reported right at the end of August, which parade coming up early in September. Great suspense at how this will turn out…. Postmedia News, Sept. 1.
from textbooks will cause direct harm. The [Ministry of Education] should bear the duty to monitor and supervise such content.”

GAMBIA – The Banjul High Court reported that Ireland has moved to the Calcutta High Court during the Jerusalem Pride, July 15. * * * are fulfilled. Male members of the human species are not at all eligible for being considered as eligible for being engaged as ASHA Karmees (workers).” Since the engagement criteria were gender-specific, the petitioner, who did not identify as female despite being identified as such at birth, was not qualified. Implicitly, the court was holding that if a transgender individual no longer identifies as having the gender assigned them at birth, they cannot seek employment in a job that requires them to be a member of that gender. 2015 WLNR 24794589 (Aug. 20, 2015).

IRELAND – Ireland has moved to join Argentina, Denmark, Colombia and Malta as the only countries with gender identity laws that allow people to change their legal gender through a self-declaration under oath without presenting evidence of surgical alteration. The willingness of the Irish government to undertake this change was attributed to the positive response both internally and among the international community to the referendum vote several months ago in support of marriage equality. This was seen as strongly signaling public support for measures to assure the legal rights of sexual minorities. Ironically, implementation of that referendum vote has been delayed due to litigation challenging the fairness of the referendum process by opponents of marriage equality, who have alleged improper support for passage by the government. BuzzFeed.com, July 15. * * * Legal Monitor Worldwide reported on August 2 that the Court of Appeal had ruled against two challenges that were filed challenging the results of the marriage equality referendum. The petitioners alleged that public money was improperly spent promoting approval of the measure, that the government had failed to provide voters with the opposing views, and they argued, unsuccessfully, that a referendum could not be adopted that contradicted other language in the Constitution of the Republic. The court's decision cleared the way for the “referendum returning officer” to certify the results. However, the appellants, Maurice Lyons of Callan, Co Kilkenny and Gerry Walshe of Lisdeen, Co Clare, filed papers in the Supreme Court of Ireland, seeking further review. The Supreme Court is not required to grant review. * * * On August 29 President Michael D. Higgins signed the certified referendum result, making it the 34th Amendment to the Constitution. The next step is for the government to present enabling legislation that must be enacted before same-sex marriages can begin. The measure is expected to be introduced in the legislature during September, with the expectation that the process will conclude before the end of the year. IrishTimes.com, Aug. 29.

ISRAEL – During the Jerusalem Pride March on July 30, Yishai Schlissel, a fervent religious opponent of homosexuality who had recently been released from prison after serving a ten year term for stabbing people during the 2005 Jerusalem Pride March, broke into the March and started stabbing people again. A 16-year-old girl, Shira Banki, subsequently died from her wounds, and several other people were injured before Schlissel was subdued and arrested. The incident set off recriminations and criticisms of the police for failing to take steps after Schlissel’s release to keep him away from the parade route. On August 24, the authorities announced that Schlissel was being charged with murder in the death of Banki, as well as aggravated assault and the attempted murder of other marchers. Schlissel, unrepentant, has refused legal counsel and disputes the authority of the court, claiming that he was carrying out the will of God. One press report quoted him as saying: “The gay pride parade should be stopped in Jerusalem and throughout...
the Land of Israel. Stop this provocation and abuse against the Holy One, Blessed be He.” Agence France Presse, dpa international, Aug. 24.

ITALY – On August 24 Transport Minister Graziano Delrio told a meeting of Comunione e Liberazione, a lay Catholic group, that the government has agreed to move forward on a civil union bill that was introduced in the parliament, with a vote expected soon. The bill is intended to satisfy the standard announced in decisions by the European Court of Human Rights holding that denying a legal status substantially equivalent to marriage in terms of rights and obligations violates European Human Rights law. ANSA English Media Service, Aug. 24.

JAPAN – A second local government unit in Tokyo will begin recognizing same-sex marriages. According to Japan Economic Newswire (July 29), Setagaya Ward (the largest ward by population) announced on July 29 that it will start issuing certificates recognizing same-sex partnerships. Shibuya Ward in Tokyo was the first, last March.

MALAYSIA – Prime Minister Najib Razak, speaking at an Islamic seminar, stated that the government would reject requests to defend LGBT rights as not being within the context of traditional Islamic teaching. Malaysia identifies as a Muslim nation. The government is appealing a ruling last November by a judge of the Malaysian Court of Appeals that declared unconstitutional a law that bans Muslim men from cross-dressing in public. The Malaysia Federal Court heard the appeal on August 13.

MEXICO – Mexico’s Federal Congress has called on state legislatures to amend their civil or family legislation so as to comply with the mandate of the Supreme Court of Mexico to allow and recognize same-sex marriages. The Supreme Court’s decision was designated as “jurisprudential,” making it binding on lower courts, but it is still complicated for same-sex couples to get marriage licenses in most of the Mexican states, where they have to incur the expense of filing a lawsuit to get a court to compel local authorities to issue the license. Thus, the Congress called on the reluctant state legislatures to get to work in order to implement the constitutional rights of same-sex couples in Mexico. Meantime, over the course of the summer same-sex marriages were performed in several more states as marriage equality steadily spread across the country. * * * The Supreme Court of Mexico has ruled that a ban on adoption by same-sex couples is unconstitutional. The 9-1 ruling mentioned a prior decision holding that denial of the right to marry to same-sex couples is unconstitutional, but did not premise this new ruling on that holding alone. The case arose from the state of Campeche, which passed a statute setting up civil unions but expressly excluded the right of adoption by civil union couples. The law was challenged in a case brought by the Human Rights Commission of Campeche. The court noted the superior interest of the child and the right to form a family, and indicated that a full opinion will be issued in the future. In the meantime, in Campeche the denial of an adoption petition from a same-sex couple is a violation of constitutional rights, according to a posting distributed online by Internet journalist Rex Wockner on August 11, and an August 12 online report from EFE News Service.

NEPAL – On August 10 Nepal issued its first passport using the new third-gender category for sexual minorities. “Manoj Shahi, an activist who identifies as transgender and prefers to be called Monica,” according to a reported posted online by Huffington Post Canada, received the first category “O” (for Other”) passport. Shahi told the press, “My country has recognized and respected my identity.” The government made this change in response to a 2007 ruling by Nepal’s Supreme Court, ordering authorities to amend existing legislation to include a third gender for those who do not identify as male or female. Australia and New Zealand also issued passports with a third-gender designation.

NIGERIA – AllAfrica.com (Aug. 20) reported that a Magistrate Court in Minna, Niger State, has imposed 6-month prison terms on two men, Mohammed Kabir and Abubakar Shehu, for “attempting to commit homosexuality” which was described as an “unnatural act of gross indecency.” A police officer testified that “Kabir was seen romancing Shehu and both were in the process of committing the actual act before they were caught.” Their conduct, according to the testimony, contravened Sections 95 and 285 of the Penal Code, and they both pleaded guilty to the offence. * * * The Nigerian Bar Association issued a statement through its president, Augustine Alegeh, at a news conference, that it did not consider the prohibition of same-sex marriage to be a violation of any person’s human rights. Alegeh pointed out that South Africa was the only county in Africa that allows same-sex marriage, and apart from them, “Africa is holding firm because most of our beliefs are based on our traditions and also on our religious beliefs.” AllAfrica.com, Aug. 31. The interesting thing about this observation is that some of the countries that have legalized same-sex marriage have also done so in the context of a wider push for civil rights and liberties. For example, Canada, which legalizes same-sex marriage, also has strong protections for freedom of religion and expression. In contrast, countries such as Russia, which have not legalized same-sex marriage, have been criticized for their repressive stance on LGBT rights and religious minorities. So while some countries may not have followed the same path to legalizing same-sex marriage, they have still made progress in protecting human rights in other areas. This highlights the complexity of the issue and the need for a multi-faceted approach to addressing it.
POLAND – On July 23 the lower chamber of the Parliament (Sejm) voted to approve the Gender Accordance Act, which if ultimately approved in the Senate and signed by the President would codify for the first time in Poland the right of transgender people to have their gender identity recognized and officially noted through a new birth certificate and conformance of educational and employment records. At present, individuals must apply to the courts and go through a hearing process involving their parents and children, bringing expert witnesses and waiting months or even years for a decision, and even then not receiving a new birth certificate or achieving conformance of their educational and employment records. The new measure was submitted by Anna Grodzka, Poland’s for openly transgender member of the Parliament. The new law would not involve participation by the applicant’s parents or children. Any Polish citizen who is unmarried could apply by providing two independent confirmations, obtained within the previous 12 months, of “being a person of a different gender identity than the gender legally assigned,” prepared either by a clinical psychologist who is also a sexologist, a psychiatrist, or a sexologist who is also a medical doctor. All applications would be channeled through the regional court in Lodz within three months of submission, and no medical interventions would be required. New birth certificates would be issued, as well as new documentation for past education and employment using the individual’s new name and gender identification. If the measure wins approval from Senate and President, it would go into effect in January 2016.

SINGAPORE – Singapore has eased its absolute ban on entry into the country by anybody infected with HIV. On April 1, the rules were modified to allow HIV-infected people to enter the country on visitor’s visas for up to three months. The ban remains in effect for those who want to come for longer stays, such as people looking for employment or seeking to accompany a child to study in a Singapore educational institution. According to a spokesperson for the Ministry of Health, the total ban was adopted in the 1980s “when the disease was new, fatal, and no effective treatment was available.” The partial lifting of the ban reflects “the current context with more than 5,000 Singapore residents living with HIV and the availability of effective treatment for the disease.” Foreigners in Singapore, excluding permanent residents or spouses of Singaporeans – who are found to be HIV-positive will be deported and place on a permanent “blacklist.” Singapore claimed the new rule was similar to immigration rules in effect in Australia and New Zealand. *BBC International Reports, July 25.*

SOUTH KOREA – A same-sex couple who had a wedding ceremony in Seoul in 2013 is suing to compel the local authority to accept their marriage registration. Kim Jho Gwang-Soo and Kim Seung-Hwan are seeking legal status as a married couple. Reporting on the lawsuit, *Agence France Presse, English Wire* (July 28) said, “Legal analysts say a suit with such potentially profound consequences is unlikely to be granted by the district court, but suggest a sympathetic judge could insert some encouraging wording in his ruling that might provide support for future cases or appeals.” There was speculation that the U.S. Supreme Court’s Obergefell decision might be helpful in trying to persuade the court to adopt an expansive view of individual liberty under South Korea’s constitution, which is modeled in some respects on the U.S. Constitution in protecting individual rights.

TAIWAN – The *Global Times* reported that judicial authorities drafted a same-sex partnership law for reference to the legislature. Hundreds of people marched in Taipei on July 11 in support of same-sex marriage, and a 2013 poll conducted by judicial authorities found 53% support of the public for same-sex marriage. Optimism was expressed that the legislature, which rejected a similar proposal in 2003, might act favorably on this one. Meanwhile, on July 24, according to a report in *China Straits Times,* Aug. 31.

RUSSIA – Despite an unofficial expression of approval, the mayor of Arkhangelsk denied permission for a Gay Pride march to take place on Paratroopers Day, described in a BBC news report as “a day notorious for drunken fistfights and displays of macho aggression.” According to a local radio station, the request was denied because allowing such a parade would violate the anti-gay propaganda law, by presenting positive images of gay people to children. The mayor had previously stated that he would allow the parade to “let off steam.”

*BBC International Reports, July 25.*

* * * The U.S. Embassy in Moscow has added the film “I Am Michael” to the schedule of movies to be shown at Amfest, an Embassy-sponsored film festival to be presented on September 16-27 in Moscow and St. Petersburg. The event highlights new American independent cinema. The film stars James Franco and Zachary Quinto, portraying a gay couple who break up when Franco’s character, after a health scare, is “saved” and becomes a Christian pastor with a boyfriend. There is some question whether the film may run afoul of Russia’s anti-gay “propaganda law,” which bans the depiction of a homosexual lifestyle to minors.

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Post, the Taipei City Government Department of Civil Affairs announced that it will petition the Constitutional Court to make a decision about marriage equality, specifically asking whether the Constitution as it now stands forbids the government from denying the right to marry to same-sex couples. The Taipei city government has been offering registration of same-sex partnerships since June 17, but the registration does not bestow the full rights of marriage, which would require a change of national law. Registration certificates are recognized, however, by the Ministry of Health and Welfare based on the Medical Care Act, which means that hospitals should be recognizing same-sex relationships of their patients.

THAILAND – A law banning commercial surrogacy went into effect on July 30. The measure was passed in reaction to several “surrogacy scandals,” including reports of a Japanese man who had father at least a dozen babies in Thailand through surrogacy and an Australian couple who abandoned a surrogate-born baby with Down’s syndrome, taking home just his healthy twin sister, according to a July 30 article posted by Japanese Economic Newswire. The law outlaws payment for surrogacy. Only married couples, of whom at least one is a Thai citizen, can make an arrangement with a woman to be their surrogate, and same-sex married couples are denied access to this mechanism. Violations of the law are punishable by up to ten years in prison and fine equal to about $5,723US. Previously many male same-sex couples from other countries had come to Thailand for surrogacy services, especially after India shut down a thriving surrogacy “industry” in that country.

UGANDA – Another round of political gay-bashing is ahead for Uganda, as an emergency session of the legislature in September will take up the government’s proposed Non-Governmental Organization (NGO) bill, which will make it illegal for NGO’s to operate in the country without the approval of the NGO Board. The measure would reportedly allow the NGO Board to ban NGO’s for “essentially any reason,” reported Buzzfeed on Aug. 28, including “when a group’s goals are ‘in contravention of the law’ or if it is ‘in the public interest to refuse to register the organization.’” LGBT groups in Uganda attempt to fly under the radar due to the intensely homophobic views of many residents as well as government officials. This measure would outlaw them. LGBT activists in the country contend that the government is able to generate support for the bill because it will allow the closure of LGBT organizations without specifically mentioning them, thus potentially blunt any foreign criticism or cut-off of foreign aid. LGBT activists are determined to prevent enactment of the measure by heavily publicizing the ulterior motive behind the government’s proposal.

VIETNAM – The National Assembly Law Committee, considering an amended Civil Code, has devoted discussion to the issue of recognizing gender identity, but decided the issue was too complicated because of a “lack of legal framework” and concerns about the impact on marriage and family law. According to a report by Thai News Service (Aug. 25), it is estimated that there are 500,000 transgender people in Vietnam, of whom about 600 have had sex reassignment surgery. (The population of Vietnam is approximately 94 million.)

UKRAINE – The Odessa District Administrative Court ruled, in response to a petition from city lawmakers, that an LGBT Pride March that had been scheduled to take place on August 15 could not be held because of the potential of danger and threats to public order and the health and lives of participants and other citizens. The event was to be held around the same time as two major soccer matches that were expected to draw large numbers of people into the city, who might predictably become unruly. An LGBT Pride March held two months ago in Kiev had turned nasty when members of a Ukrainian nationalist group attacked police officers providing security for the event. Thus, anti-gay hooligans in Ukraine have an effect heckler’s veto with the approbation of the courts. In the U.S., LGBT rights advocates gathered outside the Ukrainian Embassy in Washington, D.C., on August 14 to protest the ruling, which had also been criticized in a public statement released by U.S. Embassy in Kiev Charge d’Affaires Bruce Dona. Washington Blade, August 18.

PROFESSIONAL NOTES

The New York Times published a lengthy biographical article by Deborah Sontag about Judge PHYLLIS R. FRYE in its Sunday, August 30, issue (posted to the website on August 29). Phyllis Frye is a pioneer of the transgender rights movement, and an important leader in the overall LGBT rights movement, having served on the board of the National LGBT Bar Association and played a prominent role in promoting the visibility of transgender issues at the annual Lavender Law Conferences sponsored by that association. Frye organized the first national conference on transgender law early in the 1990s and also played an important role in organizing LGBT lawyers in Texas.
E, a former, as will also confer public service, MARC POIRIER, will present a 4-hour CLE with Lifetime, in collaboration briefs in significant cases, and became New Jersey, including writing amicus actively in the LGBT rights struggle in speakers to the campus, participated brought a variety of provocative Seton Hall LGBT law student group, Poirier was faculty advisor to the Catholic law school faculty. Prof. of what an openly-gay legal scholar who provided a striking example University Professor. We sadly note the passing of Seton Hall professorship. He was honored by the Institute for the marriage equality. He has been twice many focused on the campaign for marriage equality. He has been twice recognized by the Institute for the Dukeminier Award, which recognized the best sexual orientation legal scholarship.

The Williams Institute at UCLA Law School has announced the appointment of Professor DOUGLAS NEJAIME as faculty director and professor of law at UCLA. NeJaime was previously a visiting professor at UCLA and a professor at UC Irvine School of Law and Loyola Law School. He had been a Sears Law Teaching Fellow at the Williams Institute in 2007-2009, and did pro bono work for the Institute as early as 2005. Prof. NeJaime is a graduate of Harvard Law School, co-author of the most recent edition of West’s Sexual Orientation and the Law casebook, and a prolific author of law review articles on LGBT issues, many focused on the campaign for marriage equality. He has been twice recognized by the Institute for the Dukeminier Award, which recognized the best sexual orientation legal scholarship.

Among those being honored by The New York Law Journal with Lifetime Achievement Awards as “Lawyers Who Lead by Example” are ROBERTA KAPLAN of Paul, Weiss, Rifkind, Wharton & Garrison, and Kathleen Sullivan of Quinn Emanuel Urquhart & Sullivan. The awards will be conferred at a dinner sponsored by the Law Journal on October 14, 2015. Kaplan served as lead counsel for Edith Windsor in U.S. v. Windsor, in which the U.S. Supreme Court declared Section 3 of the Defense of Marriage Act unconstitutional, and as lead counsel in litigation challenging the ban on same-sex marriage in Mississippi; she is currently lead counsel in a challenge to Mississippi’s continuing ban on adoptions of children by same-sex couples. KATHLEEN SULLIVAN co-authored a brief challenging the Georgia sodomy law in Bowers v. Hardwick and has since been involved as amicus author, co-counsel and strategist in numerous cases involving LGBT rights. Others being honored with Lifetime Achievement awards at the same dinner include N.Y. Chief Judge Jonathan Lippman, retired N.Y Court of Appeals Judge Howard Levine, and Kenneth Standard of Epstein, Becker & Green. The Law Journal will also confer public service and pro bono service awards on 22 other lawyers and two law firms (one of them Kaplan’s firm, Paul Weiss) at the October 14 dinner.

We sadly note the passing of Seton Hall University Professor MARC POIRIER, who provided a striking example of what an openly-gay legal scholar can accomplish while embedded in a Catholic law school faculty. Prof. Poirier was faculty advisor to the Seton Hall LGBT law student group, brought a variety of provocative speakers to the campus, participated actively in the LGBT rights struggle in New Jersey, including writing amicus briefs in significant cases, and became particularly involved in the successful campaign for marriage equality and in the debates surrounding the prosecution of Dharun Ravi in connection with the suicide of Rutgers University student Tyler Clementi. Poirier was opposed to the use of the NJ Hate Crimes Law in the Ravi prosecution. He was a noted scholar in environmental and land use law, and managed to find an intersection between that area of the law and LGBT rights.

President Obama has nominated MICHAEL MICHAUD, a former Congressman who was defeated in his race for Governor of Maine last year, to be Assistant Secretary of Labor for Veterans’ Employment and Training Services. Michaud came out as gay at the beginning of his gubernatorial campaign, seeking to stem rumors that were circulating about his sexual orientation. He was elected to the House in 2003, and gave up his seat to run for governor in 2014. During his last term in the House he served as ranking Democratic member on the House Committee on Veterans’ Affairs and was part of a bipartisan group of House members who proposed extending veteran job training programs during 2014. Before serving in the House, Michaud served in the Maine Senate and, earlier, in the Maine House of Representatives. Maine legislators are not employed full time. During his state legislative service, Michaud was also an employee of Great Northern Paper Company, and served as vice president of Local 152 of the United Paperworkers International Union. BloombergBNA Daily Labor Report, 146 DLR A-17 (7/30/2015).

The NEW YORK STATE BAR ASSOCIATION, in collaboration with the LGBT BAR ASSOCIATION OF GREATER NEW YORK and the NY CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, will present a 4-hour CLE program on Sept. 11, 2015, at the CUNY Graduate Center titled “Representing LGBT Clients after Obergefell.” The program will also be webcast to registrants. Details about registration and the full program schedule can be found on the NY State Bar’s website: www.nysba.org. Several LeGaL members are among the panelists. The program will include a session on Estate Planning after Obergefell and a session on representing transgender clients.
3. Austin, David W., Sexual Orientation and Gender Identity, 48 Int’l L. & Gender 269 (Summer 2015).
8. Carlson, Allan, “Family Cycles” and the Future of Family Law, 29 BYU J. Pub. L. 431 (2015) (sour grapes from an “expert witness” in the Iowa Supreme Court’s marriage equality case whose testimony was discounted by the court in its unanimous pro-marriage equality ruling; historian purported to demonstrate that the sole justification for the state intervening in the marriage relations was to protect the biological offspring of different-sex married couples).
18. Flake, Dallan F., Bearing Burdens: Religious Accommodations That Adversely Affect Coworker Morale, 76 Ohio St. L.J. 169 (2015) (Should employers have to tolerate homophobic expression in the workplace? One example of the issue dealt with by this author).
20. Gerken, Heather K., Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure, 95 B.U. L. Rev. 587 (March 2015) (an interesting and provocation read, as the introduction suggests it will be: “While Windsor flouts just about everything we teach our students about constitutional law, it is right to do so. Its author, Justice Kennedy, blurs the lines between federalism, liberty, and equality, and he blurs the lines between structure and rights. The genius of the opinion is that it recognizes that rights and structure are like two interlocking gears, moving the grand constitutional project of integration forward. While the doctrine isn’t built to recognizing that reality, that’s the doctrine’s problem, not Windsor’s.”).
23. Kaufman, Zachary D., From the Aztecs to the Kalahari Bushmen: Conservative Justices’ Citation of Foreign Sources: Consistency, Inconsistency, or Evolution, 41 Yale J. Int’l L. Online1 (Fall 2015) (All the dissenters in Obergefell invoked foreign law in opposition to the majority’s marriage equality holding, contrary to their professed opposition to citing foreign law in American court opinions; does this portend a new trend, or is it just opportunistic cherry-picking?). 2015 Colo. App. LEXIS 1217
27. Konnoth, Craig J., Revoking Rights, 66 Hastings L.J. 1365 (June 2015) (discusses constitutional issues raised by attempts to revoke rights previously recognized; e.g., marriage rights).
29. Langnord, Bailey J., Unprotected: Condoms, Bareback Porn, and the First Amendment, 30 Berkeley J. Gender L. & Just. 199 (Summer 2015) (criticizes litigation strategy of porn producers in challenging local law requiring porn performers to use condoms; claims that including gay male porn in the lawsuit could have led courts to adopt higher standard of review).
31. LaPiana, William P., Same-Sex Marriage and Offsprings’ Parentage, 42 Est. Plan. 34 (Sept. 2015).
37. Murray, Melissa, Accommodating Nonmarriage, 88 S. Cal. L. Rev. 661 (March 2015) (The author uses “nonmarriage” to mean intimate relationships not recognized by the state as marriage).
43. Robson, Ruthann, Enhancing Reciprocal Synergies Between Teaching and Scholarship, 64 J. Legal Educ. 480 (February 2015).
47. Traylor, Elizabeth, Protecting the Rights of Children of Same-Sex Parents in Indiana by Adopting a Version of the Uniform Parentage Act, 48 Ind. L. Rev. 695 (2015).
Lesbian/Gay Law Notes Podcast

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

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EDITOR’S NOTES

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

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

All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please submit all correspondence to info@legal.org.


64. Yackle, Larry, A Friendly Amendment, 95 B.U. L. Rev. 641 (March 2015) (response to Heather Gerken’s article about U.S. v. Windsor, see above).