U.S. Supreme Court Signals Strong Possibility That It Will Reverse Novel Full Faith and Credit Ruling of Alabama Supreme Court
At its December 2015 meeting, the LeGaL Foundation Board changed the name of this publication to LGBT Law Notes. This title more accurately reflects the content and scope of its coverage.

EXECUTIVE SUMMARY

1 Lesbian Mom’s Case Gets Closer to U.S. Supreme Court Review
2 Federal Court Refuses to Dismiss Title IX Discrimination Suit against University by Students Perceived as Lesbians
4 Massachusetts Judge Rules Catholic Girls School May Not Discriminate Against Gay Married Employee
6 Discharged Atlanta Fire Chief Strikes Back in Federal Lawsuit
8 California Appeals Court Rules for Gay Teacher in Morality Discharge Dispute
10 Texas Court of Criminal Appeals Reinstates Convictions Arising Out of 2012 Fort Worth Gay Pride Protest
11 Wisconsin Birth Certificate Litigation Hits Speed Bump
13 Iowa Federal Judge Examines Scope of Equal Protection for Gay Civilly Committed Sex Offenders
14 While Legislature Is Paralyzed over Stepparent Adoption, Italian Courts Uphold Same-Sex Adoptions Performed Abroad

© 2016
The LeGaL Foundation
of the LGBT Bar Association
of Greater New York
http://le-gal.org

ISSN
8755-9021

LGBT Law Notes welcomes authors interested in becoming a contributor to the publication to contact info@le-gal.org.
Lesbian Mom’s Case Gets Closer to U.S. Supreme Court Review

A lesbian mother’s quest for joint custody of the children she had adopted in Georgia and raised together with her former same-sex partner in Alabama took a step closer to the Supreme Court when the Court granted her “Application for Recall and Stay of Certificate of Judgment of Alabama Supreme Court,” V.L. v. E.L., No. 15-648, 2015 WL 7258695 (December 14, 2015). V.L. is asking the Supreme Court to overturn a September 18 ruling by the Alabama Supreme Court, E.L. v. V.L., 2015 WL 5511249, which refused to recognize the validity of the adoptions, having filed her Petition for Certiorari with the Supreme Court on November 16.

The Supreme Court justices did not to seek joint custody or visitation in the Alabama circuit court, and that the interim visitation order issued by the circuit court and affirmed by that state’s court of appeals was terminated, disrupting V.L.’s relationship with her children. Unless the Alabama Supreme Court’s ruling was stayed pending appeal, V.L. and her children could suffer a prolonged period of separation, an injury not reparable through damages or other retrospective judicial relief and thus “irreparable” for purposes of this stay application.

Perhaps more to the point, the Alabama Supreme Court’s refusal to recognize the Georgia adoption was a clear departure from the constitutional requirement that sister-state court judgments be accorded “full faith and credit.” The Alabama court did this by misinterpreting Georgia’s adoption statute when granting the adoption and thus that court did not have “jurisdiction” (legal authority) to grant the adoption. This is a novel twist on the concept of Full Faith and Credit Clause.

A dissenting Alabama Supreme Court justice argued that the ruling theoretically opened up to challenge any out-of-state adoption when a majority of the Alabama Supreme Court disagreed with how the courts of another state interpreted their adoption statute, leading to uncertainty in an area of the law where courts have traditionally stressed the need for certainty and stability – child custody.

By granting V.L.’s stay application in this case, the Supreme Court may be signaling the likelihood that it will grant review and the strong possibility that it would reverse the Alabama Supreme Court’s ruling, to judge by Chief Justice Roberts’ description of their decisional process.

Respondent’s briefs in opposition to review are normally due to the Court a month after a petition is filed (which would be this week), although the Court can grant a motion to extend time. After all the briefs have been filed, the Court may schedule the petition for consideration at a private conference of the Court. At the pace this process usually runs, a decision whether to review the case might be expected a few months down the line. Review would normally have to be granted by mid-

The Supreme Court may be signaling the likelihood that it will grant review and the strong possibility that it would reverse the Alabama Supreme Court’s ruling.

explain their grant of this stay request. They normally issue no explanations for their rulings on such applications, but, as Chief Justice John Roberts explained in 2012 in an “in chambers” ruling on such a petition (see Maryland v. King, 133 S. Ct. 1, 2 (2012)), a stay of a lower court decision while the Supreme Court is deciding whether to grant review is warranted when there is “(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay.” The Court did state that if it denies review in this case, the stay will terminate automatically. If it grants review, the stay will be in effect as long as the case is pending before the Supreme Court.

The Alabama Supreme Court’s refusal to recognize the Georgia adoption meant that V.L. had no legal standing January for a case to be argued in this term of the Court. Unless the justices feel particular urgency to take up this case, it might not be argued until the fall of 2016, with a decision late in 2016 or early in 2017. The temporary stay reduces the urgency, if it means that V.L.’s temporary visitation order goes back into effect — a conclusion that is not certain until the lower Alabama courts address the scope of the stay.

V.L. is represented by the National Center for Lesbian Rights, cooperating attorneys from Jenner & Block LLP (Washington, D.C.), and local counsel Tracie Owen Vella (Vella & King) and Heather Fann (Boyd, Fernambucq, Dunn & Fann, P.C.), both of Birmingham, Alabama. The lead Jenner & Block attorney on the case is Paul M. Smith, who argued the appeal in Lawrence v. Texas that resulted in the Supreme Court striking down laws against consensual gay sex in 2003.
Federal Court Refuses to Dismiss Title IX Discrimination Suit against University by Students Perceived as Lesbians

The U.S. District Court for the Central District of California (Judge Dean D. Pregerson) has rejected Pepperdine University’s Motion to Dismiss the Title IX claims made against the university by two female student basketball players, who claimed that University staff accused them of being lesbian lovers and treated them to adverse action by subjecting them to invasive questioning and forcing them from the team, in Videckis v. Pepperdine University, 2015 WL 8769974, 2015 U.S. Dist. LEXIS 167672 (December 15, 2015).

Plaintiffs, both former members of Pepperdine’s women’s basketball team who had each transferred to Pepperdine from Arizona State University, alleged that Pepperdine and its employees conducted intrusive and discriminatory actions against them concluding that they were lesbians and in a relationship together. They claimed that their athletic academic advisor held meetings with each of them “in order to determine [their] sexual orientation and relationship status;” and that their coach held a meeting stating to team members that “lesbianism was a big concern for him and for women’s basketball, that it was a reason why teams lose, and that it would not be tolerated on the team.”

One plaintiff alleged that a male transfer student was permitted to play basketball immediately, but that plaintiff was not. The other plaintiff alleged that an athletic trainer had asked inappropriate questions and changed time records to make it appear that both plaintiffs had arrived late to trainings. Plaintiffs brought their concerns to University officials, but no action was ever taken against the alleged perpetrators.

The plaintiffs further alleged that they subsequently were falsely accused of academic cheating, that staff asked other members about their sexual orientation, and that staff tried to turn other players on the team against them. One plaintiff alleged that when she reported a tailbone injury and later education program or activity receiving Federal financial assistance.’ After the court granted Pepperdine’s first motion to dismiss, Plaintiffs eventually filed a third amended complaint alleging seven causes of action and a claim for prejudgment interest; three of the claims were filed under Title IX, which Pepperdine moved to dismiss along with the claim for prejudgment interest.

Judge Pregerson stated that in order to survive a motion to dismiss, a complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” It is of interest to note that nowhere in Judge Pregerson’s decision does he actually confirm or deny whether Plaintiffs are actually lesbians or in a relationship with each other, as his ruling concludes the legal analysis of the claims requires only an examination of the “biased mind of the alleged discriminator.”

Pepperdine had argued that Title IX causes of action do not apply to claims of sexual orientation discrimination, that the claims did not support a claim of gender stereotype discrimination, and that the claims were uncertain and not legally cognizable, and also sought to dismiss the claim for prejudgment interest.

Judge Pregerson stated that “in interpreting Title IX, courts often look to interpretation of Title VII for reference,” noting that “the Ninth Circuit has held that the legislative history of Title IX ‘strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII.’” Accordingly, Pregerson held that Title IX’s “prohibition of discrimination ‘on the basis of sex’ encompasses both sex – in the biological sense – as well as gender,” and that pursuant to well established Title VII law, that “discrimination based on gender stereotypes constitutes discrimination on the basis of sex.”

With respect to the sexual orientation claim, Judge Pregerson found that “the line between discrimination based on gender stereotyping and discrimination
based on sexual orientation is blurry, at best... that the distinction is illusory and artificial... [and that] claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.” He further found that “A plaintiff’s ‘actual’ sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis.”

After noting that “it is undisputed that Title IX forbids discrimination on the basis of gender stereotypes,” and that “gender stereotyping is a concept that sweeps broadly,” Judge Pregerson held that “stereotypes about lesbians, and sexuality in general, stem from a person’s views about the proper roles of men and women – and the relationships between them.” Judge Pregerson held that “here, Plaintiffs allege that they were repeatedly harassed and treated differently from other similarly situated individuals because of their perceived sexual orientation. Coaches, trainers, and support staff repeatedly queried Plaintiffs about their sexual orientation, their private sexual behavior, and their dating lives. Plaintiffs allege that they were told lesbianism would not be tolerated on the women’s basketball team,” and that “they were not cleared to play basketball because of Pepperdine’s discriminatory views against lesbianism.” Consequently, Judge Pregerson ruled, “Plaintiffs have stated a claim for discrimination.”

With respect to the sex discrimination claim, Judge Pregerson concluded that since “if Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged treatment.” Therefore, he concluded Plaintiffs had established a “straightforward claim of sex discrimination under Title IX,” citing the concurring opinion of a plurality in a 9th Circuit case recognizing same-sex marriage bans discriminatory on the basis of sex because the bans dictated who could be married based on the sex of the marriage participants. Judge Pregerson asserted that his decision was in line with a Title VII EEOC case which ruled that “an employee could show that the sexual discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.”

Judge Pregerson ruled that Plaintiffs “have clearly pled a plausible claim for retaliation” because they complained to coaching staff and Pepperdine’s Title IX coordinator and alleged subsequent retaliatory actions, ultimately, that they were “forced off the basketball team and lost their scholarships.” Judge Pregerson rejected Pepperdine’s argument that because Plaintiffs tried to hide their relationship status, they could not have made a complaint about discrimination, stating that “requiring that Plaintiffs disclose their sexual orientation or relationship status improperly focuses the inquiry on the status of the victim rather than the bias of the alleged harasser, and imposes a burden that Title IX does not contemplate.”

With respect to the certainty of Plaintiff’s causes of action, Judge Pregerson noted that “although Plaintiffs could have pled their Title IX claims as a single cause of action, the fact that they included them as three separate causes of action does not require dismissal.” Finally, Judge Pregerson rejected Pepperdine’s contention that Plaintiffs were not entitled to prejudgment interest because the damages involved are for “the intangible, noneconomic aspects of mental and emotional injury,” ruling that since “the damages involved... may go beyond mental and emotional injury... [as] Plaintiffs allege that, due to Pepperdine’s actions, Plaintiffs were forced off the women’s basketball team, had their scholarships revoked, and withdrew from the school,” the damages from these types of injuries “may be tangible and economic and thus eligible for prejudgment interest,” and refused to strike the request for prejudgment interest.

The Plaintiffs are represented by Alan B. Newman of Marina Del Ray, Jeffrey J. Zuber, Jeremy J. Gray, Zuber Lawler and Del Duca LLP, Los Angeles. – Byran C. Johnson

January 2016 LGBT Law Notes 3
A recurring question since marriage equality became legal has been whether religious institutions can freely discriminate in their employment practices against married gay couples, relying on statutory religious exemptions from anti-discrimination laws or constitutional claims. In a case involving a food service worker who lost a job with a Catholic girls school, a Massachusetts trial judge ruled on December 16 that the answer is “no,” at least in a case involving a job that plays no educational role at the school. Massachusetts Superior Court Justice Ellen Barnes, told Barrett that every employee is regarded as a “minister of the mission” and asked him whether he could “buy into” the expectation that he would “model Catholic teaching and values.” He responded affirmatively and was offered the job, which he accepted. Then he filled out a new employee hire form, listing his “emergency contact” as “Ed Suplee,” who he indicated was his husband. Two days later, he received an email informing him there was a problem and asking him to return to the school. At a meeting with school officials the next day, Barnes told him that he would not be hired because “he was a spouse in a same-sex marriage, which was inconsistent with the teachings of the Catholic Church.”

Justice Wilkins easily rejected Fontbonne’s argument that it was not engaging in sex or sexual orientation discrimination, but rather just refusing to compromise its religious principles about same-sex marriage. As have other courts confronted with similar arguments, Wilkins rejected any status/conduct distinction, finding that the school’s withdrawal of the job offer involved both sexual orientation discrimination and sex discrimination. (Sex discrimination because if Barrett was female and married a man, Fontbonne would have no objection to the marriage.)

Justice Wilkins then confronted a more serious interpretive problem due to facially conflicting religious exemption provisions in the statute. A broader exemption provision excuses a religious organization from complying with the employment discrimination ban where its actions “are calculated by such organization to promote the religious principles for which it is established or maintained.” This provision was adopted at the time the law was amended to add “sexual orientation” in 1989. However, this exemption exists against the background of an older religious exemption provision, which accords the exemption only to an organization “which limits membership, enrollment, admission, or participation to members of that religion.” The record before Wilkins shows that Fontbonne does not so limit its employment policies, with narrow exceptions that do not apply to its food services operation. Indeed, Fontbonne has a formal non-discrimination policy that explicitly includes “sexual orientation,” and thus their argument in this case, which Wilkins rejected, that refusing to employ a person married to someone of the same sex is not “sexual orientation discrimination.”

Wilkins found that “the best way to harmonize and preserve, as much as possible, the literal meanings” of both exemption provisions “is to read an implicit limitation into the latter provision, such that the phrase ‘any organization’ refers, at least in the employment context, to organizations that meet the limited membership clause.” Although the Massachusetts courts have not previously addressed this tension directly at the appellate level — surprisingly, since the broader exemption has been on the books for a quarter century — Wilkins found some support from statements in prior cases and various principles of statutory construction, not least the tendency to construe anti-discrimination laws broadly in support of the important public policy against discrimination. “No rule of construction provides certainty here,” he acknowledged. “They do, however, nearly all point in favor of the plaintiff’s approach.”
Having resolved that Fontbonne did not enjoy a statutory exemption, Wilkins turned to the school’s constitutional arguments.

The first, based heavily on the U.S. Supreme Court’s 2000 ruling, Boy Scouts of America v. Dale, 530 U.S. 640, upholding the Boy Scouts’ anti-gay employment policies, arises under the 1st Amendment right of expressive association. The Court held that the Boy Scouts were not obliged under New Jersey’s Law Against Discrimination to retain James Dale as an assistant scoutmaster after it came to their attention that he was co-president of the gay students organization at Rutgers University. In a narrow 5-4 ruling, the Court, painting Dale as a “gay rights activist,” said that requiring the Scouts to associate with him as a volunteer leader would be forcing them to broadcast a gay rights message that they deemed inconsistent with their expressive function. Wilkins easily distinguished the situation of Barrett, who is not an activist and merely listed his husband as an “emergency contact” on a personnel form. “He was not denied employment for any advocacy of same-sex marriage or gay rights,” wrote Wilkins. “Nothing on that form suggested that Barrett claimed his marriage to have sacramental or other religious significance or that it was anything but a civil marriage relationship. Fontbonne presents no evidence of advocacy by Barrett.” By contrast, Dale’s gay rights advocacy came to light when a newspaper reported on a public appearance he made in his Rutgers student organization role, advocating for gay rights.

Furthermore, pointed out Wilkins, Dale’s “role as a Boy Scout leader included instilling values in the scouts themselves. Barrett’s role would have been as Director of Food Services. That job does not include instruction, let alone any leadership role or responsibility for presenting the gospel values and teaching of the Catholic Church at Fontbonne.” Wilkins rejected the school’s argument that it was entitled to require all employees, whatever their job duties, to “model Catholic values.” Wilkins asserted that to hold otherwise would permit “an employer to grant itself constitutional protection from anti-discrimination laws simply by saying the right words.”

He found little risk that employment of Barrett would mislead students and the public into thinking that Fontbonne, as a Catholic institution, somehow approved of or endorsed same-sex marriage, in light of “widespread public awareness of the civil laws allowing same-sex marriage and prohibiting employment discrimination, coupled with Fontbonne’s ability to explain its position without interference in the form of advocacy from Barrett.” He found that the state’s compelling interest in combating employment discrimination against “historically disadvantaged groups” weighed heavily against Fontbonne’s position.

Wilkins responded similarly to Fontbonne’s attempt to invoke the 1st Amendment Free Exercise Clause through the “ministerial exception” that the Supreme Court has ruled must be incorporated in all anti-discrimination laws. The Court’s 2012 decision, Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, recognizing this exemption involved a school employee who was formally titled as a minister by the Church and whose job duties involved “important religious functions.” The Supreme Court said, “The fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee’s position.” The ministerial exception, thus, is intended to protect “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”

“Indisputably,” wrote Wilkins, “none of these considerations apply to Barrett’s position as Director of Food Services. He has no duties as an administrator or teacher of religious matters.” The school’s attempt to base this exemption on its statement that “each of its employees is a ‘minister of the mission’” goes beyond what the Supreme Court authorized in 2012. “Indeed,” wrote Justice Wilkins, “to apply the ‘ministerial’ exception here would allow all religious schools to exempt all of their employees from employment discrimination laws simply by calling their employees ministers. If that were the rule,” he continued, much of the discussion in the Hosanna-Tabor ruling “would have been unnecessary.”

After granting Barrett’s motion for summary judgment and denying Fontbonne’s motion, Wilkins directed the parties to “address whether this case needs to be scheduled for a trial on damages,” which was an open invitation for them to negotiate a settlement on that issue.

Wilkins ruled on questions of first impression on a hotly contested issue, so it seems likely that Fontbonne will seek to appeal, which would likely put off any settlement or trial on damages until the appellate process runs its course. Given the nature of the case, an appeal would probably bypass the intermediate appeals court and go directly to the state’s Supreme Judicial Court. Fontbonne would find no lack of free assistance from litigation groups that are dedicated to combating gay rights laws and expanding religious freedom, such as Liberty Counsel or Alliance Defending Freedom, which have appeared as pro bono counsel in numerous cases around the country.

Barrett’s ability to defend his victory also relies on free counsel from Gay and Lesbian Advocates and Defenders (GLAD), which is representing him. Attorneys working on the case include Bennett Klein, Gary Buseck (Legal Director and former Executive Director) and John Ward (the founder of the organization decades ago who continues to provide volunteer assistance on cases). GLAD’s track record in the courts has been stellar, including winning marriage equality in Massachusetts in 2003 and successfully challenging the Defense of Marriage Act in the federal district court and the 1st Circuit Courts of Appeals.
Discharged Atlanta Fire Chief Strikes Back in Federal Lawsuit

Kelvin J. Cochran, who was discharged as Chief of the Atlanta, Georgia, Fire and Rescue Department (AFRD) after he self-published a book asserting negative views about homosexuality and same-sex marriage based on his religious beliefs, has struck back at the City and Mayor Kasim Reed with a lawsuit claiming a violation of his constitutional rights. U.S. District Judge Leigh Martin May issued a ruling dismissing some of Cochran’s claims, but allowing others to go forward. Cochran v. City of Atlanta, 2015 WL 9244523 (N.D. Ga., December 16, 2015).

Cochran became the Atlanta Fire Chief in 2008. He left for ten months in 2009 to serve as Administrator of the U.S. Fire Administration in Washington, D.C., but returned and continued in the Atlanta position until he was suspended as a result of the controversy surrounding his book and ultimately discharged on Jan. 6, 2015.

Cochran, self-described as a devout evangelical Christian and an active member of Atlanta’s Elizabeth Baptist Church, wrote and self-published a book titled “Who Told You That You Were Naked?: Overcoming the Stronghold of Condemnation.” The book grew out of a men’s Bible study group at his church, and was intended as a guide to men to help them “fulfill God’s purpose for their lives.” One of those purposes, according to Cochran’s book, is to avoid any sexual activity outside of a traditional heterosexual marriage, expressing the view that homosexual activity and same-sex marriage are immoral and inconsistent with God’s plan.

Cochran consulted the City’s Ethics Officer about whether a city official could write a “non-work-related, faith-based book,” and was told he could do that “so long as the subject matter of the book was not the city government or fire department,” but he did not obtain a written ruling. He later asked the Ethics Officer if he could identify himself in the book as Atlanta Fire Chief, and she responded in the affirmative. Cochran placed the book for sale on Amazon.com, and distributed free copies to various individuals, including Mayor Reed, some members of the city council, and various Fire Department employees whom he considered to be Christians (some of whom knew he was writing the book and had requested copies).

A Fire Department employee who saw the book and objected to its statements about sexual morality contacted City Councilmember Alex Wan to complain, which led Wan to initiate discussions at the City’s “upper management” level. This led to a meeting of top City officials with Mayor Reed. On November 24, 2014, Cochran received a letter informing him that he was suspended without pay for 30 days while the City determined what to do. Among other things, the City cited an ordinance prohibiting city officials from engaging in outside employment for pay without written permission from the Ethics office. At the same time, Mayor Reed went public about disagreeing with Cochran’s views expressed in the book, saying “I profoundly disagree with and am deeply disturbed by the sentiments expressed in the paperback regarding the LGBT community” and disassociating his administration from those views.

Councilmember Wan released a statement to the local newspaper that “I respect each individual’s right to have their own thoughts, beliefs and opinions, but when you’re a city employee, and those thoughts, beliefs and opinions are different from the city’s, you have to check them at the door.” Cochran’s suspension and statements by Reed, Wan and other city officials led to extensive media coverage. On January 6, 2015, Cochran was informed of his discharge.

Atlanta has had local legislation banning sexual orientation discrimination for many years, and has long provided benefits for same-sex partners of city employees. At the time this controversy arose late in 2014, a federal district court had ruled against the constitutionality of Georgia’s ban on same-sex marriage, but the matter was still pending on appeal in the courts. Atlanta government leaders had openly supported the litigation for marriage equality. Cochran’s views expressed in the book were apparently out of synch with the views of the City’s elected leadership. However, Cochran claimed in his federal complaint that he has never been accused of discriminating as Fire Chief on the basis of sexual orientation.

Cochran’s lawsuit poses a classic and recurring policy question: to what extent can a state or local government require public officials to refrain from publicizing their views on controversial public issues when those views conflict with official policies as articulated by politically-accountable officials? The U.S. Supreme Court has issued a series of important decisions since first addressing this issue in 1968 in Pickering v. Board of Education, 391 U.S. 563. That case involved a public high school teacher who was discharged after publishing a letter in a local newspaper that was critical of the board of education’s budget proposals (which had been twice rejected by local voters). The Court held that public employees are protected by First Amendment free speech rights when expressing views on matters of public concern when they are speaking in their capacity as private citizens, but such protection is not absolute. The court must conduct a balancing test weighing the employee’s free speech rights against the employer’s...
legitimate concerns about being able to carry out governmental functions. Speech that results in disruption of those functions may lose its constitutional protection. Subsequent rulings have clarified that when a public employee is speaking in an official capacity, he is speaking for the government and can be disciplined or discharged when his speech contradicts government policy.

Cochran filed a nine-count complaint against the city and Mayor Reed, raising various claims under the 1st and 14th Amendments. Although Judge May dismissed some of those claims, and ultimately found that Mayor Reed enjoyed qualified immunity from personal liability to Cochran, she concluded that his complaint alleged facts sufficient to maintain several of his 1st Amendment claims as well as one of his 14th Amendment Due Process claims.

Cochran’s complaint leads off with a claim that he was fired in retaliation for constitutionally protected speech. Judge May determined that Cochran’s speech satisfied the requirement that it be on a matter of public concern and that he was speaking as a private citizen (even though his book’s “About the Author” section identifies him as Atlanta’s Fire Chief), making his claim subject to the Supreme Court’s Pickering balancing test. The City argued that the AFRD has a “need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers,” and thus that Cochran’s “interest in publishing and distributing a book ‘containing moral judgment about certain groups of people that caused at least one AFRD member enough concern to complaint to a City Council member’” could not outweigh the City’s interests in securing discipline and efficiency.

However, Judge May pointed out that on a motion to dismiss she is to evaluate the complaint based solely on the plaintiff’s allegations, and Cochran had alleged that his book did not threaten the City’s ability to administer public services and was not likely to do so. Cochran claimed that the book did not interfere with AFRD internal operations, and that he had not told any AFRD employee that complying with his teachings or even reading his book “was in any way relevant to their status or advancement” within the Department. Thus, Judge May could not find at this stage in the case as a matter of law “that Defendants’ interests outweigh Plaintiff’s First Amendment freedom of speech interests. However,” she continued, “the factual development of this case may warrant a different conclusion.”

Cochran’s second count claims unconstitutional viewpoint discrimination, focusing particularly on a section of the City Code that requires department heads to obtain prior written approval from the city’s Board of Ethics before “engaging in the provision of services for private interests for remuneration,” which he had not done. Cochran protested the self-publication of a book did not come within this policy. The City claimed he had no standing to challenge this provision since he had never applied for written permission, but Judge May disagreed, rejecting the City’s motion to dismiss this count on the basis of standing.

Cochran’s third count alleges violation of his religious liberty rights, claiming he was terminated because he expressed his religiously-based viewpoint. The City’s response was that he failed to allege that his religion compelled him to publish his views while serving as Fire Chief without obtaining prior written approval or to distribute the book to various city employees. Judge May ruled that such allegations were not necessary to state a religious liberty claim, and that Cochran’s allegations “raise a plausible inference that Plaintiff sincerely held the religious beliefs that he contends were the reason for his firing,” so this claim would not be dismissed. Similarly, Judge May found that Cochran adequately alleged facts to support his fourth claim, that the city’s action violated his 1st Amendment right to freedom of association “by terminating him for expressing religious beliefs in association with his church.” However, May found insufficient Cochran’s allegations to support his claim of a violation of the 1st Amendment Establishment Clause, stating that at the hearing on the motion to dismiss “it became clear that although the Complaint contains an Establishment Clause claim, the exact contours of that claim... are unclear,” and that it appeared to be duplicative of other claims. Although May dismissed this claim, she granted leave to Cochran to file an amended claim appropriately raising Establishment Clause issues.

Turning to Cochran’s Equal Protection Claim under the 14th Amendment, May found that Cochran had failed to allege sufficient facts to sustain this claim. Most significantly, he had failed to identify a “comparator” in order to establish discrimination. A “comparator” is somebody similarly situated to the Plaintiff who had articulated the opposite point of view without incurring adverse action from the City. Cochran pointed to Mayor Reed, who had publicly articulated opposition to Cochran’s views, but the judge pointed out that Reed, as the elected chief executive of the city, was not similarly situated to Cochran, an appointed department head. “As the Mayor,” wrote Judge May, “Reed is Plaintiff’s superior. . . As the City’s ultimate decision-maker, Reed could not be similarly situated to Plaintiff, who is subject to Reed’s decision-making power.” She also pointed out that Reed had not “ever tried to publish a book on morality that was approved by the City or even that Reed is from a different religious group from Plaintiff.” At bottom, the Court finds that Reed is too dissimilar to serve as a similarly situated comparator for numerous reasons.” It was not sufficient for Cochran to allege that “numerous City employees” who were similarly situated to him were treated differently in this regard. It appears that he is the only appointed City department head who had published a work of this kind.

Judge May dismissed Cochran’s claim that the City’s policy about outside work by city officials that was cited in support of his discharge was unduly vague, pointing out that prior similarly challenges to the policy had been rejected by the 11th Circuit Court of Appeals, which is binding on Georgia federal courts. She also found that the public comments by Mayor Reed in connection with this controversy
were not sufficiently personally “stigmatizing” of Cochran to sustain a “liberty interest” claim under the Due Process Clause. However, she refused to dismiss a procedural due process claim, finding that the ordinances cited by the City in its briefs “do not establish that Plaintiff lacks a property interest in his employment.” Under the 14th Amendment, the Courts have held that a public employee with a property interest in his job may not be deprived of that job in the absence of fair procedures, which Cochran claims he was not accorded in this case, where the decision to fire him was made unilaterally by the mayor.

As to personal liability by Mayor Reed, the ultimate decision-maker on Cochran’s discharge, Judge May found that it would not necessarily be clear to the Mayor that his actions were unconstitutional while exercising the discretionary function to discharge his Fire Chief, since the ultimate determination of that will rest on the court’s application of the Pickering balancing test. Depending on how that weighing turns out, the City may be held liable, but a municipal official in the position of the Mayor exercising a discretionary function of his office would not unless the outcome was clearly established as a matter of law. The courts have developed this qualified immunity doctrine to avoid stifling the ability of public officials to exercise discretionary functions in situations where there is not a definite constitutional ban in place.

Ultimately, the question confronting Judge May is whether the Atlanta city administration is required to keep in office an appointed department head who has published views that are out of synch with the City’s policies. If Cochran were a rank and file employee, he might well win some of his claims. But as a department head with supervisory authority over a major public safety agency, he will confront significant difficulty in arguing that the elected officials responsible to the voters are constitutionally required to keep him in office, as Judge May intimated in ruling on his first free speech claim.

---

**California Appeals Court Rules for Gay Teacher in Morality Discharge Dispute**

The California 2nd District Court of Appeal upheld a determination by Los Angeles County Superior Court Judge Luis Lavin that the Los Angeles Unified School District’s Commission on Professional Competence erred when it found a gay elementary school teacher who had been arrested in a park sting was “unfit to teach” and authorized termination of his employment. *Rodriguez v. Commission on Professional Competence*, 2015 Cal. App. Unpub. LEXIS 9062, 2015 WL 8767581 (Dec. 14, 2015). The courts relied heavily on a landmark 1969 California Supreme Court decision, *Morrison v. State Board of Education*, 1 Cal.3d 214 (1969), which had rejected long-standing precedents, holding that gay people were not necessarily morally unfit to be public school teachers and could not be discharged without a showing of adverse effect on the school and/or students.

The plaintiff had been a teacher with the Los Angeles Unified School District for 24 years at the time of his discharge. He was by all accounts an exceptionally talented and dedicated teacher. He was arrested in Elysian Park on September 1, 2010, by undercover police officers who claimed he had exposed his penis to one of them and nodded at the officer as a signal to follow him.

He was arrested in Elysian Park on September 1, 2010, by undercover police officers who claimed he had exposed his penis to one of them and nodded at the officer as a signal to follow him.

The misdemeanor complaint was subsequently amended to add a charge of disturbing the peace. The teacher pleaded no contest to the disturbing the peace charge and was placed on two years’ probation. The lewd conduct charge was dismissed and his teaching credentials were reinstated. The guilty plea was later expunged after the probationary period ended without incident. Administrators at the Pacific Boulevard School recommended in December 2010 that he be assigned to teach the fourth-grade gifted class, but the District continued to assign him to non-teaching duties, and a principal leader for the local school district recommended after an informal meeting with the teacher that he be dismissed.

In February 2012 the teacher was notified of the District’s intention to dismiss him and he was suspended without pay. The District filed charges with the Commission on Professional Competence seeking dismissal on grounds of immoral conduct,
unprofessional conduct and evident unfitness for service. In June 2012, the Committee on Credentials reviewed the file and determined to close its investigation and recommend no adverse action, but the Commission went ahead with a hearing in January 2013 at which the teacher and the arresting officers testified about what had happened on September 1, 2010, and various administrators and teachers gave opinion testimony about the teacher’s qualifications, emphasizing their fear that his “poor judgment” could affect his ability to be a role model for students and that parents who might learn of what had happened would demand that their children be withdrawn from his classes. The Commission found the police officer’s testimony credible, and found, referring to the Morrison decision factors, that even though there was no evidence of an actual adverse effect on students, the District’s witnesses “established that he could not function as an effective role model for students”; “there was evidence that parents would be adversely affected, and it was clear District administrators were as well”; and that in light of his “poor judgment” displayed on that occasion, he “could not be trusted in a classroom to exercise the judgment necessary under his responsibility to properly interact with his young students.” The Commission emphasized that the teacher continued to deny having done anything wrong and thus “did not take responsibility” for the conduct that the Commission concluded had occurred. The Commission granted the District’s request that the teacher be discharged.

The teacher then petitioned the Los Angeles County Superior Court for a writ of mandate to set aside his termination, which was granted by Judge Lavin. As authorized by statute, the court exercised its “independent judgment on the evidence in the administrative record,” finding that the police officer’s credibility was questionable and his “recollection of what transpired highly suspect.” Lavin explained that the police officer “exhibited bias or prejudice against [the teacher] because of his sexual orientation,” shown by the police officer asking the teacher whether he had AIDS and making exaggerated statements in the arrest report that “reflect outdated stereotypes and a strong moral disapproval of homosexuality.” The court doubted that the police officer’s recollection of various precise details of the incident after the passage of several years was reliable.

According to the Court of Appeal opinion by Justice Dennis Perluss, “Following in part from these credibility determinations, the court found, although the weight of the evidence established [the teacher] had exposed his penis to [the officer] and touched it for about 20 seconds, it did not support the Commission’s findings [the teacher] had masturbated or that his conduct was visible from Park Row Drive, 200 feet away and obscured by bushes, shrubs and trees.” As to the Morrison factors, Lavin said the evidence did not support a finding that the teacher’s act of exposing himself “to an undercover police officer who he thought was sexually interested in him adversely affected other teachers and students at Pacific Boulevard Elementary,” observing that those findings were based entirely on the personal opinions of the District’s lay witnesses, as the District “called no medical, psychological, or psychiatric experts to testify as to whether a man who had had a single, isolated, and limited encounter with one person would be likely to repeat such conduct in the future. The District also offered no evidence that a man of his background was any more likely than the average adult male to engage in any untoward conduct with a student, teacher, or [District] employee.” The court also noted that the teacher’s “multi-subject teaching credential” would “permit him to teach at more than 400 other schools in the District to the extent his misconduct was sufficiently notorious at Pacific Boulevard School to justify a transfer or reassignment notwithstanding ‘at most... a handful of teachers’” at that school had even “limited knowledge” of what had happened. Judge Lavin concluded that the teacher’s dismissal was improper. “Moral disapproval, by itself, of his actions is not a sufficient reason to deem him a threat to students, teachers, or administrators,” Lavin wrote.

The Court of Appeal affirmed Lavin’s ruling, rejecting the District’s appeal. “When, as here, the superior court has independently reviewed the administrative record and ruled the weight of the evidence fails to support the administrative agency’s order,” wrote Justice Perluss, “our ‘substantial evidence’ review of that conclusion is, in practice, akin to appellate review in civil failure-of-proof cases: If evidence in the administrative record compels a finding in favor of the agency as a matter of law, we must reverse. However, if there is substantial evidence on both sides of the factual issues or a complete absence of evidence, we will affirm the superior court.” In this case, the court concluded, the superior court did not err in concluding that the District presented “insufficient evidence” that the teacher was “unfit to teach.” The court of appeal found that once the superior court’s independent review of the record established that the “factual basis for the District’s penalty decision was properly set aside,” it followed that the decision to terminate him was “necessarily an abuse of discretion.”

The District claimed that the superior court had failed to follow Morrison to the letter. “The District misconceives the purpose of the Morrison factors,” wrote Perluss, “which are not inflexible rules with definable boundaries, but broad classes of issues to be considered to assist ‘in determining whether the teacher’s future classroom performance and overall impact on his students are likely to meet standards.’ Even the Morrison court itself, in analyzing whether Morrison was fit to teach, did not focus on several of the key factors. Thus, in holding the record contained no evidence Morrison’s week-long, consensual physical relationship with another man rendered him unfit to
teach, the Court analyzed whether ‘his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.’ In doing so, the court ‘inquired whether any adverse inferences can be drawn from that past conduct as to petitioner’s teaching ability, or as to the possibility that publicity surrounding past conduct may and of itself substantially impaired his function as a teacher.’

In this case, Perluss continued, substantial evidence supported the conclusion that “only a handful of administrators and teachers had limited knowledge of the basis for [the teacher]’s arrest and thus his conduct had not ‘gained sufficient notoriety so as to impair his on-campus relationships.’ . . . There was no evidence other teachers or student would ever learn of [his] conduct, occurring several years earlier and for which his conviction of disturbing the peace had been expunged.” ‘The District witnesses’ testimony about what parents might do if they were to learn of the conduct was entirely speculative and of limited value,” wrote Perluss.

While noting distinctions between Morrison, which involved private consensual behavior, and this case, which involved an arrest in a public park, the court concluded that “the fact that [the teacher] had been charged with lewd conduct or pleaded no contest to disturbing the peace is not in and of itself a sufficient basis for a determination that he was unfit to teach. Rather, it is simply a consideration. In sum, the superior court in the instant matter understood the law, evaluated the credibility of the witnesses and considered the facts in concluding the District had failed to carry its burden of demonstrating [the teacher] was unfit to teach. We find no basis to rule the court’s legal reasoning was flawed or its conclusions unreasonable.”

The teacher was represented by attorneys Lawrence B. Trygstad and Richard J. Schwab of Trygstad, Schwab & Trygstad.

Texas Court of Criminal Appeals Reinstates Convictions Arising Out of 2012 Fort Worth Gay Pride Protest

A divided Court of Criminal Appeals of Texas, the state’s highest criminal court, overturned an intermediate appellate court and rejected an as-applied First Amendment challenge to the arrests and convictions of a Baptist pastor and a church member for disobeying police orders to stay behind a “skirmish line” at a 2012 gay pride parade in Fort Worth. Faust v. State, 2015 WL 8408544 (Tex. Crim. App. Dec. 9, 2015). Judge Bert Richardson wrote for the six-member majority; one additional judge merely concurred in the judgment, while two others penned separate dissents, including Presiding Judge Sharon Keller.

Fort Worth police arrested Pastor Joey Darrell Faust and Ramon Marroquin of the Kingdom Baptist Church in October 2012 when they insisted on crossing a line of officers standing at the rear of a pride parade in order to separate participants from protesters. With members of this church having a history of inciting previous altercations at these parades, the police attempted to prevent any commingling that could escalate into violence by setting up an impenetrable skirmish line at the end of the parade. After a police officer told Faust that he could not cross the line, he suggested the officer was working for a lesbian police chief, that he “needed to put earrings and a bow in [his] hair,” and referred to him as “a fag.”

Despite repeated suggestions that they go in any other direction, the men persisted, and they were arrested for the offense of Interference with Public Duties under Texas Penal Code Section 38.15(a)(1). Both individuals were found guilty at a consolidated bench trial, fined $286 each, and sentenced to two days in the Tarrant County Jail. On appeal, a three-judge panel of the Second Court of Appeals ruled in their favor in June 2014, finding that “[p]olice officers specifically targeted the church group because of their previous history with violence resulting from their vehement rhetoric against homosexuality.” Faust v. State, 2014 Tex. App. LEXIS 6409, 2014 WL 2611186 (Tex. App. June 12, 2014). The Court of Criminal Appeals then granted the State’s petition for discretionary review.

Richardson applied the typical First Amendment public forum analysis, where reasonable restrictions on protected speech are permitted if “(1) the restrictions are justified without reference to the content of the regulated speech, (2) . . . they are narrowly tailored to serve a significant governmental interest, and (3) . . . they leave open ample alternative channels for communication of the information.”

Unlike the Second Court of Appeals panel, however, he believed Faust and Marroquin “literally crossed the line, from engaging in purportedly protected speech to physically interfering with a lawful police order.”

Viewing the skirmish line as an attempt to “promote safety, not to stifle appellants’ expressions of their beliefs,” acknowledging “the information [police] had received about previous instances of violent confrontations erupting between church members and gay pride parade supporters,” and asserting “appellants were free to continue their protesting in all directions except for one,” he concluded that “the temporary skirmish line was a lawful means to effect the police purpose of preserving the peace at the gay pride parade” and reinstated the trial court’s judgments.

Judge Cheryl Johnson joined the majority opinion, but added in a separate concurrence that Faust and Marroquin “were arrested, not for speech, but for interfering with public duties by failing to obey the lawful order of a police officer and for pushing one or more officers, acts without First Amendment ramifications.” In another
concur, Judge Kevin Patrick Yeary insisted the correct question in this case was whether the duo “were arrested and charged with a crime for exercising their First Amendment rights or whether they were arrested and charged with a crime for interfering with peace officers who were performing their duty.” For him, “to say anything other than that interference with an officer (other than by speech only) is a crime regardless of whether the officer is violating a person’s rights, except in very limited circumstances justifying the use of reasonable force for self-defense only, is to invite citizens to seek vindication of their rights on the streets against police officers who may reasonably believe, although they may be mistaken, that they are using lawful means to effect their duties.”

On the dissenting side, Presiding Judge Keller argued that the police had acted improperly by stopping members of the Kingdom Baptist Church and nobody else, because they believed the views being expressed were hateful and because a church member had assaulted a gay man during the previous year’s parade. “This cannot be right. The First Amendment protects freedom of speech, even speech that is ‘hateful,’” she contended. Keller saw this situation as demanding the tougher First Amendment test of strict scrutiny “because whether protesting church members were allowed to walk down Main Street depended entirely upon what they said and what was written on their signs.”

Separately, Judge David Newell said in his dissent that he would have returned the case to the Second Court of Appeals because it was unclear whether the issues had been properly preserved for appeal.

The Kingdom Baptist Church appears to be no longer operating in Venus, a small town south of Fort Worth, and Faust is now pastor of a church in Theodosia, Missouri. – Matthew Skinner

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York.

Wisconsin Birth Certificate Litigation Hits Speed Bump

Lambda Legal’s federal lawsuit seeking to compel Wisconsin officials to issue appropriate birth certificates for children of married same-sex couples hit a speed bump on December 16 when U.S. District Judge Barbara B. Crabb denied Lambda’s motion for class certification and summary judgment in Torres v. Rhoades, 2015 U.S. Dist. LEXIS 169965, 2015 WL 9304584 (W.D. Wis.). Lambda sued on behalf of plaintiffs Chelsea Torres and Jessamy Torres and their minor child, A.T. A.T. was born as a result of donor insemination performed in compliance with Wisconsin statutes, and the women were legally married before A.T. was born, but Wisconsin officials refused to issue a birth certificate listing both women as mothers of A.T., asserting that the non-birth mother would have to go through an adoption proceeding to get her name on an amended birth certificate.

Under Wisconsin statutes, a birth certificate lists the woman who gave birth to the child and her legal husband. Furthermore, the statute governing birth certificates provides that if a child was conceived through donor insemination in compliance with a Wisconsin statute that requires that a licensed physician supervise the process and that the woman’s husband give written consent to the procedure, then the wife and husband are both listed on the birth certificate. If the husband does not give written consent, he is not listed on the birth certificate, even though he is married to the birth mother. However, if the donor insemination is not carried out in compliance with the statute, only the birth mother is listed on the birth certificate, even though she is married. Chelsea and Jessamy Torres complied with the statute, having a doctor supervise the insemination procedure and the non-birth mother giving written consent, with the sperm donor waiving all claim to parental rights.

The motion seeking class certification proposed a class consisting of “all same-sex couples who legally married in Wisconsin or in another jurisdiction, at least one member of whom gave birth to a child or children in Wisconsin on or after June 6, 2014, and

Wisconsin Department of Health Secretary Kitty Rhoades opposed the proposed class by arguing that the proposed class representatives could not properly represent the interests of all proposed class members.
name on a birth certificate as a parent.

The proposed class would not, as a matter of fact, include same-sex male couples, just female couples, and Secretary Rhoades pointed out that women can become pregnant in at least three ways relevant to the issues presented to the court. A female couple could conceive through donor insemination carried out in compliance with the state’s assisted conception statute, involving supervision by a physician and written consent by the non-birth parent; or, they could conceive through donor insemination that does not comply with the statute; or, in presumably the rare case, they could conceive by the birth mother having sex with a man to whom she presumably was not married. (This is not so far-fetched; Law Notes has reported on a case from certificate issues that would be raised by the other two classes. “The general rule in this circuit is that a plaintiff cannot be an adequate representative of the class if she is not subject to the same defenses as other members of the class, at least if the defense is central to the litigation,” wrote Judge Crabb. In this case, while the state is essentially conceding that after Obergefell v. Hodges it doesn’t have a good defense to the claims of married same-sex couples who complied with the donor insemination statute, it could oppose the claims of those who didn’t comply, or of those who conceived by a member of the couple having sexual intercourse with a man to whom she was not married. Judge Crabb found that the circuit’s rule applies to this case.

She agreed with Lambda that the claims regarding birth certificates would be appropriate for class treatment, but she could not certify Lambda’s plaintiff couple and their child as representatives for the broad class described in the motion. In light of her decision that the proposed class could not be certified, Judge Crabb held that it would be premature to grant Lambda’s motion for summary judgment. She pointed out that the state has actually conceded that the first subclass of same-sex couples who followed the requirements of the donor insemination statute should be entitled to get both names on the birth certificate without the non-birth mother going through an adoption, and had offered to amend the birth certificates of all couples who had complied with that statute, but plaintiffs had declined the offer in order to maintain this class action.

Judge Crabb also opined that Lambda’s request for a declaration that various Wisconsin statutes unconstitutionally discriminate against same-sex married couples seemed overbroad in light of the subject matter of the litigation. Lambda was attacking not only the birth certificate statute and the donor insemination statute to the extent that their application discriminates against same-sex couples, but also the paternal presumption statute, for failing to address the legal status of the non-birth parent in a same-sex married couple. That statute as worded provides that “a man is presumed to be the natural father of a child” who is born to his wife, but that the presumption could be rebutted by showing through genetic testing that another man is the actual natural father of the child. Crabb commented, “Plaintiffs do not explain how that presumption relates to birth certificates, which is the only issue plaintiffs raise in this case.” She pointed out that the paternal presumption statute “seems to involve issues that arise later,” such as obligations for child support or inheritance rights. “Plaintiffs do not include any allegations in their amended complaint showing how they are being injured by [the paternal presumption statute], which raises the question whether they have standing to challenge that statute. Standing is a jurisdictional issue, so I cannot ignore it even if defendant does not raise an objection. Thus, if plaintiffs plan to continue to seek a ruling regarding the constitutionality of [the paternal presumption statute], they will have to show that one or more plaintiffs meet all the requirements for standing.”

The judge specified that her ruling denying Lambda’s motions was “without prejudice,” and she gave Lambda until February 1, 2016, to file a new class certification motion. Either they will have to narrow their proposed class to same-sex married couples who complied with the donor insemination statute, or they will have to recruit additional plaintiffs and seek certification of several subclasses. In addition, if they want to attack the paternal presumption statute as part of this case, they will need to recruit plaintiffs who can show some sort of concrete harm due to the

Judge Crabb agreed that “subclasses” would be needed and new plaintiffs would have to be joined as class representatives in order to give the court jurisdiction to deal with the birth certificate issues that would be raised by the other two classes.

another state in which a woman became pregnant through sex with a male friend while her relationship with her same-sex partner was “on hiatus” and the women resumed their partnership before the child was born. . .) Rhoades argued that because the proposed class representatives fit into only the first category, they could not represent the second and third categories, whose cases would present different legal issues when viewed from the perspective of equal protection of the laws and due process under the 14th Amendment, which were the constitutional grounds cited by Lambda for the lawsuit.

Judge Crabb agreed with Rhoades that “subclasses” would be needed and new plaintiffs would have to be joined as class representatives in order to give the court jurisdiction to deal with the birth
failure to that statute to take on a gender-neutral parental presumption approach that would apply to same-sex couples. In light of these rulings, Judge Crabb also struck the contemplated trial date of February 10, 2016, observing that after a new class certification is ruled upon, the court will set a new trial date, but that if the plaintiffs do not file a renewed class certification by February 1, the court would set a new trial date with the case proceeding on behalf of the named plaintiffs without class certification (in which case, by implication, the court’s ruling on the merits would only deal with the claims of married same-sex couples who complied with the donor insemination statute).

In an earlier ruling on December 16, 2015 U.S. Dist. LEXIS 167977, Judge Crabb pointed out that ordinarily a summary judgment motion would not be ruled upon in a class action case until after the class is certified and notice is sent to class members so they can opt out or opt in as the case may be. “Presumably the parties do not believe that the class is entitled to notice in this case because neither side mentions notice in their filings,” wrote Crabb, but she pointed out that the Federal Rules of Civil Procedure provide that notice should be given “to enable class members to challenge the class representatives or otherwise intervene in the suit, rather than to allow them to opt out.” Crabb asserted that it was difficult for her to decide whether notice should be required in this case without any input from the parties, so she gave the parties until December 30, 2015, “to show cause why the class should not receive notice in the event that the court grants the motion for class certification. In addition, the parties should address the question of how notice would be provided if that is what the court orders.” Judge Crabb’s December 21 ruling mentioned the December 16 order in passing, but did not indicate whether the time for response would be extended in light of the denial of class certification.

Counsel for plaintiffs include Camilla Taylor, Christopher Clark and Kyle Palazzolo from Lambda’s Chicago office, and local counsel Clearesia Lovell-Lepak and Tamara Beth Packard, both of Madison, Wisconsin. ■

Iowa Federal Judge Examines Scope of Equal Protection for Gay Civily Committed Sex Offenders

In Willet v. Iowa, 2015 U.S. Dist. LEXIS 163973, 2015 WL 8347105 (N.D. Iowa, December 8, 2015), U.S. District Judge Mark W. Bennett surveyed Equal Protection and the rights of civilly committed sex offenders in a decision that addresses thoughtfully a challenge to prohibition of sex between inmates. Although pro se inmate Harlan Hall Willet, Jr., did not prevail, there is room for future challenges.


Willet alleged that defendants discriminated against him on the basis of sexual orientation. Judge Bennett divides the argument into two claims: prohibition of inmate sex; and discrimination under Equal Protection.

On the first claim (that Willet was “sanctioned... for having a sexual relationship”), Judge Bennett found that he was “unlikely to succeed,” based on deference to administrative concerns and reliance on an unpublished decision from the Northern District of Iowa upholding a prohibition on inmates at the same civil commitment facility from corresponding with an “adult” pen pal service. Deference is not unlimited, but it includes recognition of discretion of those making therapeutic assessments of civilly committed sex offenders, citing Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (“incapacitation” appropriate goal of civil commitment, but “deterrence” reserved for criminal system); and Karsjens v. Jesson, 6 F. Supp. 3d 916, 937 (D. Minn. 2014) (class action regarding constitutional rights of Minnesota’s
civilly committed sex offenders). Judge Bennett was unwilling “in most cases” to interpose the constitution to interfere with the facility’s decisions “regarding acceptable sexual/adult relationships among its patients.”

Interestingly, Judge Bennett approaches the sexual orientation claim by assuming that, “although Iowa has only ever civilly committed men as sexual offenders, there is no reason to believe that an inappropriate male/female relationship would not be similarly sanctioned.” He found that Willet’s own pleading defeated his claim of class discrimination between gays and straights. Willet’s complaint said that only he (of five gay inmates) was subjected to video monitoring and cell sharing restrictions; and these were based on Willet’s own past sexual behavior with other inmates (his own “counter-therapeutic conduct”), not on his sexual orientation, as a member of a class. Hence, the Equal Protection

Judge Bennett was unwilling “in most cases” to interpose the constitution to interfere with the facility’s decisions “regarding acceptable sexual/adult relationships among its patients.”


Willet alleged that defendants discriminated against him on the basis of sexual orientation. Judge Bennett divides the argument into two claims: prohibition of inmate sex; and discrimination under Equal Protection.

On the first claim (that Willet was “sanctioned... for having a sexual relationship”), Judge Bennett found that he was “unlikely to succeed,” based on deference to administrative concerns and reliance on an unpublished decision from the Northern District of Iowa...
argument, as applied, collapsed into rational basis analysis as to Willet alone – or into the sexual behavior claim already rejected.

Judge Bennett nevertheless explored the Equal Protection Clause more generally, finding no precedent in the Supreme Court or Eighth Circuit for heightened scrutiny, noting that the Supreme Court “passed on the opportunity to decide whether sexual orientation amounted to a suspect class for equal protection purposes” in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). He also acknowledged that “suspect class law was still developing,” quoting Justice Kennedy’s footnote in *United States v. Windsor*, 133 S. Ct. 2675, 2683-84 (2013), that it is “still being debated and considered in the courts” whether “heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.”

Judge Bennett cited *Romer v. Evans*, 517 U.S. 620, 631-36 (1996), for Equal Protection of gays and lesbians generally and the need for a “legitimate state interest” underlying such classifications, even with the balancing of penological interests required by *Turner v. Safley*, 482 U.S. 78, 89 (1987). He was careful to write: “This is not to say that a … patient could never have an equal protection claim based on sexual orientation. Quite the contrary. It is easy to imagine a situation where civilly committed detainees are (unconstitutionally) treated differently based on their orientation. Willet has simply failed to allege such a circumstance.”

In this writer’s view, it is too early to expect federal judges to find precedent for the notion that inmates have a right to adult consensual sex. The approach here is readily contrasted with the heterosexist silliness in the Idaho prison behavior modification cases described in *Law Notes* (November 2015) at pages 490-91. As vessels for decision go, this glass if more than half full. – 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.

While Legislature Is Paralyzed over Stepparent Adoption, Italian Courts Uphold Same-Sex Adoptions Performed Abroad

On December 23, 2015, the Court of Appeals of Rome affirmed the ruling rendered on July 30, 2014, by the Juvenile Tribunal (Tribunale per i Minorenni) of Rome that recognized a female partner of the biological mother of a child as entitled to stepparent adoption of the same child (the first instance ruling is described in 2014 *Lesbian & Gay Law Notes* 425 (2012)). The judgment confirms the great strides made by Italian courts in the recognition and protection of same-sex families in a context where legislation is still missing (see Eur.


After Greece enacted a law on same-sex civil unions on Dec. 23, 2015, Italy remains the only one among Western Europe countries lacking any regulation of same-sex couples (as well as of other major sexual orientation-related subjects like criminal provisions regarding hate speech and hate crimes). A bill providing for civil unions allegedly inspired by the German model (No. S-2081) is dormant in the Senate since March 2013 and will be presumably discussed, if the schedule is respected, at the end of January 2016. The bill originated from the left-wing ranks of the Democratic Party (Partito Democratico, PD), but encountered strong opposition from both the center-right parties and the Catholic faction of PD. Throughout the discussions that preceded the bill’s official presentation in the Senate in October 2015, opponents filed more than 4,200 amendments, most of them obstructionist in nature and therefore completely useless, with no other purpose than that of delaying and ultimately sacking the bill. Strong opposition comes from the Catholic Church as well, which on multiple occasions has threatened “barricades” and popular uprising against the bill if passed.

While the government led by PM Matteo Renzi (PD) is formally supporting the bill, the coalition majority is deeply divided, however, as to its final content. In an interview released on television on October 11, 2015, Renzi declared that there is an agreement inside the coalition as to the law as a whole, and that the only remaining controversial issue was the recognition of one partner’s right to adopt the children of his/her partner (stepparent adoption). Despite Renzi’s reassurances, experience shows that the bill’s approval cannot be taken for granted. In addition, Renzi’s statement would be a bizarre one, yet, if Italian courts had not already recognized stepparent adoption as an institution applicable to existing same-sex couples with children.

Italian law acknowledges no right to adopt, but rather a child’s right to a family. Joint adoption is reserved to

Italy remains the only one among Western Europe countries lacking any regulation of same-sex couples.
couples married for at least three years (Art. 1(1) of the Law No. 183 of May 4, 1983, Child’s Right to a Family). While premarital cohabitation may count for purposes of the three-year requirement (Art. 1(3) of the same law), neither a single nor an unmarried couple may adopt a child. However, the law provides for adoption “in particular cases”, i.e., when general requirements are lacking. In this respect, adoption of a child by an adult is permitted, *inter alia*, “when the adoptee is the child of the other spouse” (Art. 44(1) (b)) or “when the placement of child for adoption is not possible” (Art. 44(1)(d)). It is important to highlight, however, that this form of stepparent adoption does not entail a link between the child and the adopter’s family, but only with the adoptee. In any event, the court has a duty to examine whether “the adoption fulfills the best interest of the child” (Art. 58(1)).

Some Italian same-sex couples employed the above mentioned provisions as a form of stepparent adoption aimed at consolidating the existing parental link between the child and the parent’s partner and therefore obtaining its recognition in court. All these couples pursued medically assisted procreation in a foreign country (mainly in Spain) and some of them even married there. While abroad both marriage and filiation are totally recognized by the law, in Italy this is not possible because of the lack of proper legislation (see Supreme Court of Cassation, Feb. 13, 2012, No. 4184, *A.G. & M.O. v. Comune di Roma et al.*, 2012 Lesbian & Gay Law Notes 108). Mainly they relied not only on the circumstance that such partner already exercised all parental rights and bore all parental duties as a matter of fact, but also on a foreign title of parenthood, obtained in a European country where the couple had entered into marriage and/or finalized an adoption proceeding.

Recognition came first in 2014 from the judgment of the Juvenile Tribunal of Rome above mentioned. With a ruling that fueled a heated debate among scholars and legislatures, the Tribunal granted the petition of the co-mother of a young girl whose biological mother the petitioner had married in Spain. The petitioner requested to adopt the girl under the category of “adoption in particular cases.” Quoting the rulings of the European Court of Human Rights (in particular *Case of Salgueiro da Silva Mouta v. Portugal*, No. 33290/96, March 21, 2000, § 35 ff.; *Case of X v. Austria*, No. 19010/07, Feb. 19, 2013), the Tribunal found that the petitioner was eligible to adopt the child under Italian law, which the courts had already declared applicable to opposite-sex couples, “as the establishment of an adoption “as the establishment of an adoption in this case cannot harm the child, but rather would enrich her.” Based on the best interest of the child, the Tribunal therefore concluded that “an interpretation of such a provision that discriminates against same-sex couples would amount to a violation of the Constitution,” and in particular of their “fundamental right to live freely their condition as couples.” The “desire to have a child, either a natural or adoptive one,” the Tribunal said, “is one of the most representative expressions of this fundamental right.” The public prosecutor appealed.

In affirming the Tribunal’s judgment, the Court of Appeals firstly rejected the claim presented by the public prosecutor according to which the couple aimed at obtaining the recognition of “a new form of biparentality not yet regulated by the law, to all disadvantage of the primary interest of the child.” The court also found that the Tribunal had properly examined the interest of the child in the specific instance, adding that the concern expressed by the appellant – that the child could suffer from such an “experiment” – was totally ungrounded.

Italian courts are active in the recognition of same-sex families. In 2014, the Court of Appeals of Turin (decree dated Oct. 29, 2014) ordered the registration of the birth certificate of a child born in Spain from a Spanish woman that indicated both the woman and her Italian wife as the child’s mothers. The first instance court had ruled that the recognition of “filiation relationships between homosexual persons [sic]” would violate public policy, but the Court of Appeals reversed. That court concluded that, because according to Italian conflict of laws rules it was Spanish law that governed the filiation relationships, the child had automatically acquired, by simple operation of law, both the parental link with the co-mother and Italian citizenship. Moreover, according to the court the best interest of the child dictated the recognition of the link with the co-mother as “we are not creating a new legal situation that did not exist before, but to ensure the legal coverage to a situation that existed for a long time in the exclusive interest of a child who had been fostered by two women whom the law acknowledges as mothers.”

Moreover, on October 16, 2015, the Court of Appeals of Milan enforced an order for a stepparent adoption issued by a Spanish tribunal regarding an Italian same-sex couple. The order entitled the co-mother to adopt her spouse’s child who was born in the context of a deliberate common procreation plan made by the two women who married in Spain. The women had recently decided to divorce, still in Spain, and to regulate their separation through an appropriate agreement in a way not to harm the well-being of their daughter. Here the Court of Milan not only recognized that the Spanish order was neither contrary to public order nor incompatible with the child’s best interest, but it also concluded that the foreign stepparent adoption had to be enforced in Italy with full effect, *i.e.*, including the links with the adopter’s entire family, which in turn would be in the best interest of the child.

By this move, the court is indirectly pushing the legislative debate in the direction of enlargement of the rights of same-sex families. It is difficult to say, however, whether this choice will assist, let alone influence, the Parliament in the current debate on the civil union bill. – Matteo M. Winkler

Matteo M. Winkler is an Assistant Professor in the Tax & Law Department at HEC Paris.

January 2016 LGBT Law Notes 15
The 2nd Circuit has affirmed District Judge Kenneth M. Karas’s decision dismissing attorney John L. Weslowski’s claim that his constitutional rights were violated when he was discharged from the Rockland County Attorney’s office because he viewed gay sexually explicit material on his office computer. Weslowski v. Zugibe, 2015 U.S. App. LEXIS 21789, 2015 WL 8949969 (Dec. 16, 2015). The court found that Judge Karas correctly held that the dismissal did not violate any 1st or 14th Amendment rights of Weslowski, and that Karas acted within his discretion “in declining to exercise supplemental jurisdiction over the remaining state law claims after dismissing the federal causes of action.” The court commented that Weslowski, an attorney representing himself, “was not entitled to the ‘special solicitude’ normally afforded pro se litigants. Weslowski had also asserted a retaliation claim under the False Claims Act, but the court concluded that he had failed to allege the necessary factual predicates for such a claim – specifically, that the County was aware that his refusal to approve a particular contract was “in furtherance of efforts to prevent a violation of the FCA.”

In a complex civil procedure ruling, the 2nd Circuit held on December 16 that venue was proper to try Reverend Kenneth Miller in the U.S. District Court in Vermont on charges of aiding and abetting the removal a child from the U.S. with the intent to obstruct the lawful exercise of parental rights in violation of the International Parental Kidnapping Crime Act. United States v. Miller, 2015 U.S. App. LEXIS 21893. This is the latest chapter in the long-running saga of Lisa Miller (no relation to the reverend) and Janet Jenkins, former Vermont civil union partners, and their extensive litigation over custody of their daughter. Rev. Miller was charged with
assisting Lisa Miller in removing the child from the United States to avoid complying with Vermont court orders giving Jenkins first visitation rights and then custody of the child. Lisa Miller and the child remain beyond the jurisdiction of the court, reportedly in Nicaragua. Rev. Miller was arrested and tried and convicted in Vermont in a trial held in August 2012. In this opinion, the court responds to Miller’s argument that venue for the prosecution did not lie in Vermont, since none of the acts charged against him took place there. The court concluded that that trial judge, William K. Sessions, III, correctly instructed the jury on venue when he told them: “If you find that the government has proved beyond a reasonable doubt all of the elements that I have described for you, you must also determine whether venue is appropriate in the District of Vermont. In this regard, the government must show by a preponderance of the evidence that the essential conduct of removing a child from the United States took part at least in an essential part outside the United States. The government must also show by a preponderance of the evidence that Kenneth Miller was first arrested in the District of Vermont. The District of Vermont includes the entire territory of the state.” The trial record was found to include evidence from which the jury could have concluded that both those requisites were met in this case.

**U.S. COURT OF APPEALS, 5TH CIRCUIT** – The 5th Circuit rejected an immigration appeal from a Jamaican man who claimed to be gay, deferring to the credibility determination by the Immigration Judge based, in part, on the petitioner’s failure to provide any corroborating evidence as well as evidence that he had conceived children with three different women. *Roach v. Lynch*, 2015 U.S. App. LEXIS 21386, 2015 WL 8230097 (Dec. 8, 2015). Petitioner came to the U.S. from Jamaica as a teenager in the 1980s. He was convicted on marijuana charges in Texas and Ohio, bringing his name to the attention of immigration officials and leading to a removability hearing. At that hearing, he stated he feared persecution or torture in Jamaica, and the IJ gave him forms to apply for asylum, withholding, or protection under the Convention against Torture. He filed for protection, asserting homosexual orientation and a fear of persecution or torture by gangs in Jamaica. On the homosexuality point, Roach declared in his application that he identified as “homosexual” even though he had never been “outwardly visible as gay.” He claimed to have been sexually abused by a man when he was a child, giving that as the root of his homosexual identity. He claimed to fear homophobic persecution if he was required to return to Jamaica. The IJ found his assertions as to his sexuality to lack credibility because of the evidence of his past sexual activity with women in the United States and his unwillingness or inability to provide any corroborating evidence, even though he had family members and friends in the U.S. upon whom he could call for such corroboration. The B.I.A. deferred to the IJ on this, and the court concluded that it should do so as well. Roach was similarly unsuccessful with his allegations about fears of gang violence against him. He represented himself pro se in this case.

**U.S. COURT OF APPEALS, 5TH CIRCUIT** – A 5th Circuit panel affirmed a ruling by a Texas federal district court against a Title VII retaliation claim brought by a management employee who resigned after being told by another official that her salary was to be cut in half for hiring a “cross-gender” person. *Brandon v. Sage Corporation*, 2015 U.S. App. LEXIS 21384, 2015 WL 8593561 (Dec. 10, 2015). Margie Brandon was Director of the San Antonio Campus of Sage, which owns and operates truck driving schools. She reported directly to the company’s president, Greg Aversa. Carmella Campanian was Sage’s National Project Director and school director at its Billings, Montana, campus. One of Campanian’s accounts expanded its operations, resulting in involvement with the San Antonio campus, and Campanian visited to implement the driver training component of this account. Campanian spotted an instructor recently hired by Brandon, Loretta Eure, “a truck driver who alleges that her ‘gender expression was traditionally masculine,’” according to the opinion for the court by Circuit Judge Edith Jones. “What is that and who hired her?” Campanian asked Brandon, who responded that she had hired Eure, who was a qualified instructor. Campanian then said that Sage did not hire “cross-gender” people and that Brandon would be disciplined for hiring Eure. When Brandon replied, “Excuse me!” Campanian responded by repeating that Sage did not hire “cross-genders.” Campanian reduced Eure’s work hours and excluded her from the project involving Campanian’s account, asking Brandon “if she was stupid” and asserting that the people from the new account “would eat Eure alive.” Campanian told Brandon that her pay would be reduced 50 percent because she hired Eure. Brandon and her direct supervisor put in a phone call to Aversa, but he was traveling and inaccessible. Brandon then sent a resignation email, stating that she felt threatened by Campanian’s pay cut statement and saying she was leaving the company because she could no longer take the abuse and humiliation from Campanian. Eure also resigned. When Aversa returned from his trip, he apologized for Campanian’s behavior and informed Brandon that Campanian had no authority to reduce her pay or Eure’s work hours. Brandon filed a Title VII discrimination and retaliation claim with the EEOC.
which found reasonable cause and authorized a lawsuit. The district court granted summary judgment for SAGE, finding as to the retaliation claim that Campanian’s pay threat was not an “adverse employment action,” a necessary element for a retaliation claim under Title VII. Brandon appealed the ruling on the retaliation claim, but the 5th Circuit sided with Sage, finding that a reasonable member of management in Brandon’s position would know that Campanian did not have authority to reduce her pay, so there was no credible threat. The first element of a retaliation claim asserting that somebody suffered an adverse employment action for opposing discrimination requires that the employee have taken some action opposing discrimination prohibited by Title VII. In a footnote, Judge Jones wrote, “Title VII in plain terms does not cover ‘sexual orientation.’ We do not opine here whether Brandon correctly surmised that Eure may claim some protection under Title VII.” This statement is a bit odd on its face, since any discrimination claim Eure would have would involve gender identity or gender stereotyping, not sexual orientation, and from the court’s own description of the facts, it appears that Eure would have an excellent Title VII claim based on Campanian’s statement and the actual reduction of her work hours, in light of the Supreme Court’s Price Waterhouse decision, the growing body of gender identity and sexual stereotyping cases in the courts of appeals, and the publicly articulated position by the EEOC. But perhaps it is not surprising considering the source, as Judge Jones, a Reagan appointee, is notoriously conservative on civil rights issues and probably disagrees with all of those rulings. Lambda Legal represents Brandon on this appeal; Lambda attorneys on the case include Peter C. Renn (Los Angeles office), Demoya R. Gordon (New York office), and Ken Upton (Dallas office). Other plaintiff counsel include Glenn Deutsch Levy of San Antonio and Robert Thomas Smith of Katten Muchen Rosenman LLP (Washington).

U.S. COURT OF APPEALS, 9TH CIRCUIT – In what is becoming a bit routine, a panel of the 9th Circuit denied a petition by a gay Mexican man for review of the Board of Immigration Appeals’ denial of his claim for withholding of removal or protection under the Convention Against Torture (CAT). Gomez-Diaz v. Lynch, 2015 U.S. App. LEXIS 20896 (Dec. 2, 2015). As is frequently the case, the summary disposition by the panel resulted in an unofficially published decision that provides little factual context, other than to identify the petitioner as a “native and citizen of Mexico.” The court noted that petitioner conceded that an asylum claim on his behalf was time-barred. The opinion suggests that petitioner came to the U.S. as a child, and does not indicate the circumstances under which he is being processed for removal to Mexico. The court said that “there is no evidence that Gomez-Diaz suffered past persecution ‘in the proposed country of removal.’ Although Gomez-Diaz experienced deplorable childhood sexual abuse in the United States, he did not provide any evidence ‘that Mexican authorities would have ignored the rape of a young child or that authorities were unable to provide a child protection against rape.’ Nor did Gomez-Diaz establish that ‘the chance of future persecution’ of him in Mexico ‘is “more likely than not”’. Additionally, Gomez-Diaz did not demonstrate that he would suffer persecution if he moved to a part of Mexico that affords protections to LGBT individuals.” The court also rejected the suggestion that petitioner could be eligible for CAT relief. “Although Gomez-Diaz provided ‘generalized evidence of violence and crime’ against gay men in Mexico,” conceded the court, “he did not establish that ‘it is more likely than not that [he] would be tortured if returned to Mexico.’” The report of the case does not indicate whether petitioner was represented by counsel on this petition for review. Although the 9th Circuit has recently showed great solicitude for the problems faced by transgender women in Mexico (see, for example, Moreno v. Lynch, 2015 WL 8283697 (9th Cir., Dec. 9, 2015), in which the court remanded to BIA yet another case involving a transgender woman’s asylum application), the court seems to believe that gay Mexican men – a group that had received protection in 9th Circuit decisions in the past – have now achieved a level of acceptance in Mexico that makes most of their refugee claims insurmountably difficult.

ARIZONA – The state will pay $300,000 in legal fees and $2,000 in costs to Lambda Legal in the state’s marriage equality litigation, in which the state decided not to appeal district court rulings to the 9th Circuit in light of the circuit court’s marriage equality rulings. At first the state “vigorously opposed” the plaintiffs’ fee request, according to lead counsel Jennifer Pizer of Lambda Legal, but when it became clear that fees would be awarded, they entered into negotiations. Part of the legal work for plaintiffs was done on a pro bono basis by the law firm Perkins Coie as a cooperating attorney with Lambda, under an agreement by which they would not receive any legal fees. All the legal fee money will go to Lambda Legal. According to the National Law Journal report on this settlement, published December 17, it brought the total amount states were paying as plaintiffs’ legal fees in marriage equality cases up to that date to $10.8 million. The largest award is $1.9 million for the Michigan case, which went through a full trial after several pretrial motions and was ultimately appealed to the Supreme Court, which consolidated it with other cases from
the 6th Circuit to rule in Obergefell. By contrast, most of the marriage equality cases outside the 6th Circuit were decided on summary judgment motions without trial, the Supreme Court denied certiorari in cases from other circuits, and some of the other cases were ultimately decided without appellate rulings after Obergefell, when courts in pending cases granted summary judgment motions under that precedent. * * * The state will also pay $200,000 in legal fees to attorney Shawn Aiken, who had filed a separate lawsuit challenging the state’s marriage equality ban, according to a December 19 report by tucson.com.

ARKANSAS – On December 10 the Supreme Court of Arkansas granted in part and denied in part an emergency motion by Nathaniel Smith, the Director of the Arkansas Department of Health, to stay a ruling by Circuit Judge Timothy Davis Fox ordering the state to issue appropriate birth certificates showing both women of three married lesbian couples as parents of the children born to them after their marriage and striking down provisions of state law that would treat married same-sex couples differently from married different-sex couples in regard to a parental presumption extending to the same-sex spouse of a woman who gives birth were unconstitutional. The state had promptly filed its notice of appeal, seeking direct review in the state Supreme Court and a stay of the ruling. Ultimately, however, the state conceded that there was no need to stay the order to grant certificates to the three plaintiff couples. However, it insisted, and a majority of the Supreme Court agreed, that the balance of the relief should be stayed pending a decision on appeal on the merits. Justice Rhonda K. Wood, concurring in part, would not have stayed Judge Davis’s order to the extent it provided that any married same-sex couple would be entitled to be treated the same as the plaintiff couples regarding children born after their marriages took place, since it appeared that the state was not appealing the substantive ruling underlying that relief. Justice Paul E. Danielson dissented from issuance of any stay, saying that the petitioner “has failed to demonstrate that a stay is warranted in this case.” The plaintiffs are represented by Cheryl K. Maples.

ARKANSAS – The Arkansas Court of Appeals held that Faulkner County Circuit Judge Charles E. Clawson, Jr., committed harmless error when he allowed testimony about the homosexual relationship between a criminal defendant, Jack W. Gillean, and a man with whom he lived who appeared as a witness in the case against him. Gillean v. State, 2015 Ark. App. 698, 2015 WL 8481576 (Ark. Ct. App., Div. III, Dec. 9, 2015). Gillean, former Chief of Staff at the University of Central Arkansas, was convicted by a jury on six counts of commercial burglary, sentenced to three years in prison, ten years of probation, and ordered to pay fines totaling $35,000. His crime consisted of giving his university passkey to a student with whom he was friendly so that the student could access professors’ offices after hours and make copies of upcoming exams from their computers. When he was confronted with evidence of this scheme by the university president, he resigned from the university. During voir dire of the jury, the question came up whether jurors would be biased against Gillean because he is gay and was living with a man. One juror who expressed uncertainty about whether she could be unbiased because of her religious disapproval of homosexuality was excused. Other jurors collectively signaled that they could be unbiased and, after individual questioning by defense counsel, were allowed to serve. The opinion sets out at length questions and answers from the voir dire on the issue of homosexuality. The defense objected to evidence being presented about Gillean’s relationship with Scott, his “roommate,” but the trial judge allowed it in as relevant, rejecting the argument that potential prejudice outweighed probative value on the merits of the case. The court of appeals, in an opinion by Judge Bart F. Virden, rejected the trial court’s conclusion that the nature of the men’s relationship was relevant. “At Gillean’s trial,” wrote Virden, “Scott testified that when he was living in Gillean’s home in the spring of 2011, he witnessed Gillean give Stark his keys, and that he heard the two of them discussing the key exchange on several occasions. Scott recalled for the jury that he had advised Gillean against helping Stark obtain the exams, but that Gillean responded that he did not care. Scott also testified that after Stark’s motorcycle accident, Gillean was angry
with Stark. [Stark had crashed while riding Gillean's motorcycle, damaging it, leading to a falling out between the two.] Scott testified that during this hiatus in Gillean's and Stark's friendship, Gillean instructed Scott that, while Gillean was out of town, Scott should not give Stark the keys if he asked for them. None of the testimony offered by Scott related to his romantic relationship with Gillean and could have been offered by any roommate who lived in Gillean's household. Scott's sexual relationship with Gillean did not place him in any better position to observe the events that led to criminal charges being brought against Gillean. The nature of their relationship is immaterial to the testimony offered by Scott, and therefore we hold the circuit court erred in allowing irrelevant evidence; however, even when a trial court errs in admitting evidence, our supreme court has held that when the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm the conviction.” The court went on to show that the evidence against Gillean was overwhelming, so it was clear that the jury did not convict him for being gay. The court of appeals affirmed the verdict and the sentence. The case had been the subject of considerable local press attention, and Gillean had filed for a change of venue, which was ultimately granted. Even so, a juror in a remote county had read about the case and was excused after saying she had formed an opinion about it.

CALIFORNIA – Federal sector employment discrimination law is complicated, as illustrated by Guli v. U.S. Attorney’s Office for the Northern District of California, 2015 WL 7759488, 2015 U.S. Dist. LEXIS 161849 (N.D. Cal., Dec. 2, 2015). Rachelle Guli, a U.S. military veteran who is a gay Filipino woman, was discharged from her position as Supervisor Information Technology Specialist by the U.S. Attorney’s Office (N.D. Cal.) after a dispute with her supervisor concerning her working hours. Ms. Guli was not “out” in the hiring process, but informed the office about her sexual orientation in October 2014, about two months after she was hired. She was assigned a long daily shift (9 am to 6 pm) without any break for meals or rest. Her supervisor rejected her complaints about this, stating that she was not the “best suited for the job, but [the office] had to hire [her] because of [her] Vet status,” according to her recollection of his comment. A few weeks after she began working there, Guli “brought a picture of her wife to put in her office” and alleges that after the supervisor saw this, “he became unresponsive to her.”

The dispute leading to her termination arose when she took a half hour toward the end of her shift on September 24 to go to a pharmacy without telling her supervisor. While she was out, the supervisor called and left a message for her to assist another management official. When Guli returned to the office and got the message, she found the other person, who said her assistance was no longer needed. Gillean’s supervisor questioned her repeatedly about her absence over the next few days and involved a Human Resources representative. When Guli raised the issue whether a nine-hour shift without a meal break was legal, her supervisor ended the meeting and subsequently terminated Gillean after she rejected a proposal that they treat her unauthorized absence as “her lunch break.” Gillean then complexities of federal employment practice, filing an EEO complaint with the Justice Department, which issued a Final Agency Decision rejecting her discrimination and hostile work environment claims. DOJ informed her she could appeal to the Merit Systems Protection Board or file a district court complaint. Gillean had already filed an MSPB claim protesting her discharge, which was dismissed as premature because her EEO complaint was pending. Then she filed in district court, asserting claims under Title VII, the military service discrimination law, and the California Labor Code (aimed mainly at the dispute about her entitlement to rest and lunch breaks and her insistence that she was entitled to overtime pay for these long shifts). The government moved to dismiss. Granting the motion, U.S. Magistrate Judge Laurel Beeler pointed out that by suing the office as such rather than appropriate officials, Guli had failed to name the appropriate defendant for her Title VII claims; that she could not sue a federal government office under California’s Labor Code; and that her military discrimination claim could not be asserted in court until it had been exhausted before the Merit Systems Protection Board. Gillean’s Title VII claims were dismissed without prejudice, so she can refile naming appropriate defendants, but Judge Beeler found that her failure to file a military discrimination claim with the MSPB had waived that claim and the dismissal of all other claims was with prejudice. Guli is represented by Daniel L. Feder of San Francisco.

CALIFORNIA – A gay man’s attempt to hold Grindr LLC to account for its business practices crashed, but didn’t fully burn, on December 15 when U.S. District Judge Gonzalo P. Curiel granted a motion to dismiss the case on grounds of standing in Howell v. Grindr, LLC, 2015 U.S. Dist. LEXIS 167669, 2015 WL 9008801(S.D. Cal.). Plaintiff Mark Howell achieved a symbolic victory, as the judge denied Grindr’s alternative motion to dismiss on an argument that California’s Dating Services Contract Act (DSCA), passed in 1989, did not apply to an on-line interactive dating service such as Grindr. Howell sought to maintain a class action charging violations of the DSCA, the California Unfair Competition Law and the
California Business & Professions Code, challenging the failure of Grindr’s contract terms to include provisions mandated by the DSCA, including a statutory three-day cooling off period during which new customers have a right to cancel and receive a full refund within ten days of cancellation. Howell paid $11.99 per month to join Grindr in 2013. He claims that when he joined Grindr failed to inform him, as required by the DSCA, that he had a right to cancel his membership and receive a refund at any time. Grindr specifies that fees are non-refundable. Howell alleged that upon cancellation of his contract, Grindr required him to pay his subscription fee for the entire month in which he cancelled, despite a provision in the DSCA that “a noncompliant dating service contract may be cancelled at any time.” Judge Curiel accepted Grindr’s argument that Howell had failed to allege facts sufficient to establish statutory standing to sue, but the court abstained from ruling on Article III standing as unnecessary to decide the motion. However, as noted above, Curiel rejected Grindr’s argument that the DSCA does not apply to it. Grindr argued that Howell “provides no evidence that the Legislature contemplated applying the DSCA to smartphone applications when the statute was enacted in 1989 or that it would have intended the DSCA to reach smartphone applications had it anticipated their invention.” Grindr argued that the statute was intended to deal with “high pressure in-person sales” by dating services, and “not a smartphone application with no in-person sales and where costs are not high. . . Defendant argues that its business interests will be harmed if the DSCA applies because during the three day cooling off period, any user could sign up, immediately use the services for three days to make connections, and then demand a refund. According to Defendant, this leads to a risk of abuse that is greater than a brick-and-mortar dating business because a brick-and-mortar dating business takes time to create a consumer’s dating profile, set up appointments, identify compatibilities, complete questionnaires and arrange dates.” Judge Curiel noted California precedents upholding the application of regulatory provisions to technology that did not exist when the statute was passed, and he found that the legislature in 1989 had “addressed the issue of consumers receiving a full refund even if they received some consideration after the statute was enacted,” by providing in the statute that “payment shall be made for any services covered by the contract and received by the buyer prior to cancellation.” In 1993, the statute was amended to allow cancellation without penalty or obligation, and it currently states “all moneys paid pursuant to any contract for dating services shall be refunded within 10 days of receipt of the notice of cancellation.” This was intended to prevent dating services from “penalizing” customers for cancelling, and it was enacted despite testimony by the industry suggesting that it was unfair, the legislature having decided the cancellation penalties were a sufficiently significant deterrent to cancellation to merit putting the risk on the industry that it might have to refund money after providing some services. “Although the concerns regarding high pressure sales tactics from employees are not applicable to Grindr,” wrote the court, “consumer protection laws to prevent fraud in dating services contracts can have practical application to online transactions or can fit within the statutory scheme. In fact,” Judge Curiel noted, “New York has enacted a consumer protection statute that governs the contents of an Internet dating service contract and requires a three day right to cancel provision,” and the court found that California courts have applied the DSCA to internet dating sites in past cases. The court found, however, that Howell had failed to respond to Grindr’s argument that he had not alleged actual losses sufficient to give him standing to sue Grindr under the Unfair Competition Law or the Business & Professions Code. Finally, however, the court extended Howell leave to amend his dismissed claims, finding that an amendment would “not be futile” if Howell could truthfully allege the necessary facts to demonstrate personal standing to sue, in light of the court’s finding that the challenged statutes do apply to Grindr. Howell was given until December 31, 2015, to file an amended complaint. Howell is represented by a battery of attorneys: Abbas Kazerounian, Kazerounian Law Group, APC, Costa Mesa, CA; Joshua Swigart, Hyde & Swigart, San Diego, CA; Matthew Michael Loker, Kazerounian Law Group, APC, Costa Mesa, CA; and Todd M. Friedman, Law Offices of Todd M. Friedman, P.C., Beverly Hills, California.

CONNECTICUT – Superior Court Judge John J. Nazzaro rejected an employer’s motion to dismiss an age and sexual orientation discrimination claim brought by a lesbian hair stylist in Forgione v. Skybox Lounge, LLC, 2015 WL 7941111 (Ct. Super., New Haven, Nov. 10, 2015). Gayle Forgione alleged that she was hired by Raffaella and Joseph Barraco to provide barber services at Skybox while their son, Joseph Jr., was incarcerated. She began working for them around the end of May, 2013. Joseph Jr. was released on June 11 and returned to Skybox, quickly becoming critical of Forgione’s performance. On June 15, he began to criticize her, screamed at her that she was “too old” and “a stupid dyke,” and threw $10 on the floor at her feet. She left the shop, not to return, and filed a discrimination charge with the Connecticut Commission on Human Rights and Opportunities, which issued a “release of jurisdiction” allowing her to sue on August 28, 2014. Her
complaint alleges, in addition to age and sexual orientation discrimination, claims of intentional and negligent infliction of emotional distress and aiding and abetting discrimination aimed at the individual Barracos. Defendants claimed that their business was not subject to Human Rights law because there were fewer than three employees, the statutory minimum for coverage. Forgione had alleged that at the time of her discharge there were four employees, counting herself and the three Barracos. Defendants claimed that Joseph and Raffaella were not employed by the business, although concededly they had recruited and hired Forgione to work while their son was incarcerated. According to defendants, the only actual employee of the business was Joseph Jr. Judge Nazzaro concluded that the clashing allegations about number of employees left a material fact issues to be resolved, so summary judgment was inappropriate. He found that Forgione’s allegations were insufficient to support an intentional infliction of emotional distress claim and that the negligent infliction claim had to be dismissed as against the senior Barracos. (The motion did not seek summary judgment on this claim regarding Joseph Jr.). The court also dismissed an aiding and abetting claim under the Human Rights law, since that claim had not been presented to the Commission and thus had not been exhausted administratively.

FLORIDA – The Miami Herald reported on December 22 that Jose Crespo-Cagnant, a gay man from Mexico, had finally won his prolonged battle with U.S. immigration officials to remain in the United States. The Herald article details a long and complicated tale involving numerous border-crossings and detentions. Crespo-Cagnant married a same-sex partner in Florida in 2013, after which they approached an immigration attorney to file a relative petition to obtain lawful resident status for Crespo-Cagnant, who had re-entered the country illegally after having been previously deported. He was indicted for illegal reentry, but on November 13, U.S. District Judge Ursula Ungaro vacated the agency’s deportation order for expedited removal, finding that immigration officials had failed to consider his plea not to be returned to Mexico for fear of persecution because of his sexual orientation. The ruling turned on Crespo-Cagnant’s account of an interview with a border agent when he was apprehended in which the agent apparently ignored his attempt to communicate his fear of persecution and past history in Mexico. The agent recorded that Crespo-Cagnant never expressed fear of persecution. Wrote Judge Ungaro, according to the news report, “He expressed to Reveruzzi [the border agent] and every other Border Patrol agent he encountered during his expedited removal proceeding that he had a well-founded fear to return to Mexico because he is homosexual and feared persecution.” He testified that the border agent was apparently not fluent in Spanish and never read back to him the sworn statement he later initialed and signed. Judge Ungaro found this testimony credible, as well as testimony that the border agent ignored his explanation for coming back to the United States, which included that he owned a home in Miami and had a U.S. citizen partner who was ill and needed his care. Crespo-Cagnant met his partner in 2002, after he had first entered the U.S. using a false identity to evade capture. Although his attorney, Rebeca Sanchez-Roig, was optimistic about the outcome of this case, Crespo-Cagnant expressed concern. “I don’t know what follows,” he told the Herald. “I’m just waiting. I have confidence in God, in Rebeca, but I don’t yet feel well. I’m still afraid.” The looming question is whether the government will appeal Judge Ungaro’s ruling to the 11th Circuit.

IDAHO – The state’s direct cost of defending its ban on same-sex marriage in the courts will cost taxpayers upwards of $715,000, reported ktvb.com on December 18. That includes payments of $628,000 to plaintiffs’ attorneys as awarded by the court, and $53,000 spent for a private law firm to represent Idaho in court.

INDIANA – In In re Steele, 2015 Ind. LEXIS 997, 2015 WL 7738298 (Dec. 1, 2015), the Indiana Supreme Court, ruling on counts of professional misconduct charged by the Disciplinary Commission against attorney David J. Steele, found that Steele had violated the disciplinary rules by lying during the investigation about the circumstances under which he had discharged JD, his gay office manager. When Steele fired JD after he had been on the job only two and a half months, JD contacted the Commission to report about Steele’s misconduct, which included a variety of financial improprieties involving client funds and professional misrepresentations. Responding to the investigation, Steele “lied regarding the circumstances of JD’s termination of employment, falsely telling the Commission that JD had been caught having sex with a male client in Respondent’s office and that JD had gained access to the firm’s website to post disparaging comments against the gay community. Additionally, Respondent brandished a handgun when he terminated JD’s employment, and Respondent instructed an associate attorney who witnessed this incident to lie about this fact to the Commission.” The opinion ends with a long list of Steele’s violations, but the closest the list comes to alluding to the circumstances of JD’s termination is “Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter,” and the balance of the opinion, discussing Steele’s patterns
of misconduct, never refer specifically to his dealings with JD. The court ordered that Steele be disbarred.

**INDIANA**– The Indiana Family Institute and the Indiana Family Association have filed suit against the cities of Indianapolis and Carmel, claiming that their local LGBT rights provisions violate the plaintiffs’ rights under the state’s Religious Freedom Restoration Act and contending that an amendment to the state’s RFRA adopted last spring, providing that the state RFRA could not be construed to authorize discrimination by the government, had violated the religious freedom rights of the plaintiffs. As summarized in an article in the *Indianapolis Star* (Dec. 11), “The lawsuit asks the court to throw out the RFRA fix, and then makes a claim under the original RFRA that local nondiscrimination ordinances are undue government intrusions on the free exercise of religion and other First Amendment rights.” The lawsuit was filed December 10 in Hamilton County Superior Court. Standing of the plaintiffs to bring this action seems dubious. At least one legal observer told the newspaper that the lawsuit was “merely an attempt to influence upcoming legislation,” a proposal by Republicans in the state legislature to adopt an LGBT anti-discrimination measure along the lines worked out last year in Utah, broadly exempting religiously-affiliated organizations and not covering public accommodations. LGBT rights organizations have already been strongly critical about the drafts of the legislation that have been circulating.

**KANSAS** – Kansas.com reported on December 4 that a sealed court ruling from 2013 belied claims by state officials that the Department for Children and Families was not taking account of sexual orientation in foster care and adoption cases. According to the article, Judge Kathleen Sloan “removed a 16-month-old child from DCF custody after finding the agency had not acted in the child’s best interest when it took him from lesbian foster parents he had lived with since he was 3 days old and recommended he be placed with a family that initially had declined to adopt him even though it had adopted his half-siblings.” Johnson County District Court Judge Sloan found that DCF placed “their concerns for the ‘gay/lesbian’ classification above concerns for the child’s best interest, contrary to established law.” The opinion referenced internal DCF documents showing that “agency officials sought to have the women’s foster care license revoked and talked about needing a negative psychological evaluation to support their case,” according to the article. Judge Sloan wrote, “In essence, DCF conducted a ‘witch hunt’ and made a concerted, purposeful effort . . . to obtain negative information . . . because they are homosexual women in a committed relationship.” DCF Secretary Phyllis Gilmore reacted to the release of the opinion by stating that a proposed audit of the agency would prove the claims untrue. A spokesperson for the agency refused to comment on the decision. Rep. Jim Ward (D-Wichita) said that the “abuse of power outlined in this opinion is grounds for termination of Secretary Phyllis Gilmore” and called on the government to “step up for the children of Kansas and end the systematic discrimination of non-traditional families.” That seems an unlikely result, given the firmly and openly anti-gay policies of Gov. Sam Brownback’s administration.

**LOUISIANA** – A transphobic employer will avoid a court hearing of a discrimination claim against it pursuant to a ruling by U.S. District Judge Carl J. Barbier in *Broussard v. First Tower Loan LLC*, 2015 U.S. Dist. LEXIS 165636, 2015 WL 8478573 (E.D. La., Dec. 9, 2015), consigning the matter to arbitration. Tristan Broussard, a 21-year-old transgender man, applied for a job with First Tower Loan (Tower), presenting as male, in early February 2013. He sought a position as a management trainee at Tower’s Lake Charles, Louisiana, office. He was interviewed on February 25 and was offered a job the same day by the manager of the office, Leah Sparks, in a phone conversation. Broussard accepted and reported for work on March 4, 2013. Sparks presented him with paperwork to complete, including a written “Employment Agreement” that subjects all disputes between the parties to arbitration and authorizes Tower to seek injunctive relief against any attempt to sue it in court. The Employment Agreement also states: “Signature by the employee on this contract constitutes an offer of employment by the employer, which offer is not accepted, and neither an employment relationship nor contract is formed or consummated until Tower signs this contract at its corporate headquarters in Rankin County, Mississippi.” Broussard signed the “Agreement” on March 4. A separate document, labelled “Acceptance Form,” which Sparks signed on behalf of Tower, stated that it was an offer of employment, and said “Please indicate your acceptance of our offer by signing your name at the bottom of this page.” It also said the terms of employment were governed by the separate “Employment Agreement” form. Broussard signed this. Sparks forwarded all of this paperwork to Tower’s corporate headquarters, where it was stamped as “received” on March 7. Sparks requested a form of identification from Broussard, who gave her his Louisiana driver’s license, which identified Broussard as female. When Sparks noted this discrepancy, Broussard explained that he is a transgender man.
Sparks communicated this information to her superiors. On March 11, a Tower vice president visited the Lake Charles office and gave Broussard a copy of the company’s dress code, stating that because Broussard was legally female, he had to dress as a woman to work at Tower. The VP presented Broussard with a written statement to that effect and told him that he would have to sign it to remain employed. Broussard refused and was fired. Ironically, his paperwork continued to churn through the process at corporate headquarters and was signed by the company’s Human Resources director around March 26, two weeks after Broussard’s termination. Broussard filed a Title VII sex discrimination charge with the EEOC, which found probable cause and authorized him to file suit against Tower, which he did on April 13, 2015, in the U.S. District Court, Eastern District of Louisiana. Tower filed suit against Broussard the same day in Rankin County (Mississippi) Chancery Court, seeking an order to compel Broussard to arbitrate; Broussard removed this to the U.S. District Court in Mississippi and then, upon his motion, transferred it to the Louisiana court that had his Title VII suit. The EEOC then moved to intervene as co-plaintiff, which Judge Barbier granted. Then Tower moved to compel arbitration and stay all court proceedings. Broussard argued that because his “Employment Agreement” with Tower was not signed by the HR Director until two weeks after he was fired, he was never formally bound by the “Employment Contract” arbitration provision, and the EEOC argued that the arbitration provision was unenforceable as a matter of public policy and, in any event, not enforceable against the EEOC, which was not a party to it and should be allowed to proceed with its lawsuit on Broussard’s behalf as a Title VII enforcement action. Sorting all this out, Judge Barbier decided that as a matter of Louisiana contract law Broussard had a contract when he accepted Sparks’ offer and commenced work, and he was thus bound by the arbitration provision. He found that 5th Circuit precedent rejects the idea that arbitration agreements covering Title VII claims are unenforceable on public policy grounds. And he found that although a stay of the EEOC action was not mandatory, it was nonetheless appropriate in the case because of the overlapping remedies sought by Broussard in his individual case and the EEOC in its action on his behalf as complaining party. Thus, the lawsuit is stayed and the case will go to arbitration. Now the question is whether an arbitrator who has any comprehension of transgender law will be appointed to decide this case. The Southern Poverty Law Center and the National Center for Lesbian Rights are involved in the case with local counsel on behalf of Broussard. Judge Barbier had previously denied a motion by Tower to dismiss the case for improper venue.

**MASSACHUSETTS** – Superior Court Justice Raymond V. Veary, Jr., issued a preliminary injunction on December 1 in **AIDS Support Group of Cape Cod, Inc. v. Town of Barnstable**, Civ. Action No. BACV2015-00586. Finding that a needle access program “saves lives,” the injunction allows the plaintiff to continue administering the program in the town of Barnstable despite efforts by the town to shut it down. Judge Veary wrote that a 2006 Massachusetts law, “An Act Relative to HIV and Hepatitis C Prevention,” which was passed to enable injection drug users to protect themselves from serious infectious conditions by being able to obtain clean injecting instruments, “clearly marked a change in the Legislature’s approach to intravenous drug users: a shift away from criminal enforcement and toward the promotion of health.” Justice Veary found that the 2006 act was intended to allow the kinds of activities described in the plaintiffs’ complaint seeking injunctive relief.

Gay & Lesbian Advocates & Defenders and the AIDS Action Committee of Massachusetts represented the AIDS Support Group during a court hearing at which relevant experts testified in support of the program.

**MICHIGAN** – The Michigan Court of Appeals held in **Kolailat v. McKennett**, 2015 WL 9257953 (Dec. 17, 2015) that it was precluded by precedent from applying the doctrine of equitable parent to a lesbian co-parent of a child born during her non-marital relationship with a same-sex partner. The Michigan Supreme Court recognized the concept of equitable parent in **Van v. Zahorik**, 460 Mich. 320, 597 N.W.2d 15 (1999), building upon prior court of appeal decisions in situations involving a husband who was not the biological father of a child born to his wife during the marriage but had formed a parental relationship with the child. In **Stankevich v. Milliron**, 2015 Mich. App. LEXIS 2191 (Nov. 19, 2015), the court of appeals had extended the concept to *married* same-sex couples in light of the requirement under **Obergefell v. Hodges** to treat married same-sex couples equally to married different-sex couples, but the court held that as Rola Kolailat was not married to Lindsey McKennett when the child was born, and had never adopted the child, she could not avail herself of the equitable parent doctrine to seek custody or visitation rights. Kolailat argued that the Michigan Supreme Court’s limitation of the equitable parent doctrine to the marital context in **Van** was “flawed” because it “failed to recognize that the overriding consideration in a child custody action is the best interests of the child.” She also argued that this approach would violate the equal protection rights of an “illegitimate” child born in these circumstances. But the court insisted
that as long as Van is a binding Michigan Supreme Court precedent, the court of appeals is without authority to provide relief to Kolailat. The ruling was issued per curiam by a three-judge panel.

MICHIGAN – In Reed v. South Bend Nights, Inc., 2015 U.S. Dist. LEXIS 170459, 2015 WL 9302392 (E.D. Mich., Dec. 22, 2015), another frustrating case in which a federal district judge completely ignores the recent EEOC decision finding sexual orientation discrimination claims actionable under Title VII, U.S. District Judge Nancy G. Edmunds nonetheless refused to grant summary judgment to the employer on a sexual orientation/gender stereotype claim by a lesbian plaintiff. Luckily for the plaintiff, her factual allegations provided a firm basis for Judge Edmunds to conclude that a plausible gender stereotyping claim had been stated. Plaintiff Tracy Reed is a lesbian who is married to a woman. She asserted in her complaint that she “is female and does not conform to traditional gender stereotypes, in terms of her sexual orientation, mannerisms, and behavior.” She began working in the housekeeping department of the defendant’s Best Western motel on September 26, 2013, and was subsequently discharged by her supervisor, Chelsea Sparks. Sparks evidently took a dislike to Reed after hearing her make statements revealing that she was a lesbian. Sparks fired her, assertedly for leaving work without permission (she had left to deal with a family emergency at a time when Sparks was not on the premises) and failing to “fit as part of the team.” Reed alleged that Sparks had stated that she didn’t “feel comfortable with my sexuality” and a co-worker stated that Reed’s “being gay was disgusting” and that she was “firing her.” The co-worker also said that Sparks had said to her that Reed “was crazy and acted too manly” and Sparks “didn’t want to work with her.” At a deposition, Sparks testified that Reed “dressed more like a male than a female.” She also stated that Reed’s demeanor was a “little more mannish” and she said Reed was not a “good fit” because of “the way she carried herself and the way she spoke and she was loud in the laundry room. She used profanity, a lot of profanity, and she was loud.” In other words, Sparks’ reaction to Reed sounds quite familiar to anybody who has read the Supreme Court’s Price Waterhouse v. Hopkins decision, in which the Court upheld a Title VII sex discrimination cause of action for Ann Hopkins, who was perceived by partners voting against her promotion as too loud and profane and mannish in her grooming, dress, and behavior. On that basis, Judge Edmunds found that it was consistent with 6th Circuit precedent to reject the summary judgment motion. The defendant argued that it had valid reasons to fire Reed, but Edmunds found that “there are genuine issues of material fact as to whether the proffered reasons for Plaintiff’s termination were a mere pretext for sex discrimination.”

MICHIGAN – Finding that the Supreme Court’s ruling in Obergefell rendered moot a pending marriage recognition lawsuit by Bruce Morgan and Brian Merucci, U.S. District Judge Gordon Quist ruled on November 3 that the couple could not get an award of legal fees to compensate for what they spent on their case. Morgan and Merucci married in 2013 in New York. They sought $30,000 in legal fees for expenses associated with litigating against the state of Michigan for refusing to recognize their marriage. Judge Quist opined that plaintiffs cannot obtain relief if their case becomes moot before a judgment is issued; only the issuance of a judgment or a formal settlement could provide the basis for claiming to be a prevailing party on a civil rights claim. Mlive.com, a website reporting on this development, mentioned that another U.S. District Judge in Detroit, Arthur Tarnow, had reached the same conclusion in a “virtually indistinguishable case there.”

MISSISSIPPI – U.S. District Judge Sharion Aycock granted summary judgment to the defendants on a lesbian employee’s equal protection claim in Hurley v. Tupelo Public School District, 2015 U.S. Dist. LEXIS 170625, 2015 WL 9424147 (N.D. Miss., Dec. 22, 2015). Peggy Hurley, who had been employed by the Tupelo Public School District as a food service manager, claimed that she was discriminated against because of her sexual orientation, including having her pay cut, not being considered for open positions in the District, and being subjected to a hostile work environment. Because there were no applicable statutes forbidding sexual orientation discrimination, Hurley’s claim was based on the Equal Protection Clause of the 14th Amendment. “Although the Supreme Court has not recognized sexual orientation as a suspect classification,” wrote Judge Aycock, “a State violates the Equal Protection Clause by creating a ‘disadvantage for homosexuals’ without a ‘rational relationship to a legitimate government aim,’” citing Johnson v. Johnson, 385 F.3d 503 (5th Cir. 2004), which in turn relied on Romer v. Evans, 517 U.S. 620 (1996). “In this case,” continued the judge, “the Defendants do not argue that any legitimate government aim exists because they contend that they did not discriminate against or create a disadvantage for Hurley in the first place.” After a thorough scouring of the factual record, Judge Aycock agreed with the defendants. She found that the pay cut occurred because Hurley’s position was eliminated when the school to which she was assigned closed, and she was hired as a “floater” at a lower rate with less responsibility. She did apply for several open positions at different schools, but
CIVIL LITIGATION

in each case the person selected had better credentials or Hurley lacked an essential credential for the position. Her claims of unequal treatment fell short for lack of appropriate comparators, and the court found that her allegations of hostile environment fell far short of the standard set for such cases. Hurley had also asserted a state tort claim of intentional infliction of emotional distress, but Judge Aycock found that she had “only alleged job-related conduct” and had “not alleged any conduct that arises to the level of ‘extreme or outrageous’ as required to support her claim.” Conduct that “falls within the bounds of an ordinary employment dispute” is not ordinarily sufficient to support an intentional infliction of emotional distress claim. Thus, the court granted summary judgment to the school district. Attorney Luther C. Fisher, IV, of Oxford, Mississippi, represented Hurley.

MISSOURI – The opinion in In re R.M.A., 2015 Mo. App. LEXIS 1271, 2015 WL 8742999 (Mo. Ct. App., W.D., Dec. 8, 2015), may be entertaining to students of Missouri procedure, but casts no light on the underlying merits of a claim by a transgender school student to the right to use boys restrooms and locker rooms consistent with his gender identity. When the local school board denied R.M.A. this access, he filed an action in the Circuit Court of Jackson County, seeking a writ of mandamus commanding the defendants to allow him and “all other transgendered students of the Blue Springs R-IV School District full and equal access to the appropriate restroom, locker room, and any other facilities segregated by sex as is consistent with their gender identity.” The trial court evidently proceeded without regard to procedural niceties to address the merits after holding an oral argument based on stipulated facts. On March 5, 2015, the trial judge Jack R. Grate issued a “judgement” holding that R.M.A. has “no existing, clear, unconditional legal right which allows R.M.A. to access restrooms or locker rooms consistent with R.M.A.’s gender identity.” The court concluded that a writ of mandamus was not appropriate because “administrative remedies” remained available to R.M.A., presumably through the state education department or a Human Rights Commission proceeding. R.M.A. appealed. The court of appeals decided it had no jurisdiction to hear an appeal on the merits, because the matter was not handled properly at the trial level. Judge Cynthia L. Martin wrote, “Here, there was no summons issued by the trial court nor any grant of a preliminary order in mandamus. Rather, the parties and the trial court appear simply to have disregarded Rule 94, Boresi, and the cases addressing Boresi that have plainly counseled trial courts and parties about the importance of following the procedures set forth in Rule 94. The trial court’s denial of the Petition affords R.M.A. no more recourse than would have been available to R.M.A. had the Petition been denied shortly after it was filed. R.M.A. has the right to file the Petition in a higher court. R.M.A. does not, however, have the right to appeal the trial court’s denial of the Petition.” The court’s determined avoidance of discussion of the merits may reflect relief that it had a way to get rid of this appeal procedurally without having to express a view as to the merits. We already know what the U.S. Department of Education thinks about this. . .

NEW YORK – U.S. District Judge Jack B. Weinstein confirmed a report and recommendation by U.S. Magistrate Judge Viktor V. Pohorelsky to deny an award of attorneys’ fees to Rocketball Ltd., owner and operator of the Houston Rockets basketball team and a defendant in a sexual orientation discrimination case that had won dismissal of the claims against it upon a determination that it was not an employer of the plaintiff. Tate v. Levy Restaurant Holdings, LLC, 2015 WL 9076230 (E.D.N.Y., Dec. 15, 2015). Tate is an employee of Levy Restaurant Holdings, which has a catering contract with the Barclays Center in Brooklyn, home of the Brooklyn Nets basketball team. Tate was assigned to provide catering service in the locker room of the visiting Houston Rockets team, but

a permanent injunction in Ferguson v. Jonah on December 18, incorporating an agreement by the parties that JONAH would entirely shut down its operation and that its founder Arthur Goldberg and counselor Alan Downing would refrain from performing any form of conversion therapy in New Jersey. The Southern Poverty Law Center, which provided representation to JONAH’s victims, issued a press release on December 18 announcing the action. Under the settlement worked out by the parties after the jury verdict, JONAH will pay the full $72,400 in damages awarded by the jury as restitution and compensatory damages to the plaintiffs, and will pay $3.5 million in legal fees. “The plaintiffs agreed to accept an undisclosed portion of that award,” wrote SPLC, “but the defendants will be liable for the full amount if they violate the agreement.” JONAH was given 30 days to shut down after the order was entered and required to remove its websites and online listservs from the internet, liquidate its assets, and permanently dissolve as a corporate entity within six months.

NEW JERSEY – A trial jury having found on June 25 that JONAH (Jews Offering New Alternatives for Healing) had violated New Jersey consumer fraud laws by peddling bogus conversion therapy to desperate parents who wanted to “cure” their children’s homosexuality, New Jersey Superior Court Judge Peter F. Bariso, Jr., granted
when he arrived he claims to have been taunted as a “faggot” by Houston team members, some of whom demanded that he be removed from the locker room.

Tate left at the request of a Brooklyn Nets staff member and reported the incident to his manager at Levy, and the matter was taken up with the Nets and the union representing Levy’s workers. Tate was assured that appropriate steps were being taken and that NBA commissioners and the Rockets had been advised of the incident, but Tate asserts that after this incident his work assignments were curtailed, he was denied overtime opportunities, and he was not given desirable assignments that he had previously received at the Barclay Center. He claimed those assignments were being given to heterosexual employees and those who had not complained about discrimination. A co-plaintiff in the case, Iusaset Bakr, became Tate’s new supervisor and noticed the disparity in assignments. After she complained to management, she found her own assignments curtailed and she was ultimately discharged for “insubordination.” Tate and Bakr sued claiming a violation of the NY City Human Rights Law, naming the Houston Rockets (Rocketball) as a co-defendant with Levy. Rocketball moved to be dropped from the case, arguing it could not be sued for employment discrimination under the NYC statute because it was not the employer of either plaintiff. Tate and Bakr contended that Rocketball was a “joint employer” with Levy. Judge Weinstein granted Rocketball’s motion, but stayed dismissal for 60 days to allow plaintiffs to conduct discovery on the issue of joint employer. The discovery period was extended at plaintiffs’ request and they filed a motion seeking reconsideration of the ruling, but it was denied and dismissal of claims against Rocketball became final. Rocketball then moved for attorneys’ fees, claiming that the claims against it were not meritorious and it should be compensated for its cost of litigating the motion to dismiss. The magistrate judge recommended against awarding fees, finding that Judge Weinstein’s willingness to allow further discovery on the joint employer issue showed that the claim was not totally frivolous, and rejecting Rocketball’s arguments that plaintiffs had engaged in vexatious litigation. Prevailing defendants don’t always get attorneys’ fees in discrimination cases. Courts normally exercise discretion to award fees only in limited circumstances where plaintiffs have engaged in vexatious and bad-faith conduct, which was not found here. Judge Weinstein noted that Rocketball had not filed any objections to the Magistrate’s recommendation, which was issued on November 16, 2015. Although it is not mentioned in the opinion, presumably the discrimination case against Levy, the employer, continues.

NEW YORK – Last March 2, N.Y. County Supreme Court Justice Arthur F. Engoron ruled in Gellenbeck v. Whitton, 2015 N.Y. Misc. LEXIS 637, that a gay couple dissolving their partnership could have the court determine what was in the best interest of their dog in deciding who would get custody of the animal. Then, in a ruling issued on October 26, 2015, the judge said that he had reconsidered and decided, based on various precedents, that the “best interest” standard used in child custody disputes could not be employed in this case, because a dog is “property.” Docket No. 154365/2014, NYLJ 1202741935478 (N.Y. Sup. Ct., N.Y. County, Oct. 26, 2015). Thus, he would have to decide under property law principles which of the men could claim ownership of the dog. On December 15, Justice Engoron issued his ruling, as reported in the New York Post the next day. Characterizing this as “maybe the very hardest if not the hardest case to decide,” the judge declared that the dog is “co-owned.” Doug Gellenbeck’s lawyer, David Wolf, told the judge that he thought “co-parenting” would not work because the two men “don’t get along,” reported the Post. Michael Whitton’s lawyer, Daniel LoPresti, said they expected a ruling awarding the dog to one or the other of the men. But the judge said that it was up to them to make a decision about the dog. “I hope, despite some pessimism right now, that things can be worked out,” he said, indicating that if they could not work something out, he had authority, as with any disputed property, to order that the dog, Stevie, be put up for auction. He said, “You can’t steal him, you can’t take him away forever, you can’t hide him. If you do, I assume the other side will come back and seek relief or you can go to the police. I said in my opening remarks that I often wish there was a jury and this was one of those times. It would be easier and less pressure on me.” Gellenbeck had claimed that the dog belonged to him because it was a present for his 40th birthday from Whitton. Whitton pointed out that he was the documented “adopter” of the dog, and it was just a coincidence that the date of the adoption was the day before Gellenbeck’s birthday.

NORTH CAROLINA – U.S. District Judge Terrence W. Boyle refused to grant summary judgment to the employer on an employee’s hostile environment Title VII claim in Davis v. Gregory Poole Equipment Co., 2015 U.S. Dist. LEXIS 164181 (E.D. N.C., Dec. 8, 2015). Plaintiff Danny Davis made numerous complaints to supervision about a co-worker, David Crum, concerning Crum’s sexually-charged behavior towards Davis, including unwanted touching and an attempted kiss. Davis, who was discharged assertedly for poor work performance, claimed that the discharge was in retaliation for his complaints, and also pled “negligent supervision/retention.” Judge Boyle granted summary judgment to the
company on the retaliation and negligence claims, finding that Davis’s allegations fell short of meeting the causation test as to the first. On negligent supervision, North Carolina recognizes the tort, but Davis fell short on establishing the first element – commission of a tortious act against the plaintiff by the negligently-supervised employee – or that the employer had reason to anticipate that the employee would commit a tortious act based on his past conduct. However, Judge Boyle found that the elements of a hostile work environment had been adequately pled to create material fact issues precluding summary judgment. “Here,” he wrote, “the evidence indicates that there is a genuine issue of material fact as to whether the conduct at issue was directed toward plaintiff because of his gender. A number of facts from the record support this conclusion, including the attempted kiss, Crum’s report that he is disgusted by the female body, Crum’s girlfriend’s fear that Crum would leave her for a man at work, and the repeated physical contact by Crum at work, among others.” Judge Boyle also found that considering the totality of circumstances alleged by Davis, there was a genuine issue of fact concerning the “severe and pervasive” element of a hostile environment claim. “Plaintiff claims the offending conduct happened ‘hundreds’ of times, that the contact was often physical and sexual in nature – including an attempted kiss as well as a physical attack – and that he changed his work habits as a result by requesting not to work with Crum and adapting his arrival and departure times from work to avoid Crum. Accordingly, the Court finds that there is a genuine issue of material fact as to whether Crum’s actions constitute sufficiently severe and pervasive conduct.”

TEXAS – A notably unsympathetic U.S. Magistrate Judge, Don D. Bush, issued a report and recommendation advising the district court to grant defendants’ motion for summary judgment in K.S. b/n/f/ Thomas v. Northwest Independent School District, 2015 WL 9450853 (E.D. Tex., Sherman Div., Dec. 1, 2015), a Title IX claim brought on behalf of an 11-year-old boy who claimed to have been subjected to unlawful gender-based harassment at Tidwell Middle School. As summarized by Judge Bush, “Plaintiffs allege that K.S. was verbally harassed every day because he had breasts like a girl, was pigeon-toed and flat footed, walked ‘funny’, and was called gay. Plaintiffs also allege that K.S. was touched on his breasts by other students.” Bush broke down his analysis along two lines, first determining that the allegations of the complaint did not meet the high bar for unlawful gender-based harassment claims, and second that the school district was not deliberately indifferent to the incidents that were brought to its attention. Almost all of the alleged harassment was attributed to fellow-students, and the court found that K.S. did not invariably report all incidents to school authorities. Furthermore, the school investigated many of the incidents, and imposed discipline on some students for their actions. “Even if conduct is inappropriate and immature and may have hurt a student’s feelings and embarrassed him, that does not necessarily make it severe, pervasive, and objectively unreasonable for purposes of Title IX analysis,” wrote Bush, noting circuit precedent stating that “peer harassment is less likely to support liability than is teacher-student harassment.” The court was unimpressed by the allegations that enduring continuing harassment resulted in K.S. developing physical symptoms (stomach problems) leading to absences and, ultimately to his parents’ decisions that they should move out of state to a different school district. Finding that K.S. had not been “barred access to educational opportunity or benefits” and that the school district had not been “deliberately indifferent” to his grievances, Bush remarked that K.S. earned grades at about the same level after the alleged harassment began as he had prior to the first incidents. There is a strong air about the opinion that the judge thought K.S. was overly sensitive and should have “manned up” to the situation. But then, this ruling emanates from Texas, where

NORTH CAROLINA – A group of North Carolina attorneys have joined together to file a legal challenge in the U.S. District Court in Asheville (W.D.N.C.) challenging the constitutionality of Senate Bill 2, a measure enacted after the 4th Circuit’s marriage equality ruling in 2014 to allow local magistrates with objections to same-sex marriage to avoid having to issue licenses to same-sex couples. Ansley v. State of North Carolina, Case No.: 1:15-cv-274. Plaintiffs, same-sex couples, assert standing as taxpayers to challenge a state law that authorizes discrimination by state employees in violation of the Due Process and Equal Protection Clauses of the 14th Amendment. They point out that in order to comply with the law, taxpayers are incurring unnecessary expenses to shift personal around between different counties in order to insure that same-sex couples can get marriage licenses in every county regardless of the religious objections of paid public officials who have been authorized to refuse to issue the licenses based on their personal beliefs. Proponents of the statute presumably engineered the coverage requirement to avoid claims that they were creating undue barriers to the exercise of 14th Amendment rights by couples seeking marriage licenses. The plaintiffs claim that as taxpayers they should not be required to fund discrimination against them.
the state government ardently believes in junk science and “open carry” for weapons, and in defunding HIV-AIDS testing and education programs carried out by non-profit organizations that have been subjected to slanderous misrepresentation of their activities. There; we got that off our chest!

WISCONSIN – When U.S. District Judge Barbara Crabbe issued her ruling on marriage equality on Friday, June 6, 2014, the Milwaukee County Clerk announced that the County Courthouse would be opened on Saturday, June 7, 2014, so that same-sex couples could obtain marriage licenses while the state’s stay petition was pending. Robert C. Braun, a religiously-inspired opponent of marriage equality, determined to protest against the marriage equality activity at the Courthouse, together with his wife and a friend. They showed up with their signs to find that there were also pro-marriage equality demonstrators. A police officer who was managing the situation required Braun and his friends to stand apart from the others and not enter the courthouse or block access when the officer observed arguments and potential confrontations going on. Braun claimed that the county clerk had specifically told him that there was no reason why he could not enter the courthouse, but the police officer said it was open solely to issue licenses and Braun had no business inside. Braun and his group protested for a while and then left as more than seventy same-sex couples received marriage licenses and many were married at once, some in the park adjacent to the courthouse. Braun subsequently filed this lawsuit against two Milwaukee police officers, Byron Terry and Reynaldo Herrera, claiming that the spatial restrictions placed upon him violated his 1st and 14th Amendment rights. On November 30, U.S. District Judge J.P. Stadtmueller granted the defendants’ motion for summary judgment, finding there was no validity to Braun’s constitutional claims based on uncontested facts. The defendant police officers had, in the court’s view, imposed reasonable time, place and manner restrictions to preserve public order and avoid confrontations, narrowly tailored for that purpose. *Braun v. Terry*, 2015 WL 7734126 (E.D. Wis., Nov. 30, 2015).

CRIMINAL LITIGATION NOTES

U.S. COURT OF APPEALS, 11TH CIRCUIT – The court rejected an ineffective assistance of counsel appeal by an HIV-positive man who was seeking to have his sentence vacated or set aside or corrected. As is sometimes the case with unpublished decisions, the *per curiam* here does not provide any recitation of the facts or even a description of the crimes of which the petitioner was convicted. *Anderson v. U.S.*, 2015 WL 7740615 (Dec. 2, 2015). However, one surmises from the discussion that Anderson felt his trial and appellate counsel had not handled the issue of his HIV status appropriately. The court of appeals disagreed, affirming the trial court’s rejection of his arguments. “Anderson has not shown that his sentencing counsel provided deficient representation by failing to rebut the Government’s statement that he never disclosed his HIV status to an undercover officer because the Government did not provide false information to the court when it said that Anderson withheld his HIV status from the undercover officer during their communications. Anderson never claimed that he affirmatively communicated his HIV status to the undercover officer, and the Government’s argument relied on a factual assertion that he withheld his HIV status by not affirmatively communicating it. Because the Government did not provide materially false or unreliable information, Anderson’s sentencing counsel did not render ineffective assistance by failing to counter the alleged due process violation, because a competent attorney could have chosen to focus on other arguments for a lower sentence rather than questioning the Government’s interpretation the conversations between Anderson and the undercover officer.” Anderson also faulted his counsels’ failure to object to the Government’s claim that he carried an “extremely communicable” disease and their failure to present evidence about the minimal risk of HIV transmission. The panel pointed out that the sentencing court never indicated that it thought HIV to be “highly communicable,” and there were many other aggravating factors taken into account at sentencing. The court also found that several of Anderson’s claims concerning HIV had already been rejected on direct appeal of his sentence.

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – The court sustained the court martial conviction of Aviation Ordnanceman Airman Jeffrey D. Sager on charges under Article 120 of the Uniform Code of Military Justice in *U.S. v. Sager*, 2015 CCA LEXIS 571 (Dec. 29, 2015). Article 120 prohibits, inter alia, non-consensual sexual contact. Sager was charged with manipulating the penis of a sleeping serviceman and then performing oral sex to ejaculation on the man. The complainant, Airman (AN) TK, had been on shore leave in Yokosuka, Japan, and connected with Sager and other sailors at a bar. The group left the bar around 11 pm and crashed at one of their apartments. Others who were present described AN TK as being intoxicated, and in a statement to a Naval Investigator Sager said that AN TK was “plastered,” although he later modified that description to say
AN TK was stumbling and slurring his words “a little bit” while walking to the apartment where, upon arrival, AN TK vomited into a bucket. AN TK “passed out” on a futon; he testified that he later awoke to Sager manually stimulating AN TK’s penis and, after it became erect, performing oral sex on him. AN TK testified that he kept his eyes closed the entire time and never responded to what Sager was doing. “In describing why he did not respond during the sexual encounter,” wrote the court, “AN TK stated he was frustrated, confused, and ‘wasn’t really sure what was going on.’ He described himself as ‘too intoxicated,’ and that he was unable to move, talk, or think of a way out of the encounter.” After ejaculating, he fell asleep. When he awakened the next morning, Sager had already left. AN TK later called his mother and told her what had happened, and she advised him to report the incident. Subsequent DNA testing found traces of Sager’s DNA from saliva on AN TK’s shorts together with AN TK’s semen. Sager’s account was different. He testified that he and AN TK laid down on the futon together after AN TK had vomited and that they had an “intimate” conversation that led Sager to believe AN TK would be open to sexual contact, so he decided to “test the waters” by putting a hand on AN TK’s stomach; encountering no resistance, he pulled AN TK’s penis out of his underwear and began to stimulate it manually, performing oral sex when it became erect. According to this testimony, AN TK was awake throughout. In appealing his conviction, Sager raised various technical objections to the way the panel was convened and composed, as well as contesting whether the activity was consensual, but the appellate court found upon reviewing the record that the court martial members could have found beyond reasonable doubt that AN TK was not capable of consenting to the sexual contact, sustaining the conviction.

CALIFORNIA – In the course of an opinion denying a petition for a writ of habeas corpus filed by a man who was convicted for various sex crimes towards male teens, U.S. District Judge Larry Alan Burns had to deal with the petitioner’s claim that the trial court violated his constitutional rights by admitting evidence about the petitioner’s homosexual orientation as well as a DVD depicting adult homosexual sex found in petitioner’s home. Poizner v. Frauenheim, 2015 U.S. Dist. LEXIS 168410 (S.D. Cal., Dec. 15, 2015). Prior to trial, Poizner filed a motion in limine seeking to exclude evidence of his sexual orientation, and specifically that he had told the boys or a parent that he was gay or bisexual. The prosecutor successfully argued that the evidence was relevant to the petitioner’s intent, sexual interest and motivation to be around boys, and that he had used statements about being a gay man who was interested only in stable adult gay relationships as a way of gaining parents’ trust to be allow to be around their sons. “There is no question that evidence of a defendant’s sexual preference can be highly prejudicial if it is irrelevant to the charged crime,” wrote Judge Burns. “However, exclusion is required only where the evidence’s unfair prejudice substantially outweighs its probative value,” he continued. (Emphasis in original.) “We perceive no manifest abuse of discretion in the trial court’s admission of this evidence. In this case, Poizner’s homosexuality was not collateral to the issues. Poizner’s remark to Austin’s mother about his sexual preference and assurance he was not attracted to teenagers or boys was part of Austin’s trial testimony, and it tended to show Poizner’s plan or scheme to reassure parents and gain access to the boys while concealing his true intentions. This is a permissible use of such evidence, no matter how the evidence may reflect on the defendant.” The court found that even if there had been an abuse of discretion, this was a “harmless error” situation because the prosecution did not emphasize it in closing arguments. “At no point did the prosecutor make remarks suggesting that Poizner’s sexual preference disposed him to a sexual desire for adolescent boys,” wrote Burns. “Indeed, … the trial court gave a curative instruction to the jury that it was not to consider Poizner’s sexual preference on the question of his disposition or inclination to commit the charged offenses. We presume the jurors followed the instruction absent any contrary indication.” Furthermore, “the evidence against Poizner is abundant and strong,” so it is not likely that exclusion of this evidence would have changed the verdict. As to the contested DVD, whose cover pictured very young-looking men, the court found no error in its admission. The trial judge had stated, “But there’s no question that the defense in this case has been to challenge the credibility of each of these boys, that they’re making this up for all sorts of various reasons, to even challenge the credibility of Mr. Araway, and that if the defendant’s a homosexual, he’s a homosexual interested in adults, not children, and this video, his possession of it, appears to support an inference that he does have a sexual interest in young-looking men. They may be adult men, but they look like teenage boys. How they look – I don’t particularly like the idea of the jury’s seeing the sex acts, but looking at the age of the boys in this video or on the cover of the video is unfortunately very probative.” The trial judge instructed the jury that it could only consider Poizner’s sexuality and possession of the video “for the limited purpose of determining Poizner’s intent and whether he had a plan or scheme to commit the charged offenses.” Burns concluded, “Poizner’s homosexuality and interest in homosexual pornography that depicted young men who looked like teenaged boys engaging in sex was relevant to that inquiry.”
Criminal Litigation

Florida – Miami-Dade Circuit Judge Richard Hersch imposed a prison sentence of just over 11 years on Andras Janos Vass under Florida’s human trafficking law, which went into effect in 2012. According to the Miami Herald (Dec. 15) report on the December 15 sentencing hearing, this was the first case in which the law was used to prosecute somebody for trafficking gay men for sex. The article related the testimony of one of the victims, a 24-year-old gay man from Hungary who had been working as an escort, advertising on GayRomeo.com. He and others were contacted by Vass and Vass’s two business partners and promised lucrative employment in the United States at “legitimate” jobs. They were taken to a one-bedroom apartment in New York where eight men were held captive and required to “perform sex acts around the clock” with paying customers of the business, called “Never Sleep Inc.” Another victim’s statement was read to the court: “I was under their control, all day, all night. They used me like I was a machine. I was not allowed to be tired. I was not allowed to be sad.” Then the men were relocated to Miami for more of the same. Vass claimed that he had actually been victimized by the other two men (who are awaiting trial), including being forced to marry one of them. Perhaps the judge believed him; the offenses charged against him could have yielded the government had failed to comply with the statute, which required that such a request be communicated to the defendant so that he would have the opportunity to appear in opposition. Perhaps more to the point, the government’s proposal failed to allege facts that would support the necessary finding under 42 U.S.C. sec. 14011, that the defendant’s conduct at issue in the case involved “sexual assault that pose a risk of transmission … of sexually transmitted diseases to the victim as the result of the assault,” or that the “victim” had requested testing. “Even if the government had made the showings required under the statute,” wrote Quarles, “the Court is not required to order testing. The sexual acts in this case occurred several years ago, and the government has presented no reason to suspect the transmission of HIV or AIDS. Thus, mandating testing at this time does not appear to be a necessary precaution to protect Jane Doe’s health.”

Maryland – A gay man who pled guilty to felony robbery charges suffered denial of his Petition for Writ of Error coram nobis, which was affirmed by the Court of Special Appeals of Maryland on December 17 in Mendoza v. State, 2015 WL 9257157 (not officially published). Wayne Mendoza, a citizen of Trinidad & Tobago, already had a prior criminal record at the time of his guilty plea and was subject to deportation, but he had obtained temporary relief under the Convention Against Torture (CAT) based on the likelihood that he would suffer torture in Trinidad because of his sexual orientation. In this case, he is arguing that his guilty plea should be set aside on the ground that he was facing a “significant collateral consequence” (i.e., deportation) due to the conviction. The Court of Special Appeals agreed with the Circuit Court that this ground as invalid. So long as the Department of Homeland Security continued to believe that Mendoza faced potential torture if returned to Trinidad, he would not be deported. Furthermore, because of his prior criminal record, he would be subject to deportation even if he stood trial and was acquitted of the robbery charges in this case (which would seem unlikely, given his knowing plea after a recitation of the facts of both robberies during his plea hearing). Part of the court’s opinion was devoted to rebutting Mendoza’s argument that his plea was not knowing and voluntary.

Pennsylvania – A Philadelphia jury convicted Kathryn Knott on a count of simple assault and reckless endangerment for her part in a violent attack on a gay couple in Philadelphia, but acquitted her on four counts, including aggravated assault on each of the victims. Knott testified that she never shouted slurs or threw a punch. Her two co-defendants are on probation after pleading guilty, according to an Associated Press report of December 18. Other witnesses testified that Knott had thrown a punch during the group attack. One of the victims suffered a broken jaw in the incident. The incident led the city to expand its hate crime ordinance to cover sexual orientation.

Vermont – The Vermont Supreme Court ruled in State v. Goewey, 2015 VT 142, 2015 WL 8540364, 2015 Vt. LEXIS 121 (Dec. 11, 2015), that a trial judge’s use of the term “sodomy” to describe the male defendant’s performance of oral sex on a young man was not evidence of personal bias.

January 2016 LGBT Law Notes 31
by the judge, but merely her attempt to characterize the nature of the offense charged. “Defendant suggests that the inherently negative historical connotations underlying the term sodomy renders its use impermissible during sentencing,” wrote Justice Eaton for the court. “Defendant focuses on the origin of the term, which is derived from the Old Testament where the Kingdoms of Sodom and Gomorrah were unredeemably sinful and were destroyed after divine judgment. Genesis 19:23–26 (King James). Defendant also focuses on the term’s modern definition, which includes a common thread of moral judgment based on the sinfulness or unnatural nature of homosexual acts. See, e.g., Black’s Law Dictionary 1396–97 (7th ed.1999) (defining sodomy as oral or anal copulation between humans, especially of the same sex, and also termed ‘abominable and detestable crime against nature; unnatural offense’). Defendant contends that by using the term, the trial court expressed an inherently negative judgment on non-coital and homosexual intercourse. The trial court’s use of the term ‘sodomy’ was in the context of describing the nature of defendant’s relationship with the victim, and not related to the fact that both parties were male. The trial court stated that the relationship between defendant and victim ‘culminated in nothing less than [the victim] being repeatedly sodomized by [defendant]’. When the use of the term was objected to by the State, the trial court clarified that ‘the court’s definition of sodomizing a child, is engaging in oral sex.’ The term “sodomy” remains in use in the criminal codes of several states. Despite this, given its historical application, continued use of the term in connection with sexual practices can carry a pejorative connotation. It is clear from the record here that the judge’s reference to sodomy, which was a passing one, was not intended to convey a personal religious or moral judgment concerning same-sex sexual practices. On the contrary, the judge intended the comment merely to describe the sexual acts using what she felt was ordinary parlance, as she quickly indicated by referring to the Webster’s Dictionary. The comment may be viewed as inappropriate, but it was not used with moral or religious intent. Indeed, defendant’s attorney did not find the comment objectionable at the time it was made. Likewise, we do not now find the use of the term in the context of this case as one that could reasonably be construed as basing the sentence, at least in part, on religious beliefs or moral judgments. Thus, we do not find the sentencing judge relied on improper factors in imposing the sentence.”

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT – In a per curiam decision that “does not constitute binding precedent,” the Third Circuit affirmed summary judgment against gay inmate Timothy T. Fletcher on his claims of failure to protect and denial of equal protection in Fletcher v. Phelps, 2015 U.S. App. LEXIS 22203, 2015 WL 9267601 (3d Cir., December 21, 2015). Circuit Judges Julio M. Fuentes and Thomas Ignatius Vanaskie and Senior Circuit Judge Anthony Joseph Scirica sustained the decision of United States District Judge Sue L. Robinson (of the District of Delaware) but adopted different reasoning under the standards of Farmer v. Brennan, 511 U.S. 825, 834 (1994). Sergeant Gladys Little had moved Fletcher’s cell repeatedly for safety reasons when he faced anti-gay harassment from cellmates, eventually placing him in protective custody with cellmate Wilkerson. Fletcher told Little he remained in fear. She interviewed Fletcher and Wilkerson separately (and each accused the other of sexual harassment). She threatened them with “isolation” if they did not desist from “bickering.” Later a fight ensued that injured Wilkerson, and which Fletcher claimed occurred as he resisted a rape. Under the two-part Farmer test (awareness of substantial risk of harm and deliberate indifference to that risk), District Judge Robinson found a jury question on the issue of awareness of the risk because it was “undisputed that, although plaintiff had been moved to a new cell, he continued to fear an assault by his new cellmate because of his sexual orientation.” This decision is

CRIMINAL / PRISONER LITIGATION
found at 2013 U.S. Dist. LEXIS 164831 (D. Del., November 20, 2013) and reported in Law Notes (December 2013) at page 433. Judge Robinson found no jury question, however, on the second prong, writing that Little’s moving of Fletcher, interviewing the inmates separately, and obtaining assurances was “reasonable” and not deliberate indifference. The Circuit flipped these points. It found a jury question on the second prong (whether it was reasonable and sufficient to respond by threatening isolation if inmates did not stop bickering) – citing Hamilton v. Leavy, 117 F.3d 742, 748-49 (3d Cir. 1997) (reasonableness of response by defendants who were aware of inmate’s risk of harm was jury question) – but it held that summary judgment should have been granted in Little’s favor on the first prong (whether the record supported a finding that she knew about the risk). The Circuit wrote that it “cannot conclude” that there was an issue of fact about Little’s knowledge, because the evidence “falls far short” of establishing that Little knew. Fletcher was already in protective custody and he and his cellmate were accusing each other. Although an official may be deliberately indifferent to risk of harm to an inmate in protective custody – Bistrian v. Levi, 696 F.3d 352, 368 (3d Cir. 2012) – there is “scant evidence” here that Little remained in danger other than his allegations; and the surrounding evidence did not support an argument that Little must have believed them to be true under Beers-Capitol v. Whetzel, 256 F.3d 120, 140 (3d Cir. 2001). “Even if it can be inferred that Fletcher was at greater risk of harm than other inmates due to his sexual orientation, the evidence is insufficient to show that Little was aware of a substantial risk of harm.” The Court of Appeals also affirmed the dismissal of Fletcher’s Equal Protection claim as “frivolous,” referring without elaboration to Judge Robinson’s reasoning, which held that “federal courts have declined to recognize homosexuals as a protected class,” citing an old string cite from the Tenth Circuit in Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008), and ignoring everything that has transpired for LGBT equal protection in the last seven years. Although Little responded to Fletcher’s complaints about sexual fear by saying “you are a gay man, these men have been without a women in a long time, you should expect that, and man-up,” Judge Robinson found these words, however offensive, not to be actionable. The Circuit wrote that “plaintiff did not plead, and there is no evidence of record, that plaintiff was treated differently from similarly situated individuals” or that his treatment lacked rational basis. This throwback ruling and the failure to frame the safety and equal protection issues properly may be seen as consequences of Fletcher’s pro se status in the appeal.

U.S. COURT OF APPEALS, FIFTH CIRCUIT – Pro se plaintiff Donald R. Vicks, a Louisiana prisoner who is HIV-positive and diabetic, claimed that prison authorities violated his 8th Amendment rights by refusing to exempt him from a policy requiring inmates housed in extended lockdown to wear mechanical restraints on their arms and legs during their weekly five hours of outdoor exercise. Vicks claimed that his medical conditions necessitated more vigorous exercise than the restraints permitted. The trial court granted summary judgment against him, finding no 8th Amendment violation, without holding a hearing, having rejected Vicks’ motion to appoint counsel. The 5th Circuit affirmed per curiam, finding Vicks had presented no evidence of a “nexus between any deterioration of his health and defendants’ enforcement of the out-of-cell restraints policy.” The court pointed out that the defendants had presented “uncontested evidence that Vicks’ range of permitted exercise is limited to walking because his required medication regimen makes him especially susceptible to heat-related illnesses caused by overexertion. Vicks did not dispute defendants’ assertion that he is able to walk in full restraints.” Of course, the court’s refusal to appoint counsel for Vick undoubtedly posed a substantial barrier to his being able to contest the state’s proffered evidence. . . The court also found no abused of discretion by the trial court in deciding the case without a hearing or in refusing to appoint counsel. “Vicks’ complaint advanced a single, straightforward constitutional claim that was properly dismissed by summary judgment, thereby precluding a trial,” wrote the court. “Accordingly, appointment of counsel would not have advanced the administration of justice.” Arthur S. Leonard

U.S. COURT OF APPEALS, SEVENTH CIRCUIT – Pro se gay plaintiff Michael Hughes is under civil commitment as a “sexually violent person,” and his case alleging sexual orientation discrimination was dismissed on screening for failure to state a claim by United States District Judge Harold A. Baker (C.D. Illinois). In a summary disposition, the Seventh Circuit reversed in Hughes v. Farris, 2015 WL 8025491, 2015 U.S. App. LEXIS 21169 (7th Cir., Dec. 7, 2015). Hughes sued: (1) the institutional laundry supervisor for encouraging homophobic slurs and inciting other inmates to violence against him; and (2) the supervisor and institutional director for punishing him for complaining by removing him from employment and “treatment.” Chief Judge Diane Pamela Wood, for herself and Circuit Judges Richard Posner and Frank Easterbrook, found that Hughes stated claims: (1) under the Fourteenth Amendment (which applies to the civilly committed) for conditions of
confined that, if proven, were at least as onerous as those violating the Eighth Amendment for the criminally convicted, citing Sain v. Wood, 512 F.3d 886, 893 (7th Cir.2008); (2) under the Equal Protection clause for discrimination; and (3) under the First Amendment for retaliation. The opinion includes an initial observation that the District Court should have allowed Hughes to amend his complaint, even though Hughes had appealed, noting: “A chance to amend after the merit-review hearing would have … potentially avoided this appeal.” On the merits, the court found that “[t]hreats of grave violence can constitute cruel and unusual punishment under the Eighth Amendment,” citing Beal v. Foster, 803 F.3d 356, 357–58 (7th Cir.2015) – reported in Law Notes (November 2015) at pages 516–7 – where verbal abuse was found to constitute cruel and unusual punishment. Here, Hughes alleges that the supervisor urged inmates to assault Hughes’ rectum with brooms and mops, and he lived “in constant fear of violent attack” and “reprisals” against him “because he is gay.” The same allegations state Equal Protection violations in the form of sexual harassment and discrimination on the basis of sexual orientation, citing Baskin v. Brogan, 766 F.3d 648, 654–55 (7th Cir.2014); and Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir.2002). Allegations that defendants retaliated against Hughes because of his complaints about “anti-gay abuse” sound under both Equal Protection – see Locke v. Haissig, 788 F.3d 662, 669–71 (7th Cir. 2015) – and the First Amendment – see Gomez v. Randle, 680 F.3d 859, 866 (7th Cir.2012). In this case, the retaliation (in the form of losing his rehabilitative job) also stated a potential claim of deprivation of “treatment” (which is the point of civil commitment under sexually violent predator laws), raising professional judgment issues under the Fourteenth Amendment’s Due Process Clause – see Younghberg v. Romeo, 457 U.S. 307, 323 (1982) (and other Seventh Circuit cases). The court lifted a Prisoner Litigation Reform Act “strike” against Hughes, without resolving an issue as to whether civilly committed plaintiffs are “prisoners” under the PLRA. William J. Rold

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT – Last May, Law Notes reported that transgender inmate Roy Mitchell lost her motion before Chief United States District Judge William M. Conley for a preliminary injunction prohibiting parole officers from placing her in an all-male shelter during her parole. Mitchell v. Wall, 2015 U.S. Dist. LEXIS 46084 (W.D. Wisc., April 8, 2015), reported May 2015 at pages 229-30. Now, the Seventh Circuit, in an opinion by Circuit Judge Richard Posner (for himself and for Chief Judge Diane Pamela Wood and Judge Frank H. Easterbrook), has dismissed her appeal as moot because she has been re-incarcerated. Mitchell v. Wall, 2015 WL 9309923 (7th Cir., December 23, 2015). Because she has damages claims pending in the case regarding doctors’ treatment of her during her incarceration, the decision does not direct the lower court to dismiss the case on remand. Moreover, the court specifically declines to vacate the injunctive claim about parole conditions for mootness, writing: “should she be released from jail in the course of the litigation and again placed on probation she’ll be able to renew her objections to the terms of her probation.” Although Judge Conley had ruled that Mitchell could not join her probation claims with her claims against the prison doctors in a single case, the Circuit decision specifically protects Mitchell’s options in this regard, writing that “the dismissal of the interlocutory appeal on grounds of mootness does not leave in force a final district court decision that the prevailing party could use as a basis for asserting collateral estoppel in a future litigation between the parties” and that she could either ask Judge Conley to reconsider injunctive relief, enter permanent relief (which is not precluded by the denial of preliminary relief), or commence a new action on the same claims, if she is again paroled – citing Orion Sales, Inc. v. Emerson Radio Corp., 148 F.3d 840, 843 (7th Cir.1998). “[S]hould the plaintiff… be released from jail and again placed on probation she may be able, as an alternative to reviving her claim for injunctive relief against the probation officers..., to bring a new suit, which doubtless will involve issues related to the claims in her present suit against the probation officers. And she’ll be able to ask the district court to vacate his current judgment denying her claims against them, on the ground that our ruling her appeal moot deprived her of an opportunity to challenge his earlier ruling.” While Judge Posner’s opinion is opaque on civil procedure, it clearly preserves Mitchell’s future options for redress of all of her claims. William J. Rold

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT – A divided Eighth Circuit panel affirmed summary judgment against a transgender inmate on qualified immunity grounds in Reid v. Griffin, 2015 WL 9239134 (December 17, 2015). Circuit Judges Roger Leland Wollman and Raymond W. Gruender, in a per curiam opinion, affirmed dismissal of the complaint by U.S. District Judge J. Leon Holmes of the Eastern District of Arkansas, who adopted the report and recommendation of United States Magistrate Judge Jerome T. Kearney. Plaintiff Andrew Reid, incarcerated in Arkansas’ “Super Max” prison, went on a hunger strike to protest lack of evaluation by a Gender Identity
Disorder ["GID"] specialist who could order hormone therapy. More recently, she attempted self-castration, but doctors were able to save one testicle. Thereafter, she met with what the majority calls a “GID Committee” (which the dissent describes as a “group of staff members” not including a GID specialist), who decided she did not meet GID criteria but made no other diagnosis. Four months later, she cut off her remaining testicle. The majority found that the subjective arm of the Eighth Amendment’s health care standard (deliberate indifference to a known or obvious serious need) was not shown sufficiently to present a triable issue because Reid: (1) was merely disagreeing with the treatment proposed by the prison’s health care staff – which is not actionable; and (2) she failed to support her claims by expert testimony that contradicted the staff. The court also cited a decision written by Circuit Judge Wollman 27 years ago – White v. Farrier, 849 F.2d 322, 325-28 (8th Cir. 1988) – saying that a “failure to provide hormone therapy did not constitute deliberate indifference” to “transsexuals.” Actually, White reversed a summary judgment in favor of the transgender prisoner and remanded the case for further proceedings because the record was unclear. Here, Reid lost because she had been evaluated and she was not diagnosed with GID. Senior Circuit Judge Kermit Edward Bye dissented, writing that it was “unreasonable for [defendants] to provide no additional treatment to Reid and ignore the likelihood she would harm herself again after she cut off one testicle.” Defendants “did not provide Reid with a GID diagnosis or any other diagnosis.” He continued: “In this case, it was not reasonable for [defendants] to believe they could simply send Reid back to her cell and tell her she would be fine when they knew she had previously gone on a hunger strike and mutilated one testicle. By doing so, they deliberately ignored the high risk Reid would harm herself, and as such they are not entitled to qualified immunity” – citing Eighth Circuit precedent holding inmates’ right to safety extends to protection from self-harm. The majority held that Reid failed to present a claim of deliberate indifference to risk of self harm. Even if she did, they said: “Reid does not suggest any actions that the defendants could have taken to prevent her from inflicting self harm other than providing estrogen-replacement therapy—treatment to which she is not entitled under the law.” Plainly, Reid needed an expert to prevail with this panel, but the majority’s circular decision (no right to diagnosis and no right to treatment without diagnosis) is nevertheless an outlier among recent Circuit decisions holding correctional officials to a higher standard in both diagnosis and treatment of transgender inmates. See Rosati v. Ighinoso, 2015 WL 3916977 (9th Cir. June 26, 2015), reported in Law Notes (Summer 2015) at 288; Kothmann v. Rosario, 558 F. App’x 907, 910 (11th Cir. 2014); Lynch De’lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013); Fields v. Smith, 653 F.3d 550, 554-55 (7th Cir. 2011). William J. Rold

CALIFORNIA – Pro se prisoner Filipe Garcia alleged that he was a victim of excessive guard force and subjected to danger as a sex offender (you are a “weirdo” and you play with lil’ boys”) after Garcia objected to transport to court when he had not been permitted to shave for a week. United States Magistrate Judge Stanley A. Boone screened the case under 28 U.S.C. § 1915A(a), and he found that Garcia stated a claim for excessive force on allegations that a cell extraction officer slammed him into cage bars while he was cuffed and not resisting, in Garcia v. Beard, 2015 U.S. Dist. LEXIS 161832 (E.D. Calif., December 1, 2015). Under Hudson v. McMillian, 503 U.S. 1, 8-9 (1992), the case could proceed to service and answer on whether the force used was a good faith effort at prison discipline or a malicious effort to cause harm. Garcia may also have a claim for failure to protect. Garcia, who was not assaulted or specifically threatened, must show more than mere verbal harassment to proceed, citing Morgan v. McDonald, 41 F.3d 1291, 1294 (9th Cir. 1994) (label of “snitch” insufficient if retaliation does not ensue). Judge Boone wrote that injury was not a “necessary element” of the claim, but Garcia had to allege more than “speculative and generalized fears.” Garcia denying being a sex offender; and, while it is unclear from the opinion if he is gay, Judge discussed Radillo v. Lunes, 2008 WL 4209824 (E. D. Cal. Sep. 8, 2008), wherein an inmate who was “outed” to a gang stated a claim of deliberate indifference to his safety. He found Radillo to be “instructive” because it involved a “particularly vulnerable” inmate for whom the disclosed information would present a risk of “specific harm.” Here, “weirdo” and “lil’ boys” alone were “insufficient.” Unlike the disposition in many screening decisions, Judge Boone allowed Garcia the option of proceeding on the excessive force alone, based on the original complaint, or amending the pleadings to add a more specific protection from harm claim. William J. Rold

FLORIDA – United States Magistrate Judge Elizabeth M. Timothy’s Report and Recommendation [R & R], in Hawkins v. Sharp, 2015 WL 7968275 (N.D. Florida, November 3, 2015), recommends dismissal of pro se prisoner Jacob D. Hawkins’ claim that nursing staff violated his civil rights by telling security about his sexual activity while he was not assaulted or specifically threatened, must show more than mere verbal harassment to proceed, citing Hudson v. McMillian, 503 U.S. 1, 8-9 (1992), the case could proceed to service and answer on whether the force used was a good faith effort at prison discipline or a malicious effort to cause harm. Garcia may also have a claim for failure to protect. Garcia, who was not assaulted or specifically threatened, must show more than mere verbal harassment to proceed, citing Morgan v. McDonald, 41 F.3d 1291, 1294 (9th Cir. 1994) (label of “snitch” insufficient if retaliation does not ensue). Judge Boone wrote that injury was not a “necessary element” of the claim, but Garcia had to allege more than “speculative and generalized fears.” Garcia denying being a sex offender; and, while it is unclear from the opinion if he is gay, Judge discussed Radillo v. Lunes, 2008 WL 4209824 (E. D. Cal. Sep. 8, 2008), wherein an inmate who was “outed” to a gang stated a claim of deliberate indifference to his safety. He found Radillo to be “instructive” because it involved a “particularly vulnerable” inmate for whom the disclosed information would present a risk of “specific harm.” Here, “weirdo” and “lil’ boys” alone were “insufficient.” Unlike the disposition in many screening decisions, Judge Boone allowed Garcia the option of proceeding on the excessive force alone, based on the original complaint, or amending the pleadings to add a more specific protection from harm claim. William J. Rold

January 2016 LGBT Law Notes 35
with homophobic remarks, threats, sexual harassment, and assaults. Hawkins sued only the medical staff, not security officials who disclosed the information, which included sexual encounters with five other inmates. Hawkins claimed medical staff violated his right to privacy under the Fourteenth Amendment and showed “callous indifference” to his safety under the Eighth Amendment. Judge Timothy recognized a “constitutional interest” in personal matters under Whalen v. Roe, 429 U.S. 589, 599 (1977), as limited by the balancing test of Turner v. Safley, 482 U.S. 78, 89–91 (1987), citing the Eleventh Circuit’s rejection of privacy protections for HIV+ inmates subject to forced segregation in Alabama prisons early in the AIDS epidemic in Harris v. Thigpen, 941 F.2d 1495, 1513 (11th Cir.1991), in order to “control the spread of a communicable, incurable, always fatal disease within its correctional facilities.” Id., at 1521. Defendants argued that Hawkins had no expectation of privacy regarding prison sex and that, even if he did, security considerations overrode it: “sexual activity among inmates would promote instances of sexual harassment, the creation of a sexual marketplace, the exploitation of weaker, mentally ill, or homosexual inmates, conflict among sexual rivals, and conflict among spurned lovers…. [P]ermission of such acts would also expose prison staff to lewd exhibitions and require them to constantly monitor such activity for ‘true’ consent – versus the already prolific problem of rape – disrupting overall security.” Judge Timothy cited Florida law prohibiting “sexual behavior between inmates” (Fla. Admin. Code 33–601.314) and the “Inmate Orientation Handbook,” which declares: “There is no such thing as legal consensual sex in prison.” Judge Timothy found that “prohibiting sexual activity in prison is a legitimate governmental interest,” citing Veney v. Wyche, 293 F.3d 726, 733 (4th Cir.2002) (and district court string cite). Even assuming that Hawkins had “some” right to privacy, the sick call nurse’s disclosure only to security supervision was “reasonably related” to a “legitimate government interest of prohibiting sexual activity in prison.” For similar reasons, the disclosure lacked the subjective “culpable state of mind” element of protection from harm cases and therefore did not violate Hawkins’ right to safety under Farmer v. Brennan, 511 U.S. 825, 837 (1994). Hawkins may have a cause of action for the disclosure under state law (don’t hold your breath), under Fla. Stat. § 456.057, which protects HIV-related information and disclosures in connection with requests for testing. Judge Timothy recommends that dismissal on this theory be without prejudice to proceeding in state court. For a more thoughtful analysis of constitutional protection of sexual activity in prison, see Willet v. Iowa, 2015 U.S. Dist. LEXIS 163973 (N.D. Iowa, December 8, 2015) (reported elsewhere in this issue of Law Notes).

MINNESOTA – The Minnesota Court of Appeals upheld an unemployment law judge’s denial of benefits to a transgender woman who had resigned her position as a manager at an east St. Paul Burger King outlet owned and operated by Heartland Midwest LLC–Burger King. Nikita Seras-Nachole Cordes, who represented herself in the proceeding, asserted that she resigned due to harassment because of sexual orientation and gender and retaliation for complaining about discrimination and harassment. Cordes v. Heartland Midwest LLC, 2015 Minn. App. LEXIS 1151, 2015 WL 8549280 (Dec. 14, 2015). Although the Department of Employment and Economic Development determined that Cordes was eligible for unemployment benefits and she drew benefits for several months, Heartland appealed and the ULJ ruled against Cordes after a three-day telephonic hearing. The court of appeals decision affirming the ULJ rejected Cordes’ challenges to the judge’s credibility findings, evidentiary rulings, and denial of Cordes’ request for a rehearing. The facts found by the ULJ suggested that Cordes had violated several company rules, including leaving unsecured cash in a restaurant when closing up and allowing non-employees to be present in employee-only areas of the restaurant. The company had also received complaints that Cordes was “intimidating and bothering” other employees. When Cordes complained about harassment, the company sought to investigate, but Cordes refused to cooperate with the investigation unless a friend whom she described as her attorney (but who is not a member of the bar) was allowed to be present. The company refused to proceed on that basis, insisting that its investigation was an internal matter. Under the unemployment benefits law, an employee who quits her job is not entitled to benefits unless the employee quit “because of a good reason caused by the employer.” The court upheld the ULJ’s finding that this standard was not met in Cordes’ case.

NEVADA – United States Magistrate Judge Valerie P. Cooke recommended entry of summary judgment against pro se HIV+ prisoner Lance Reberger in Reberger v. All ESP Culinary Personnel, 2015 WL 8287970 (D. Nev., November 18, 2015). Reberger claimed food personnel at the prison denied him a medically necessary double portion low fat diet, the absence of which caused medical complications, including a seizure – and then retaliated against him when he complained by serving raw food, eggs to which he was allergic, and half portions. The opinion is not helpful in analyzing the constitutional standards.
for special medical diets – failing even to cite the seminal Ninth Circuit case of *Toussiant v. McCarthy*, 801 F.2d 1080, 1112 (9th Cir. 1986). Here, a registered dietitian certified that Reberger’s diet met medical specifications of low salt and fat in proper portions, and other food service staff affidavits swore that he received said diet, properly cooked. A prison physician stated that Reberger suffered no medical adverse events, that his alleged medical complications were caused “by a period of severe, self-inflicted dehydration”; and that Reberger tested negative for allergy to eggs. The case again illustrates the near impossibility of a pro se inmate’s defeating summary judgment on medical care without an expert. (Reberger’s submission of an affidavit of another inmate who was a former dairy farmer was treated dismissively by Judge Cooke, leaving Reberger only with the argument that the defendants were all lying.) Judge Cooke recommended summary judgment against Reberger on the retaliation claim based essentially on the same marshalling of evidence. *William R. Rold*

**Pennsylvania** – Sometimes prisoners’ cases languish for years without screening for sufficiency before a ruling on whether the case is permitted to proceed. Sometimes, there is a ruling within a month. Here, United States District Judge Malachy E. Mannion dismissed as legally insufficient pro se plaintiff Joshua Keziah’s claim of retaliation against him for complaining about homophobic conduct in *Keziah v. Superintendent Keresetes*, 2015 U.S. Dist. LEXIS 165296 (M. D. Pa., December 10, 2015). Keziah had filed grievances on unstated subjects in October of 2015, whereupon a lieutenant confronted him: “Your faggot ass has two punk ass grievances.” Eight days later, Keziah was given a pair of new shoes with homophobic epithets painted on them. When he complained, the shoes were replaced and Keziah was given an apology. Keziah continued his complaints, however, which included what the opinion calls “terrorist threats” to his state court judge. He commenced the federal case on November 12, 2015. District Judge Malachy Mannion surmised that Keziah’s “declarations” must be considered “false” and hence insufficient to constitute a “claim,” citing *Toussaint v. Blatter*, 175 F.3d 378, 398 (6th Cir.1999); “Prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse.” In *Thaddeus-X*, the court remanded on retaliation, finding a claim of retaliatory segregation sufficient as a matter of law and a claim of ongoing “harassment” and cold meals in need of further development. Here, Keziah engaged in protected activity by filing grievances, but he failed to show “adverse action” based on “verbal threats” alone under *Burgos v. Canino*, 358 Fed. Appx. 302, 306 (3d Cir.2009). “Additionally, the Court notes that before any deterrent to Plaintiff to exercise a constitutional right could even take place, the shoes containing the derogatory remarks were replaced with a new, unmarked pair, and the correctional officer apologized for the remarks.” Keziah also failed to allege “physical harm” needed to state a claim for emotional distress under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e). Judge Mannion does not address homophobia as raising any separate Equal Protection claim. *William J. Rold*

**Tennessee** – Gay inmate Steven L. Hill sued various county jail officials (and other inmates) for alleged sexual orientation discrimination in *Hill v. Kinnaman*, 2015 U.S. Dist. LEXIS 164919, 2015 WL 8484487 (M.D. Tenn., December 9, 2015). Senior United States District Judge John T. Nixon allowed Hill to proceed past screening on claims that he was “targeted” for repeated cell searches and discriminatory job assignments based on his sexual orientation in violation of the Equal Protection Clause, citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 441 (6th Cir. 2012) (non-suspect-class analysis); *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 681-82 (6th Cir. 2011) (rational basis analysis);
and Radvansky v. City of Olmsted Falls, 395 F.3d 291, 312 (6th Cir. 2005) (same). Hill alleged that staff failed to protect him from hate crimes by other inmates, who insulted him and posted offensive signs on his cell. This claims sounds under Farmer v. Brennan, 411 U.S. 825, 832-3 (1994); but it fails the first test (serious risk of harm) because Hill alleges nothing more than verbal harassment, without assaults or threats of assault, which are “nothing more than petty harassment.” Verbal comments alone are not actionable – see Johnson v. Unknown Dellatifa, 357 F.3d 539, 545-46 (6th Cir. 2004) – including offensive remarks about “sexual preference” – see Murray v. U.S. Bureau of Prisons, 106 F.3d 401 (6th Cir. 1997). The other inmates are not themselves proper defendants in a civil rights case because they did not act “under color of state law.” William J. Rold

WISCONSIN – United States District Judge Rudolph T. Randa permitted pro se transgender inmate Dominique Dewayne Gulley-Fernandez, a/k/a Teriyaki Ariana Daniels-Wilds, to proceed after initial screening on her claim that Wisconsin prison officials refused medical treatment for her “gender identity disorder,” in Gulley-Fernandez v. Wis. Dep’t of Corrections, 2015 U.S. Dist. LEXIS 161623 (E.D. Wisc., December 1, 2015), citing Johnson v. Unknown Dellatifa, 357 F.3d 539, 545-46 (6th Cir. 2004) – including offensive remarks about “sexual preference” – see Murray v. U.S. Bureau of Prisons, 106 F.3d 401 (6th Cir. 1997). The other inmates are not themselves proper defendants in a civil rights case because they did not act “under color of state law.” William J. Rold

LEGISLATIVE & ADMINISTRATIVE

CENTERS FOR MEDICARE AND MEDICAID SERVICE – The agency is accepting public comments to aid officials in determining whether a standard that would require coverage for sex reassignment surgery is warranted. A ban on such coverage was instituted in the 1980s, and not rescinded until 2014. Under the 2014 change, the surgery is covered when found reasonable and medically necessary in a particular case. The question now posed is whether a formal standard should be adopted, which could simplify the process of determining whether a particular individual is qualified for coverage, and exactly what will be covered. Costs concerns have been raised about extending these federal programs to sex reassignment procedures, but a recent study led by staff at Johns Hopkins University and published in the Journal of General Internal Medicine suggests that sex reassignment surgery and hormone treatment for transgender people is cost-effective and can contribute to the health, longevity, and work productivity of transgender people. U.S. News & World Report, Dec. 4.

DEPARTMENT OF EDUCATION – There was considerable public comment as it was revealed that a record number of higher education institutions with religious affiliations had applied for and been granted waivers of any requirement to comply with Title IX in connection with policies concerning LGBT staff and students. Many of these schools, such as Bethel College in Indiana, are willing to employ gay staff and enroll gay students so long as they vow celibacy. Bethel’s President, Gregg Chenoweth, told the South Bend Tribune (Dec. 10) that this policy is the same that Bethel applies to unmarried heterosexuals. The school’s religious principles require that any sexual activity occur only within the context of heterosexual marriage. “When we admit a student,” he said, “we do not require a profession of faith or a declaration of sexual identity. We have students who are atheists and we have students who are gay,” he said, neglecting to add that if they are faithful to university policy, many of them are suffering from severe horniness…. Or, as is more likely, the school follows a don’t ask, don’t tell policy under which LGBT students would encounter difficulty only if their sexual activities come to light. President Randall O’Brien of Carson-Newman University told TV station WVLT that he had obtained a Title IX exemption in order to protect the school’s policy of banning pregnant students, women who have had an abortion, LGBT students, and anyone else who does not conform to the school’s Bible-based ideology. “This is who we are as a Christian university,” said O’Brien, thus taking in vane the name of his Saviour, who said “Judge not lest ye not be judge.” The interview with O’Brien brought to light that the same attorney had been soliciting such applications from religious schools around the country, selling it as a defensive mechanism in case they were threatened with lawsuits under Title IX. These school all enjoy tax exempt status, of course…
LEGISLATIVE

LGBT groups called on the Education Department to publicize the list of educational institutions that have been granted their waivers, as a consumer protection measure for potential employees and students.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – The EEOC has issued new publications, available on its website: “Living with HIV Infection: Your Legal Rights in the Workplace under the ADA,” and “Helping Patients With HIV Infection Who Need Accommodations at Work.” Both publications use a question & answer format to cover the legal issues identified in their titles.

FOOD & DRUG ADMINISTRATION – The FDA announced on Dec. 21 that it was amending its policy on blood donation, no longer disqualifying men who have sex with other men from donating, so long as they have not engaged in sexual contact with another man for a one-year period prior to the donation. This scraps a lifetime ban that had been in effect since the early 1980s when AIDS was identified as a condition that could be transmitted through blood donations. Gay rights and AIDS organizations criticized the one-year rule, pointing out that testing technology has reduced the period of uncertainty after a sexual contact to a matter of weeks. The agency pointed out that the new rule was consistent with those recently adopted in Britain and Australia, and was consistent with waiting periods associated with other risk factors, such as getting a tattoo, suffering a needlestick injury in a hospital, or being treated for syphilis or gonorrhea. The FDA asserted that with the new rule the risk of HIV transmission is now one in 1.5 million, but that dropping all time-related deferrals and making eligibility decisions on a case by case basis could quadruple that risk. The deferral period applies also to women who have had sex with men who have sex with men. . . New York Times, Dec. 21.

INTERNAL REVENUE SERVICE – The IRS issued Notice 2015-86 discussing the application of the Obergefell marriage equality decision to qualified retirement plans and health and welfare plans regulated under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code. The Notice provides guidance in Question and Answer format, and is not binding on the courts, although it would be a source of persuasive authority. The Notice states: “Individuals who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is no denominated as a marriage under the laws of the state are not recognized as spouses for federal tax law purposes,” citing Rev. Rul. 2013-17, which was issued in response to U.S. v. Windsor. The general drift of the notice was that changes mandated after U.S. v. Windsor were generally sufficient to comply with Obergefell, although employers might consider further plan modifications to ensure equal treatment of same-sex couples with different-sex couples. On a heavily contested point, the notice does not push retroactivity beyond the decision date of Windsor (June 26, 2013) for recognition of married same-sex couples for employee benefits purposes in states that did not recognize their marriages prior to that date.

SOCIAL SECURITY ADMINISTRATION – The SSA has been sending mixed messages about qualifications for spousal benefits for married same-sex couples, specifically on the issue of retroactivity to couples who were legally married but resided in states that did not recognize their marriages prior to Obergefell v. Hodges, under which any refusal to recognize a lawfully-contracted same-sex marriage would violate the 14th Amendment. The extent to which this ruling is retroactive is continuing to raise questions and concerns. SSA encouraged people to apply for the benefits as early as possible, but did not commit to a policy of granting benefits regardless of whether or when an applicant’s domiciliary state recognized their marriage, and on the agency website there is a benefit determination chart showing the dates when same-sex marriages started in each state and when states began to recognize marriages from other states. Arguably this data should be irrelevant in light of U.S. v. Windsor and Obergefell. Reuters reported on December 10 that SSA and the Justice Department were conferring on how to implement Obergefell on this issue.

LGBT EQUALITY DAY PROPOSAL – Legislation introduced by Rep. Suzan DelBene (D-Wash.) and co-sponsored by 94 House members would designate June 26 as “LGBT Equality Day,” in recognition of the three foundational gay rights rulings by the Supreme Court, all issued, by coincidence, on June 26 – Lawrence v. Texas (2003), U.S. v. Windsor (2013), and Obergefell v. Hodges (2015). There were no Republican co-sponsors at the initial introduction of the resolution, and it seemed unlikely that would be taken up by Congress during its session in 2016, inasmuch as the Republican control the chamber and most of their leaders are on record as opposing these rulings, especially Obergefell. A House committee led by Republicans actually hired expensive outside counsel to defend the constitutionality of the Defense of Marriage Act in Windsor. As such, the proposal resolution is mainly a “going on record” co-sponsorship opportunity for House members who want to signal their agreement with the
Supreme Court’s rulings. Washington Blade, Dec. 3.

STONEWALL NATIONAL HISTORIC SITE PROPOSAL – Rep. Jerrold Nadler (D-NY) and Senators Kristen Gillibrand and Charles Schumer (D-NY) introduced legislation in both houses on December 10 to create the Stonewall National Historic Site, the first U.S. national park devoted to LGBT history. It is intended to preserve the site of the famous Stonewall Riots of 1969. Letters of support for the proposal came from ten other members of the House, 50 New York State legislators, five New York City council members, and New York City Comptroller and Public Advocate, and the Manhattan Borough President.

CALIFORNIA – The board of trustees of Capistrano Unified School District has adopted a policy updating its 15-year-old non-discrimination policy to add gender identity and expression as prohibited grounds of discrimination. The policy was intended to bring the district in line with state law and federal requirements of the U.S. Department of Education under Title IX. Orange County Register, Dec. 17.

COLORADO – Summit County’s Board of Commissioners has approved personnel policies to strengthen existing protection against discrimination for transgender employees, and plans to implement inclusive health insurance coverage that will cover gender transition. The county added “gender identity” and “gender expression” to its equal-employment-opportunity and anti-harassment guidelines. Targeted News Services, Dec. 8.

ILLINOIS – A dispute over restroom and locker room access for a transgender girl in Palatine-Schaumburg High School District 211 resulted in a settlement with the U.S. Department of Education’s Office of Civil Rights under which the student will be allowed access to the girls’ locker room with a separate changing area. The school district had resisted any access on the ground that the student has not undergone sex reassignment surgery. Chicago Sun Times, Dec. 8; Chicago Tribune, Dec. 9. There was some controversy about the extent to which the settlement with respect to this student would be generalized to all transgender students in the district.

INDIANA – The Bloomington Common Council voted unanimously to add gender and sexual minorities to the protected classes under the local anti-discrimination ordinance, treating those categories the same as “sex” under the existing ordinance. The action took place against the backdrop of news reports that state legislators will be taking up a proposed anti-discrimination bill during 2016, but that it will have a rather broader religious exemption than gay rights proponents would tolerate, forecasting a heated debate. It was reported that the proposed state ordinance would preempt local ordinances. University Wire, Dec. 10. * * * The Anderson City Council approved an ordinance adding sexual orientation and gender identity to the local anti-discrimination ordinance, covering housing, education, employment and public accommodations. The council voted unanimously. The only speakers at the hearing on December 10 opposing the measure cited religious grounds. In common with many such municipal ordinances, there is limited enforcement authority. The city's Human Rights Commission can issue a cease and desist order and, in some cases, impose a fine. Herald Bulletin, Dec. 11. Mayor Kevin Smith signed the measure into law on December 18. Herald Bulletin, Dec. 23. * * * Goshen Mayor Allan Kauffman issued an executive order adding “gender identity” to the city's hiring policy against discrimination. The city’s Discrimination and Harassment policy, which has been in effect since 1998, already covered sexual orientation. Kauffman has encouraged all employers to adopt such policies, but can only take executive action with respect to municipal employment. Elkhart Truth, Dec. 14. * * Sen. Jim Tommes (R-Wadesville) has introduced a bill that would require that public bathrooms in Indiana be designated as female or male only, and that people could only use facilities consistent with their “biological gender” by which he means gender identified at birth. Anyone age 18 or older found in the wrong bathroom could be prosecuted as a trespasser under a misdemeanor law. SB 35 has two parts. One requires public primary and secondary schools to have male and female facilities only, which “may be used only by the students of the biological gender for which the facility is designated.” Biological gender is defined in terms of chromosomes, so presumably in order to prosecute anybody the state would have to pay for a DNA test to determine sex at the chromosomal level and there might be difficulties with people who exhibit abnormalities of sex chromosomes. The second part of the measure makes it a Class A misdemeanor for a male to “knowingly or intentionally” enter a female facility and vice versa. (Editor’s musing: News reports did not specify whether this would apply to janitorial staff, which could require facilities to employ both male and female janitors in order to keep the facilities clean. Perhaps this could be promoted as an “equal employment opportunity” bill…) The misdemeanor aspect of the statute would not apply to K-12 schools, who would be left to make their own policies. Courier & Press, Dec. 24.
KENTUCKY – In an action of dubious legality, newly-inaugurated Governor Matt Bevin, a Republican, issued Executive Order 2015-048 on December 22, purporting to revise the state’s marriage license forms to remove the names of county clerks. The changes would be made only to the license form, not to the existing marriage certificate and certificate of marriage forms. Bevin premised his authority to do this on the state’s Religious Freedom Restoration Act and his judgment that requiring the clerks’ names on the forms would unduly burden their free exercise of religion as protected by that statute. KRS Chapter 402 requires that clerks names appear on the marriage license forms. Bevin’s executive order fulfilled a campaign promise that he made in light of the controversy over Rowan County Clerk Kim Davis’s refusal to issue marriage licenses to any couples so long as she was required to issue licenses to same-sex couples, and her brief imprisonment for contempt of court for refusing to comply with an order by U.S. District Judge David Bunning to issue marriage licenses as required by state law and the U.S. Constitution.

LOUISIANA – The avowedly anti-gay governor Bobby Jindal is term-limited and has to leave office on January 11, 2016. His successor, Democrat John Bel Edwards, announced in December that he planned to issue an executive order extending protection against discrimination in government employment and contracts to LGBT people. freedomforallamericans.org, Dec. 2.

MINNESOTA – U.S. District Judge Joan N. Ericksen has refused to grant summary judgment to the defendant in Scott v. CSL Plasma, Inc., 2015 U.S. Dist. LEXIS 162413, 2015 WL 7854150 (D. Minn., Dec. 3, 2015), in which a transgender woman’s attempt to donate plasma was rejected. Lisa Scott is a transgender woman who has had sex reassignment surgery and takes hormone replacements. She went to CSL Center in Minneapolis on November 17, 2008, intending to donate plasma. CSL, which collects plasma and sells it to other companies that then process it into medical products, compensates donors for their time. The intake nurse interviewed Scott. Upon learning that she was taking hormone replacements and had sex reassignment surgery, the nurse told Scott she was permanently ineligible to donate plasma, and noted in the file that Scott was rejected “due to sex change operation and hormone replacement medication.” No other explanation was offered, and the court’s opinion does not reflect any evidence proffered by CSL why the fact of sex reassignment and hormone replacement would be medically disqualifying. The disqualification seems more likely to be based on the assumption, mentioned in the opinion in passing, that a transgender woman would have had sex with men or used injecting drugs making them high risk for HIV or other blood-borne pathogens. Scott insisted that she did not use such drugs and had not engaged in sex with men. Scott filed a sexual orientation discrimination claim with the Minnesota Department of Human Rights in April 2009, and that agency found “probable cause” in a letter dated June 29, 2010. (Minnesota’s Human Rights Law defines sexual orientation discrimination broadly to include gender identity discrimination.) When no further progress was made on the case, Scott withdrew her charge and obtained the agency’s authorization to sue. She filed this diversity case in federal court on September 23, 2013. The judge rejected CSL’s argument that the complaint was untimely or that the case didn’t come within the compass of the Human Rights Law because it involved plasma donation rather than a commercial transaction. The court noted that CSL compensated plasma donors, and it was irrelevant whether they were compensated for time or for their plasma, the point being that there was a commercial transaction and that Scott was rejected because of her transgender status, so a prima facie case was made. The main point of serious contention was CSL’s argument that it had a legitimate business justification for refusing plasma donations from transgender persons who had undergone sex reassignment and were receiving hormone treatments. Judge Ericksen found that there were disputed material facts precluding summary judgment on this point. At the time Scott was rejected, CSL did not have a firm policy of rejecting plasma donations from transgender individuals; rather, its policy (subsequently changed to a categorical exclusion) was that the intake nurse should call one of the staff doctors when faced with such a potential donation to obtain instruction. Recollections are mixed as to whether the nurse made such a call in this case, and whether it would have resulted in rejecting Scott as a donor. CSL also argued that the issue of eligibility of transgender individuals to donate plasma was preempted by federal law from being determined in a state discrimination suit, inasmuch as plasma donation is regulated by the Food & Drug Administration, but the court noted that the FDA had not established a firm policy on this that would have preemptive force as of the date of the incident in question. (Indeed, the FDA has not as of now promulgated an ultimate policy categorically rejecting transgender individuals who receive hormone therapy as plasma donors.) Ultimately, the court concluded that Scott had made out a prima facie case of discrimination, and that CSL’s “legitimate business justification” affirmative defense could not be resolved on summary judgment, precluding a decision for the defendant at this time.
NEBRASKA – The Nebraska School Activities Association proposed a draft policy that would give to parents and local school districts the initial decision concerning whether transgender students could participate in athletic activities designated for the gender with which the students identify. The policy would require at least a year of hormone therapy before an individual could elect to participate in athletic activities of their preferred gender, in order to reduce the possibility of “unfair competition.” The Association proposed to establish a Gender Identity Eligibility Committee to which schools could apply for a waiver from the policy, which also provides that students who have not had sex reassignment surgery would be required to use locker rooms and restrooms associated with their gender as identified at birth, although schools could have an option to provide private facilities for such students. Governor Pete Ricketts approved the concept of letting local school districts make the decision on sports participation, but the Nebraska branch of the ACLU was critical, asserting that any policy denying students participation or facilities consistent with their gender identity would face potential litigation and loss of federal funding for the school district under Title IX as interpreted by the U.S. Department of Education. Columbia Telegram, Dec. 9; AP State News, Dec. 10.

NEW JERSEY – On December 15 the Princeton Public School Board voted to adopt a proposal on access to facilities and activities for transgender and gender non-conforming students. Board President Andrea Spalla stated that the unanimous vote merely confirmed practices already taking place informally. These practices include barring teachers from revealing a student’s gender identity, acknowledging the right of students to determine their gender and allowing them to use restrooms and locker rooms corresponding to their gender identity. Star-Ledger, Dec. 17.

NEW MEXICO – Republican state legislators David Gallegos and Nora Espinoza have pre-filed HB 55 for consideration during the 3-day legislative session beginning on January 19, 2016. The measure would amend the state’s Human Rights Law to eliminate protection against discrimination because of sexual orientation and gender identity in the provision of services by businesses, non-profit organization and the government. The proponents say this is necessary to accommodate religious free exercise rights of those who disapprove of homosexuality and same-sex marriage. Gallegos told a TV interviewer, “The intent of the bill would be to ensure people would not be forced to operate their business that was in a way inconsistent with their religious beliefs.” The measure would be considered during the 30-day session only if Governor Susana Martinez, also a Republican, puts it on the agenda. She would, of course, be a fool to do so. Albuquerque Journal, Dec. 22.

NEW YORK – The New York City Human Rights Law expressly forbids discrimination because of an individual’s gender identity or expression. On December 21, the City’s Human Rights Commission issued new guidelines on the implementation of this policy. The document available on the Commission’s website is titled “Legal Enforcement Guidance on the Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code Sec. 8-102(23).” The Guidelines provide definitions of terms, a discussion of legislative intent, and provides numerous illustrations of actions by entities covered by the city law that could be considered violations of the non-discrimination ban. The Guidelines were described in news media as “the nation’s toughest transgender anti-discrimination law.”

NEW YORK – The Hamburg School District in western New York adopted a policy on December 9 providing that transgender students will have access to restrooms and locker rooms for the gender with which they identify. The school superintendent observed that in any given year the district has had three to five self-identified transgender students, who have been accommodated. Reporting on the policy, the Buffalo News (Dec. 10) indicated that several other western New York school districts are considering similar policy proposals.

NORTH CAROLINA – The school board of a public charter school in Rutherford County voted 5-3 on November 12 to suspend all student club activity while it sought legal counsel about a newly-formed LGBT group at Lake Lure Classical Academy. The ensuring public uproar led to a strategic retreat by the board, now advised by counsel of its obligations under the Equal Access Act. Bowing to concerns expressed by some parents, the board voted to establish a new policy under which K-8 students (but not high school students) will need parental consent to join any student club. Associated Press, Dec. 1.

OHIO – The Cincinnati City Council voted 7-2 on December 9 to prohibit “conversion therapy” on violators. Cincinnati thus followed the lead of California, Oregon, Illinois and New Jersey, as well as the District of Columbia, in taking action against so-called “conversion therapy.” First Amendment attacks on such laws have been defeated in the 3rd and 9th Circuit

**OKLAHOMA** – The Norman City Council unanimously approved a resolution interpreting the city’s Human Rights Ordinance to protect people from discrimination because of sexual orientation or gender identity as part of the prohibition of sex discrimination, thus taking a position consistent with the U.S. Equal Employment Opportunity Commission’s interpretation of “sex” under Title VII of the federal Civil Rights Act of 1964, *Freedom Oklahoma Press Release*, Dec. 22.

**WEST VIRGINIA** – Members of the Lewisburg City Council voted unanimously on first reading in favor of an ordinance banning discrimination that would be inclusive of sexual orientation and gender identity, as an amendment to the existing Human Rights Commission ordinance. A second reading was to be held at the next scheduled Council meeting on January 19. *Register-Herald*, Dec. 17.

**WISCONSIN** – The Mount Horeb School Board voted on December 7 to approve measures to accommodate transgender students, granting access to restrooms and locker rooms and physical education classes consistent with the student’s gender identity, and adding “transgender status” to the district’s non-discrimination policy. The Board vote was unanimous, 7-0. *Wisconsin State Journal*, Dec. 8.

**LEGISLATIVE / LAW & SOCIETY**

**EMPIRE STATE PRIDE AGENDA** – The board of Empire State Pride Agenda, a New York state-wide LGBT political advocacy, announced on December 12 that it was suspending operations during the first half of 2016. Citing the passage of marriage equality in 2016 and a recent action by Governor Andrew Cuomo directing the State Division of Human Rights to adopt a regulation interpreting the state’s human rights law to ban gender identity discrimination, ESPA indicated that remaining legislative priorities could be parceled out to other organizations, but that it would keep intact its political action committee. The action immediately drew adverse criticism from the LGBT press, organizational leaders, and former executive directors of ESPA, arguing that there was a continuing need for an effective statewide LGBT lobbying operation with central coordination and that it was inappropriate for the organization’s board to take this action without public discussion and consultation. There were immediate calls for political leaders in the LGBT community to begin efforts to set up a new statewide lobbying organization.

**TRANSGENDER RIGHTS INITIATIVE**  
– The Arcus Foundation announced that in partnership with several other foundations they were devoting $20 million to funding transgender rights activity by awarding grants to U.S. groups that focus primarily on transgender issues or are led by transgender individuals. The funding will not go to organizations that include transgender issues as part of a broader agenda. The focus was expected to expand internationally in the following years. The articulated goals of the effort include: “quelling a rising tide of violence against transgender people, increasing job opportunities, and boosting long-term inclusion of transgender people in society,” according to a December 8 report by BuzzFeed.com. The foundations pledge to distribute $20 million over five years, beginning in 2016.

**BLUFFTON UNIVERSITY** – Bluffton University, a Mennonite institution in Ohio, recently amended its non-discrimination policy to include sexual orientation, stating that this is a “clarification” of its policy. Bluffton also announced that it would resign from the Council of Christian Colleges and Universities. CCCU issued a statement saying that Bluffton knew that if it changed its non-discrimination statement this would “result in a change of membership status while the CCCU Task Force on membership finished their work.” CCCU is the third Mennonite college during 2015 to withdraw from CCCU after changing their policies to allow employment of lesbian and gay people. Some other member schools in CCCU had announced that they would terminate their membership if the organization allowed member schools to recognize same-sex marriages and hire gay people, according to a December 8 report by InsideHigherEd.com.

**WILLIAMS INSTITUTE AT UCLA/ CALIFORNIA HIV/AIDS RESEARCH PROGRAM** – These organizations issued a joint report in December titled “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.” In addition to amassing data about the history and the impact of criminal law on people living with HIV/AIDS, the report explores law and policy implications of the data and an agenda for further research.

**HUMAN RIGHTS CAMPAIGN** – During the 2015 Clinton Global Initiative Annual Meeting, HRC announced the formation of a Coalition for Workplace Equality Worldwide in which HRC will partner with major international corporations employing a combined total of 1.4 million people in more than 190 countries seeking to establish an international business.
standard of equal treatment for LGBT employees. HRC announced that its Corporate Equality Index, which has drawn increasing international media attention for its ranking of corporate policies towards LGBT people, will now take into consideration whether companies have adopted a global non-discrimination policy or code of conduct that specifically prohibits discrimination because of sexual orientation or gender identity. In the past, HRC’s ratings have focused only on US-domestic policies of corporations. On the impact of the HRC ratings, we have noted that as soon as the annual ratings are released, on-line media are flooded with press releases from companies that were highly rate bragging about their ratings, and there seems to be some competition among companies for high ratings as something valuable in the corporate recruitment process.

**MICHIGAN INITIATIVE PASSES FIRST TEST** – Proponents of a Michigan Initiative to enact LGBT rights protections through a ballot measure survived their first test when the Michigan Board of State Canvassers approved the form and wording of their petition. Proponents will need to gather approximately 315,000 valid voter signatures by July 11 in order to qualify their measure for the 2016 general election ballot. The measure would add gender, gender identity, sex and sexual orientation to a provision of the Michigan Constitution that bars discrimination because of religion, race, color or national origin. The state’s Republican-controlled legislature has repeatedly blocked efforts to pass a bill amending the state’s anti-discrimination ordinance to protect LGBT people from discrimination. Gay rights groups in the state are divided over the initiative proposal, which was instigated by Detroit civil rights attorney Dana Nessel (who litigated the Michigan marriage equality case) and a pro-gay Republican attorney, Richard McLellan. Stephanie White, executive director of Equality Michigan, the statewide LGBT lobbying group, expressed doubts about whether there was sufficient support to enact the proposal. *Lansing State Journal*, December 30.

**INTERNATIONAL NOTES**

**EUROPEAN UNION** – The European Parliament’s Intergroup on LGBT Rights reported on December 8 that Hungary and Poland had blocked an effort by the EU to adopt regulations that would simplify the legal procedures for EU couples living or working in another Member State in the event of divorce or death. Difficulties arise when the legal status of a couple is in question because the state where they happen to be at the time of the divorce or death does not accord any legal recognition to their relationship. During debate in the Justice and Home Affairs Council, the Justice Ministers from Poland and Hungary argued that the proposed regulation would violate Member States’ national identity by intruding on local traditions and values around the definition of families. Although the European Parliament voted in 2013 that all couples living or working in another Member State deserved equal cross-border property rights, the body has been unable to agree on specific regulations that could override national law.

**ARMENIA** – On December 6, the voters approved a new constitution for Armenia that locks in a constitutional definition of marriage that excludes same-sex couples. Article 34 states, in a translation provided by PinkArmenia.org, “Men and women of marriageable age have the right to marry with each other and found a family according to their free will.” This is construed to exclude any right of men to marry men or women to marry women. There was some confusion shortly after the vote when a translation provided by the government was misconstrued in some media source to allow same-sex marriages.

**AUSTRALIA** – The state government in Tasmania plans to introduce legislation during 2016 to expunge historic criminal records for consensual homosexual activity, according to a December 18 report in the Tasmanian publication *The Advocate*. Criminal bans on homosexual sex were repealed in Tasmania in 1997, but existing convictions were not erased from the books at that time. Attorney-General Vanessa Goodwin explained, “The legislation will ensure that any individual prosecuted under these offences will no longer suffer distress or be disadvantaged by a criminal record in relation to travel, employment and volunteering.” If enacted as expected, the measure would make Tasmania the first Australian state to expunge criminal records for consensual violations of anti-gay criminal laws on an across-the-board basis.

The state parliament in Queensland has voted to change course and restore state-sanctioned civil partnership ceremonies for same-sex and different-sex couples. In 2012 a new parliamentary majority had enacted legal changes to end the ceremonies, although couples could still register their civil partnerships with Births, Deaths and Marriages registrars. A new change in government and the crossover of some members who had supported the prior measure led to a 69-22 vote on December 3. *Brisbanetimes.com.au*, Dec. 3. *The Advocate*.

Trent Zimmerman, an openly gay candidate of the Liberal Party, has become the first openly
**INTERNATIONAL**

gay person to be elected to the House of Representatives of the Federal Parliament, reported starobserver.com.au on December 7. There have been openly gay senators in the past, but Zimmerman is the first openly gay person elected to the lower house. Zimmerman said that marriage equality was the most important LGBTI issue confronting Parliament, but he expected that there would be a plebiscite before any vote in Parliament. Zimmerman had previously served as a ministerial advisor and also was an elected councilor at North Sydney Council.

**AUSTRIA** – On December 21 the Vienna Administrative Court rejected the claim that Austria’s denial of marriage to same-sex couples unconstitutionally consigned their children to the legal disability of being labelled illegitimate. Austria has registered partnerships for same-sex couples that provide sufficient rights to have satisfied the European Court of Human Rights, which has ruled that nations which are parties to the European Convention on Human Rights must provide some form of legal recognition for same-sex partners. One Austrian LGBT rights group – Homosexuelle Initiative (HOSNI) Wien – had been opposed to the litigation, asserting in a statement from its Secretary General Kurt Krickler to internet journalist Rex Wockner distributed on December 21, that a substantial portion of children are born in Austria each year to unmarried women and couples and “nobody cares” because legal reforms have virtually eliminated any legal disabilities of such children. “HOSI Wien is not opposed to marriage equality in general,” said Krickler, “however we simply think we first have to reform marriage before we take it. Registered partnership today is the better institution, and who does say marriage is the non-plus-ultra?”

**BERMUDA** – Chief Justice Ian Kawaley has turned down a petition by the government for significant further delay in implementing new rules under which foreign same-sex partners of Bermudians will get the same right to live and seek work in the country as legal spouses of Bermudians. The new rules, decreed by the Supreme Court in a ruling in a case brought by Bermuda Bred Company, an organization of bi-national same-sex couples, against the Minister of Home Affairs and the Attorney-General, will go into effect by the court’s order on February 29, 2016. Chief Justice Kawaley rejected the government’s argument that it would need at least a year to make the necessary legal changes to accommodate this ruling. CANA News, December 9.

**CANADA** – Kimberly Horwood, Chief Adjudicator of the Newfoundland and Labrador Human Rights Board of Inquiry, ruled on December 3 in S.B. & C.A. v. Her Majesty the Queen, that Service NL may not require transgender applicants to undergo sex reassignment surgery in order to get a change recorded of the gender designation on their birth certificates. Horwood’s gives Service NL 30 days to revise the criteria for changing sex designation on a birth certificate so as to remove the discriminatory effect of the current system on transgender persons and take reasonable steps to publicize the revised criteria so that transgender persons become aware of them. The Provincial Government, which had been planning to address this issue during the next sitting of the House of Assembly, indicated that legislation will follow in due course, but in the meanwhile Service NL will not be following the “offending legislation” with respect to the two complainants in this case and those similarly situated. Canadian Government News, Dec. 9. **Despite Canada’s liberal reputation on gay rights issue, it is not easy for gay refugees to obtain asylum there. A detailed account of the difficulties encountered by an Albanian citizen seeking asylum in Canada on grounds of his sexual orientation is set out in the decision by Justice Russell of the Federal Court of Canada in Islam v. Canada (Citizenship and Immigration), 2015 FC 13542 (Dec. 9). The Refugee Protection Division decided, on grounds of credibility, that the applicant had not proven he was gay and thus could not claim asylum on that ground, and Justice Russell agreed, in a lengthy opinion setting forth the arguments of both parties in great detail. In another case, the Refugee Board denied an asylum petition from a gay man from St. Kitts, Rolston Ryan, based on the tribunal’s conclusion that “the Government of St. Kitts and Nevis provides adequate protection to its citizens.” The Board did not consider it determinative that Mr. Ryan bears wounds from two gay-bashing attacks he had suffered in St. Kitts, or that St. Kitts has not moved to decriminalize consensual gay sex. Toronto Star, Dec. 28. In another case, a gay man from Uganda, identified in a press report as J.K., has been fighting to avoid deportation for five years. On December 17 he learned that an application he had sent to the United Nations Committee against Torture had borne fruit: the Committee ruled on December 17 he learned that an application he had sent to the United Nations Committee against Torture had borne fruit: the Committee ruled that Canada had not moved to decriminalize consensual gay sex. Toronto Star, Dec. 28. In another case, a gay man from Uganda, identified in a press report as J.K., has been fighting to avoid deportation for five years. On December 17 he learned that an application he had sent to the United Nations Committee against Torture had borne fruit: the Committee ruled that Canada has its first transgender judge, Kael McKenzie, a crown attorney with indigenous ancestry who was official designate for appointment to
the provincial court in Manitoba on December 17. The newspaper article identified him as the third openly transgender judge in North America, identifying Victoria Kolakowski of Alameda County in California as the first openly transgender lawyer to be elected to the bench. * * * “Gender identity and expression” will be added to the Human Rights Act of Alberta upon receiving royal assent, as a result of a unanimous vote in the provincial legislature on December 7, making Alberta the eighth jurisdiction in Canada to protect transgender persons explicitly in a human rights code. * Postmedia News, Dec. 8. * * * The ongoing dispute over credentialing of Trinity Western University’s Law School reached a new chapter with a ruling by Chief Justice Hinkson of the Supreme Court of British Columbia in * Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 (Dec. 17, 2015). The Law Society had determined against credentialing Trinity without giving official reasons, although everyone concerned knew that the point in controversy was the attitude and policies of Trinity, an evangelical institution, towards gay people. In a long and complicated decision, Justice Hinkson found that the normal deference to the decision-making by the Law Society’s governing body should not apply in this case because the body basically surrendered its decision-making to the general membership, which had voted in a referendum to reverse the initial decision accrediting Trinity on behalf of the bar in British Columbia. Thus, his remedy was to revive the original decision. Perhaps this case is headed to the federal Supreme Court, as there are now decisions on this issue from several provinces. It came up across the nation as Trinity graduates seek admission to the bar, which requires them to have graduated from a school recognized by the bar in the jurisdiction where they are applying for admission. * CHINA – HONG KONG – Leung Chun-kwong, a senior immigration officer, is suing the government in the High Court for official recognition of his marriage to Scott Paul Adams, also a Hong Kong resident. The men married in New Zealand on April 18, 2014, and Leung, who has worked for the government since 2002, applied to have the marriage recognized for employee benefits and tax purposes, but was turned down by the Civil Service Bureau and the Tax Bureau, both of which asserted that this marriage “falls outside the meaning of marriage” for legal purposes in Hong Kong. Leung’s application to the High Court claims unconstitutional sexual orientation discrimination, stating: “At its heart, this matter concerns protection for the dignity of a historically oppressed class in our society – homosexual persons, a substantial portion of our society. Allowing discriminatory treatment against such a minority undermines the law.” In reporting on the case, * South China Morning Post* (Dec. 28) noted that in another case pending before the High Court, a British lesbian seeks judicial review of a decision by the Immigration Department to deny her a dependent visa when she followed her same-sex spouse to relocate to Hong in May 2015. That case has been submitted and judgment is pending. * CHINA – HUNAN PROVINCE – Sun Wenlin filed a complaint against the Furong District Civil Affairs Bureau in Changsha during December challenging the Bureau’s refusal to allow him and his same-sex partner to register their marriage. The matter was presented to the Furong District People’s Court. His lawyer, Shi Fulong, told *Radio Free Asia* (Dec. 21), “We have filed this administrative complaint because the civil affairs bureau failed to carry out its duty to register marriages. We are appealing to the court to order it to proceed.” * CZECH REPUBLIC – Praguepost.com (Dec. 7) reported that a court in Prostejov, South Moravia, had issued a “breakthrough ruling” by recognizing the adoption of 10-year-old twins by a Czech-French gay couple living in the United States. The Czech man and his French husband adopted the newborn twins in San Francisco, where they have been raising them. The children spent their holidays with their grandmother in the Czech Republic, and their Czech father sought to get official recognition of the adoption to preserve his parental rights while they are in the country. “Now we can be granted Czech citizenship, thanks to which we can move to the Czech Republic,” said the Czech father. “Our traveling across Europe will be easier and the boys will have their door to Czech schools open.” He reported that the boys “feel very well in the Czech Republic and they would like to stay here.” The ruling came after a new law came into force on international private law, under which the court found it could recognize a foreign adoption ruling. * ESTONIA – Although the Cohabitation Act, under which same-sex couples would be allowed to legally register their partnerships, was to go into effect on January 1, 2016, the failure of the government to adopt implementing laws has created uncertainty and confusion, and the Estonian Chamber of Notaries recommended that people delay registering their partnerships. Although notaries can oversee the signing of such agreements, procedures are not yet set up for them to be registered with the government, which creates the anomalous situation that partnerships cannot be legally dissolved, a procedure which requires deleting marriage records. This sounds mixed-up to us. *EstonianPublicBroadcasting, December 30.*
INDIA – On December 18 the legislature rejected an attempt to decriminalize consensual gay sex through an amendment to Section 377 of the Indian Penal Code. This was the first such attempt since 2013, when a Supreme Court panel reversed a decision by the Delhi High Court finding Section 377 unconstitutional. United News of India reported that the session was sparsely attended because all Congress Party members were absent in protest over an unrelated matter. There was speculation that the leadership called for a vote at this time in order to take advantage of the absence of Congress members. The vote was 71 against, 24 in favor. * * *

* Following up on a Supreme Court ruling, the government has drafted a bill creating a recognized “third gender” for transgender individuals, and classifying them as a group eligible for affirmative action in educational institutions and employment. The new legislation follows on legislative approval of the Right of Transgender Persons Bill 2015, which provides various social security benefits, including scholarships, pensions and skill development training, targeted to transgender people. Under the draft bill, transgender people would be declared as the “third gender,” and a person from that community would have the option to identify as “man,” “woman,” or “transgender.” The bill also proposes “coverage of medical expenses and therapeutic intervention by a comprehensive insurance scheme for transgender persons.”

IRELAND – Church-related state institutions are major employers in the Republic of Ireland, so it was big news when the legislature passed the Equality (Miscellaneous Provisions) Bill without opposition on December 2. The bill would forbid employment discrimination against LGBT people, divorcees and single parents working in schools and hospitals that are under religious patronage. This measure was intended to close a big loophole left by the Equal Status Act 2000, which had exempted such institutions from compliance. IrishTimes.com, Dec. 3.

ISRAEL – Amir Ohana, an openly gay man, received enough votes in the last parliamentary election to be number 32 on the Likud Party list. With the resignation of MK Interior Minister Silvan Shalom on December 20, Ohana was entitled to take the newly-vacated Likud seat, becoming the first openly-gay person to become a member of the Knesset through an open process of voting by party members. As Prime Minister Benjamin Netanyahu pointed out during Ohana’s installation ceremony, prior openly-gay members of the body from other parties had been selected by party committees, not by the general party membership in a vote. Ohana is a lawyer, a major in the military reserves, and a veteran of the Shin Bet Domestic Security Force. According to a Dec. 21 report by Times of Israel, he is the first openly gay MK in a “right wing party” and only the second member in the current session of the Knesset. Ohana lives in Tel Aviv with his partner and their infant twins who were conceived and born in the United States through a surrogacy process. At the installation ceremony, the prime minister (whose presence had not been expected) took the podium and welcomed Ohana “with pride.” * * *

The Israel Defense Forces announced on December 1 that it was changing enlistment policy to allow enlistment of people who are HIV-positive. Military service is compulsory for Jews but those who were HIV-positive had been uniformly rejected as unfit to serve for medical reasons. The head of the Medical Services Department of the IDF, Col. Moshe Pinkert, said that the enlistment policy will change

GREECE – Associated Press (Dec. 22) reports that the Greek Parliament overwhelmingly approved legislation creating civil partnership for same-sex couples, two years after the European Court of Human Rights had ruled that Greece’s failure to provide such civil partnership violated the European Convention on Human Rights. The legislators voted 193-56 to approve the measure, but only after the original proposal was amended to remove the right of same-sex civil partners to jointly adopt children. The bill encountered fierce opposition from the Greek Orthodox Church, which condemns homosexuality as “a deviation from the laws of nature” and “a social crime.” Bishop Amvrosios from Kalavryta said, “Those who experience or support it are not normal people.” Greece had adopted a civil partnership law in 2008, but made the new status available only to different-sex couples. Local gay rights advocates applauded the step forward, but announced their determination to keep working for full marriage rights for same-sex couples. According to an announcement circulated on December 22 by the European section of the International Lesbian and Gay Association (ILGA), the action made Greece the 26th European country to legally recognize same-sex unions.

GUERNSEY – The legislature of Guernsey, a self-governing island in the English Channel which is a British dependency, voted 37-7 in favor of taking up a marriage equality bill in the future. The vote came after the body decisively rejected proposals to create civil union or civil partnership structures. A Policy Council spokesperson said that it would “not be before 2017” when proposed legislation would be placed before the body for approval. A similar process is also unfolding in another Channel island British dependency, Jersey. BBC.com, Dec. 10.
and determinations will be made on a case-by-case basis as long as enlistees meet a series of “health-related criteria.” In addition, HIV-positive people will not be assigned to combat units. Pinkert said that the policy change was a “very important step for the acceptance of people with HIV into society and reducing social stigma.”

**JAMAICA** – Maurice Tomlinson, a gay Jamaican attorney, has filed a lawsuit in the Civil Division of the Supreme Court of Judicature of Jamaica, claiming that the country’s anti-gay sodomy law violates the Charter of Fundamental Rights and Freedom Act 2011 as well as various other statutory provisions. In his complaint, Tomlinson stated that Jamaican laws that “criminalize consensual sexual intimacy between men essentially render me an un-apprehended criminal.” He contended that maintaining such laws “amounts to a direct and blatant denial of equality before the law for me and other gay men in Jamaica.” Tomlinson had represented the claimant in a previous lawsuit attacking the law, but that case was withdrawn at the request of the plaintiff. Tomlinson is married to a Canadian man, splitting his time between Jamaica and Toronto. He agreed to be the plaintiff in this case when it proved difficult to recruit somebody else to take the place of the prior plaintiff. The lawsuit seeks to have the law nullified in all cases of adult consensual sex. Although nobody has been convicted under the law since 2005, Tomlinson said that it served as a “blackmailer’s charter” that police officers had exploited to extort money from gay men, and had relied upon to deny assistance to gay men who were gay-bashed. The court has scheduled a first procedural hearing in the case for February 23.

**JAPAN** – A transgender woman has filed a discrimination suit against Konami Sports Club Co., which operates a health club in Kyoto. She claims that the club required her to use the men’s dressing room because she had not changed her sexual identity on the official family register. The incident took place before she had sex reassignment surgery in March 2014. According to a Dec. 25 report in Japan Economic Newswire, “The plaintiff is still listed as a male on the register as she has a daughter under 20 and transgender people with underage offspring are legally prevented from changing their officially listed gender.”

**MALAWI** – After BBC International Reports gave wide circulation on December 16 to a report by the UK-based Malawian newspaper Nyasa Times that two Malawi men had been arrested and charge with engaging in homosexual activity carrying a potential 14 year prison sentence, there was an international uproar and several countries, including the U.S., called on Malawi to release the men and drop the prosecution. A statement issued by the U.S. Ambassador to Malawi, Virginia Palmer, said, “I urge the Malawi government to make good on its international human rights obligations, drop the charges, and resolve this unfortunate incident as quickly as possible.” Evidently this had an immediate effect, as BBC International Reports (Dec. 23) said just days later that Malawi had suspended its laws against same-sex relationships and ordered police not to arrest gays pending a decision on whether to repeal the legislation. Malawi dropped charges against the men, according to a December 19 announcement by Malawi’s Minister of Justice Samuel Tembenu, who said that Malawi is committed to adhere to “universally accepted human rights standards.” He said that the government had committed itself to review colonial-era sodomy laws and possibly rid itself of this “relic,” but that any action would be done “in consultation with the people of Malawi as prescribed by the constitution.”

**MEXICO** – With an overwhelming favorable vote on December 17, the legislature in the state of Nayarit approved a measure opening up civil marriage to same-sex couples. As a result, couples can obtain marriage licenses and register their marriages there without having to apply to a court for an order (called an “amparo”) directing local officials to allow the marriage. With this latest vote, same-sex marriage is legal in five states (Chihauhua, Coahuila, Guerrero, Nayarit and Quintana Roo); in Mexico City, a federal district; and in the city of Santiago de Querétaro, capital of Querétaro state. By virtue of a Supreme Court order from several years ago after Mexico City became the first jurisdiction in the country to allow same-sex marriages, such marriages legally performed must be recognized by governments throughout the country. As a result of a more recent Supreme Court ruling, judges in jurisdictions that have not yet legislated to allow same-sex marriages must grant amparos upon application from qualified same-sex couples, directing local officials to allow the marriages. Appeals are pending before the Supreme Court from cases in two other states, as a result of a deliberate campaign to establish that same-sex couples should be able to get married anywhere in Mexico without having to seek a court order against local officials. Internet journalist Rex Wockner has been following the developments in Mexico closely and his dispatches are the principal source for this news item.

* * * Associated Press reported on December 15 that the state legislature
INTERNATIONAL

in Tabasco voted 21-9 on December 14 to restrict the option of hiring a surrogate to gestate a fetus to Mexican couples that include a mother aged 25- to-40 who can present proof that she is medically unable to bear a child. This would effectively exclude gay men from hiring surrogates in order to have children, and would exclude non-citizens from hiring Mexican women for this purpose. According to the AP report, the relatively low cost of hiring a Mexican surrogate in Tabasco, “current the only Mexican state that allows surrogacy, supposedly on a non-commercial basis,” had made the area a “low-cost alternative to the United States” for people seeking surrogates.

NEW ZEALAND – GayNZ.com reported on December 21 that Judge I.A. McHardy had ruled that refusal to grant joint adoption to a same-sex de facto couple violated the Bill of Rights Act. The effect of the ruling is to grant all de facto couples, same-sex or different-sex, the right to apply for joint adoptions. Lawyer Stewart Dalley, arguing on behalf of himself and his partner, presented his case to the court on October 30, and received written orders effectuating the judge’s decision on December 18. Same-sex married couples won the right to adopt in August 2013 under the Marriage Amendment Act, but under the Adoption Act, courts had previously refused to allow joint adoptions by unmarried couples. Prior to this new ruling, an unmarried same-sex couple would have to resort to one of them adopting a child and the other then applying to be appointed a guardian of the child. The court’s ruling follows the advice of a 2000 report by the Law Commission, recommending establishment of a “general principle that persons are not disqualified from eligibility to adopt on account of their relationship status – that is, whether they are single, married, in a same-sex, or de facto relationship.”

SLOVENIA – The Parliament voted last March to allow same-sex marriages, but opponents pressed for a referendum on the measure. The government tried to prevent such a vote, arguing that the matter involved a human rights issue not subject to popular referendum, but the nation’s Constitutional Court ruled that a vote must be held. On December 20, voters repealed the marriage law, with 63.5% voting for repeal. About a third of the registered voters participated. Slovenia is a majority-Catholic country, and the Church came out strongly in favor of repealing the law, with Pope Francis telling an audience of Slovenian Pilgrims in St. Peter’s Square a few days before the vote, “I want to encourage all Slovenians, particularly those with public responsibilities, to preserve family as a basic cell of society.” In light of his prior statements against same-sex marriage, this was seen as a call to vote down the law. New York Times, Dec. 21.

TUNISIA – The world press focused outrage on Tunisia, where six teenage boys were given three-year prison sentences by a court in Kairouan and banished from the city for five years after serving their sentences, after they were arrested in a University residence hall and charged with violations of Article 230 of the Penal Code. One of the men was given an additional six months in prison because police found gay videos on his computer. Upon arrest, the men were subjected to “anal exams” to determine whether they had engaged in gay sex. A local gay activist group characterized the arrests, anal exams and imposed punishments as “a return to the Middle Ages,” reported HuffingtonPost.com on December 21.

UNITED KINGDOM – Northern Ireland – The Assembly’s refusal to adopt a marriage equality measure has prompted two same-sex couples to institute litigation. Although a legislative majority actually voted in favor of the measure, under a power-sharing arrangement in the legislature a Catholic minority party was able to veto the enactment. The plaintiff couples were among the first to form civil partnerships when Northern Ireland implemented the UK’s civil partnership law in 2005. Their case is being heard in Belfast High Court by Justice O’Hara. The case is brought against the Department of Finance and Personnel, contending that the ban on same-sex marriage violates the European Convention on Human Rights. A victory would be breaking new ground under the Convention, as the European Court of Human Rights has not yet found a sufficient consensus among signatories to the Convention to recognize a right to marry. That court has ruled that signatory nations can comply with their obligations to protect entitlement to marriage and respect for family life by creating a legal construct for recognition of same-sex couples similar to civil unions and civil partnerships. The Belfast Telegraph (Dec. 3) reports that the case is being heard “in tandem with another case in which two men who wed in England are seeking to have their marriage recognized in Ireland.” Justice O’Hara indicated he would rule sometime in 2016.

VENEZUELA – On December 6 voters elected the first openly transgender person, lawyer Tamara Adrian, to the Venezuelan National Assembly. She is a member of Popular Will, a left-leaning Socialist Party that is pro-LGBT, according to a December 7 report in the Washington Blade.
1. Bambauer, Jane R., and Toni M. Massaro, Outrageous and Irrational, 100 Minn. L. Rev. 281 (Nov. 2015) (examining the Supreme Court’s use of intermediate forms of scrutiny to deal with cases that don’t fit neatly into the established categories of suspect classifications or fundamental rights, drawing upon gay rights cases as prime examples).


10. Jones, Brian Christopher, Disparaging the Supreme Court: Is SCOTUS in Serious Trouble?, 2015 Wis. L. Rev. Forward 53 (Nov. 3, 2015) (suggesting that heated criticism of the Court over, inter alia, Obergefell v. Hodges, could signal serious problems for the prestige usually accorded the Court by other political actors).


