

L G B T
LAW NOTES

April 2017

BECAUSE OF
SEX (UAL ORIENTATION)

Sitting En Banc, Seventh Circuit Boldly Becomes First Federal Court of Appeals to Overrule Bad Precedent And Conclude Sexual Orientation Discrimination is Prohibited Under Title VII

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7th Circuit Issues Landmark Ruling That Title VII Prohibits Sexual Orientation Discrimination

The U.S. Court of Appeals for the 7th Circuit substantially advanced the cause of gay rights on April 4, releasing an unprecedented *en banc* decision in *Hively v. Ivy Tech Community College of Indiana*, 2017 WL 1230393, holding that Title VII of the Civil Rights Act of 1964, which applies generally to all employers with fifteen or more employees as well as many federal, state, and local government operations, prohibits discriminating against a person because of their sexual orientation. The text of the statute does not mention sexual orientation, so the interpretive question for the court was whether discriminating against somebody because they are lesbian, gay,

(Reagan appointee) wrote a concurring opinion which was joined by Kenneth Francis Ripple (Reagan appointee). The dissent by Diane S. Sykes (George W. Bush appointee) was joined by Michael Stephen Kanne (Reagan appointee) and William Joseph Bauer (Ford appointee). Ripple and Bauer are senior judges who were sitting on the *en banc* hearing because they were part of the three-judge panel (with Judge Rovner) that ruled on the case last year. The Circuit has 11 authorized positions, but there are two vacancies among the active judges, part of the Republican Senate's legacy of refusing to confirm most of President Obama's judicial appointees during his second term.

sexual orientation. Since Indiana's state law does not forbid sexual orientation discrimination, and South Bend's ordinance (which does forbid sexual orientation discrimination) would not apply to the state college, she filed suit in federal court under Title VII. She represented herself at that stage. The trial judge, Rudy Lozano, granted the college's motion to dismiss the case on the ground that 7th Circuit precedents exclude sexual orientation discrimination claims under Title VII.

Hively obtained representation from Lambda Legal on appeal. The three-judge panel rejected her appeal, while two of the judges urged that the precedents be reconsidered.

What was particularly amazing about the affirmative decision was that the 7th Circuit is composed overwhelmingly of Republican appointees.

or bisexual can be considered a form of sex discrimination.

What was particularly amazing about the affirmative decision, the first to rule this way by a federal appeals court, was that the 7th Circuit is composed overwhelmingly of Republican appointees, many of whom were appointed as long ago as the Reagan Administration. Although the lead opinion for the Circuit was written by Chief Judge Diane Pamela Wood, who was appointed by Bill Clinton, the 8-member majority of the 11-judge bench included more Republicans than Democrats. Many of the judges in the majority could be generally characterized as judicial conservatives.

Wood's opinion was joined by Frank Easterbrook (Reagan appointee), Ilana Rovner (George H. W. Bush appointee), Ann Claire Williams (Clinton appointee), and David F. Hamilton (the only Obama appointee on the Circuit). Richard Posner (Reagan appointee) wrote a concurring opinion. Joel Martin Flaum

The Circuit's decision to grant *en banc* review clearly signaled a desire to reconsider the issue, which Judge Rovner had called for doing in her panel opinion. Rovner then made a persuasive case that changes in the law since the 7th Circuit had previously ruled negatively on the question called out for reconsideration. Those who attended the oral argument on November 30 or listened to the recording on the court's website generally agreed that the circuit was likely to overrule its old precedents, the only mystery being who would write the opinion, what theories they would use, and who would dissent.

The lawsuit was filed by Kimberly Hively, a lesbian who was working as an adjunct professor at the college, which is located in South Bend, Indiana. Despite years of successful teaching, her attempts to secure a full-time tenure-track position were continually frustrated and finally her contract was not renewed under circumstances that led her to believe it was because of her

Judge Wood found that several key Supreme Court decisions have broadened the meaning of "because of sex" in Title VII, to the extent that she could write that "in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B." The broadening includes launching a complex law of sexual harassment, including same-sex sexual harassment, and discrimination against a person who fails to conform to "a certain set of gender stereotypes."

As have many of the other judges who have written on this issue, Wood quoted from Justice Antonin Scalia's opinion for the unanimous court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the same-sex harassment case, in which, after noting that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," this did not mean that the statute could

not be interpreted to apply to such a situation. “But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,” Scalia wrote, “and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

Woods found convincing Hively’s contention, argued to the court by Lambda Legal’s Greg Nevins, that two alternative theories would support her claim. The first follows a “comparative method in which we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?” The second rests on an intimate association claim, relying on the Supreme Court’s 1967 ruling striking down state laws barring interracial

Insurance Co., 791 F.2 888 (11th Cir. 1986), and *Holcomb v. Iona College*, 521 F.3d 130 (2nd Cir. 2008). These citations were a bit ironic, since the 11th and 2nd Circuits have in recent weeks rejected sexual orientation discrimination claims under Title VII, in which the plaintiffs advanced the same analogy to support their Title VII claims. These recent opinions issued during March, which are reported on below, were by three-judge panels that held themselves to be bound by prior circuit rulings. Lambda Legal has already filed a petition for *en banc* review in the 11th Circuit case, and counsel for plaintiff in the 2nd Circuit case has said she will do the same.

Ultimately, Wood acknowledged, “It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’ The effort to do so has led to confusing and contradictory results, as our panel opinion illustrated so well.

of proving that her sexual orientation was a motivating factor in the college’s decision not to promote her or renew her adjunct contract. And, what passed unspoken, the college might decide to petition the Supreme Court to review this ruling, although the immediate reaction of a college spokesperson was that the school—which has its own sexual orientation non-discrimination policy—denies that it discriminated against Hively, and is ready to take its chances at trial.

Judge Posner submitted a rather odd concurring opinion, perhaps reflecting the oddity of some of his comments during oral argument, including the stunning question posed to the college’s lawyer: “Why are there lesbians?” Posner, appointed by Reagan as an economic conservative and social libertarian, has evolved into a forceful advocate for LGBT rights, having satisfied himself that genetics and biology play a large part in determining sexual identity and that it is basically unfair to discriminate against LGBT people without justification. He wrote the Circuit’s decision striking down bans on same-sex marriage in Indiana and Wisconsin in 2014, *Baskin v. Bogan*, 766 F.3d 648.

Posner takes on the contention that it is improper for the court to purport to “interpret” the language adopted by Congress in 1964 to cover sexual orientation discrimination. After reviewing various models of statutory interpretation, he insisted that “interpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text) – a meaning that infuses the statement with vitality and significance today.” He used as his prime example judicial interpretation of the Sherman Antitrust Act of 1890, adopted “long before there was a sophisticated understanding of the economics of monopoly and competition.” As a result of changing times and new knowledge, he observed, “for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics.” Basically, the courts have “updated” the Act in order to keep it relevant to the present.

After briefly describing these two theories, Wood wrote, “Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.”

marriages, *Loving v. Virginia*, 388 U.S. 1. The Supreme Court held that a ban on interracial marriage was a form of race discrimination, because the state was taking race in account in deciding whom somebody could marry. Similarly here, an employer is taking sex into account when discriminating against somebody because they associate intimately with members of the same sex. After briefly describing these two theories, Wood wrote, “Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.”

Woods noted at least two rulings by other circuits under Title VII that had adapted *Loving*’s interracial marriage analysis to an employment setting, finding race discrimination where an employer discriminated against persons who were in interracial relationships, *Parr v. Woodmen of the World Life*

The EEOC concluded, in its *Baldwin* decision, that such an effort cannot be reconciled with the straightforward language of Title VII. Many district courts have come to the same conclusion. Many other courts have found that gender identity claims are cognizable under Title VII.”

Woods recited the now well-worn argument about how it is a basic inconsistency in the law that a person can enter into a same-sex marriage on Saturday and then be fired without legal recourse for having done so when they show up at the workplace on Monday. That is still the state of the law in a majority of the states.

Wood acknowledged that this decision does not end the case. Because Hively’s original complaint was dismissed by the district court without a trial, she has not yet been put to the test

He argued that the same approach should be brought to interpreting Title VII, adopted more than half a century ago. This old law “invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted.” And, after reviewing the revolution in understanding of human sexuality and public opinion about it, he concluded it was time to update Title VII to cover sexual orientation claims, even though “it is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII.” Although some of the history he then recites might arouse some quibbles, he was able to summon some pointed examples of Justice Scalia employing this method in his interpretation of the Constitution regarding, for example, flag-burning and an individual right to bear arms.

“Nothing has changed more in the decades since the enactment of the statute than attitudes toward sex,” wrote Posner, going on to recite the litigation history of the struggle for marriage equality that culminated in 2015 with the Supreme Court’s ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584.

Although it might sound odd at times as a judicial opinion, Posner’s concurrence is eminently readable and packed full of interesting information, including his list of “homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations)” who have made “many outstanding intellectual and cultural contributions to society (think for example of Tchaikovsky, Oscar Wilde, Jane Addams, Andre Gide, Thomas Mann, Marlene Dietrich, Bayard Rustin, Alan Turing, Alec Guinness, Leonard Bernstein, Van Cliburn, and James Baldwin – a very partial list).”

This brought to the writer’s mind a famous paragraph in Supreme Court Justice Harry Blackmun’s opinion rejecting Curt Flood’s challenge to the traditional anti-trust exemption for professional baseball, in which Blackmun included his own list of the greatest professional baseball players in history (compiled through a survey of

the Supreme Court’s members and their young legal clerks).

Instead of pursuing Judge Wood’s line of reasoning, Posner was ready to declare that sexual orientation discrimination is a form of sex discrimination without such detailed analysis. “The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten society. Title VII in terms forbids only sex discrimination, but we now understand discrimination against homosexual men and women to be a form of sex discrimination; and to paraphrase [Oliver Wendell Holmes, Jr.], ‘We must consider what this country has become in deciding what that [statute] has reserved.’”

In his concurring opinion, Judge Flaum took a narrower approach, noting that Title VII was amended in 1991 to provide that “an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.” In other words, discrimination does not have to be “solely” because of sex to violate Title VII. It is enough if the individual’s sex was part of the reason for the discrimination. In light of this, Flaum (and Ripple, who joined his opinion) would look to the analogy with discrimination against employees in interracial relationships. In addition, he noted, “One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ and ‘own’ meaningless” in dictionary definitions that define homosexuality in terms of whether somebody is attracted to persons of

“the same” or “their own” sex. Clearly, “sex” is involved when people are discriminated against because they are gay.

Judge Sykes’s dissent channeled scores of cases going back to the early years of Title VII and argued against the method of statutory interpretation used by the various opinions making up the majority. “The question before the en banc court is one of statutory interpretation,” she wrote. “The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.”

Although Sykes conceded that sexual orientation discrimination is wrong, she was not ready to concede that one could find it illegal by interpretation of a 1964 statute prohibiting sex discrimination, at a time when the legislature could not possibly have been intending to ban discrimination against LGBT people. As Posner pointed out, that issue wasn’t on the radar in 1964. Thus, to Sykes, Bauer and Kanne, it was not legitimate for a court to read this into the statute under the guise of “interpretation.”

Speculating about the ultimate fate of this decision could go endlessly on. There are fierce debates within the judiciary about acceptable methods of interpreting statutes, and various theories about how to deal with aging statutes that are out of sync with modern understandings.

Posner’s argument for judicial updating allows for the possibility that if Congress disagrees with what a court has done, it can step in and amend the statute, as Congress has frequently

amended Title VII to overrule Supreme Court interpretations with which it disagreed. (For example, Congress overruled the Supreme Court's decision that discrimination against pregnant women was not sex discrimination in violation of Title VII.) Posner's approach will be familiar to those who have read the influential 1982 book by then-Professor (now 2nd Circuit Judge) Guido Calabresi, "A Common Law for the Age of Statutes," suggesting that courts deal with the problem of ancient statutes and legislative inertia by "updating" statutes through interpretation to deal with contemporary problems, leaving it to the legislature to overrule the courts if they disagree. This method is more generally accepted in other common law countries (British Commonwealth nations), such as Australia, South Africa, India, and Canada, than in the United States, but it clearly appeals to Posner as eminently practical.

So far the Republican majorities in Congress have not been motivated to address this issue through amendments to Title VII, or to advance the Equality Act, introduced during Obama's second term, which would amend all federal sex discrimination laws to address sexual orientation and gender identity explicitly. Perhaps they will be provoked to act, however, if the question gets up to the Supreme Court and the 7th Circuit's view prevails.

With the possibility of appeals now arising from three different circuits with different views of the issue, Supreme Court consideration of this question is highly likely. Public opinion polls generally show overwhelming support for prohibiting sexual orientation and gender identity discrimination in the workplace, which might serve as a brake on conservative legislators who would otherwise respond adversely to a Supreme Court ruling approving the 7th Circuit's holding. ■

[We normally would not cover an April decision in the April issue, but this issue of *Law Notes* was not complete when the opinion was issued late on April 4, so we decided to include it rather than leave it to the May issue.]

Supreme Court Remands Transgender Rights Case to the 4th Circuit

The Supreme Court will not decide this term whether Title IX of the Education Amendments of 1972 and an Education Department regulation, 34 C.F.R. Section 106.33, require schools that receive federal money to allow transgender students to use restrooms consistent with their gender identity. *Gloucester County School Board v. G.G.*, No. 16-273 (Summary Disposition, March 6, 2017). Title IX states that schools may not discriminate because of sex if they get federal money, and the regulation allows schools to provide separate restroom and locker room facilities for boys and girls so long as they are "equal."

Responding to a February 22 letter from the Trump Administration, advising the Court that the Education and Justice Departments had "withdrawn" two federal agency letters issued during the Obama Administration interpreting the statute and regulation to require allowing transgender students to use facilities consistent with their gender identity, the Court announced on March 6 that it was "vacating" the decision by the 4th Circuit Court of Appeals in the case of transgender high school student Gavin Grimm, which it had previously agreed to review, and sending the case back to the 4th Circuit for "further consideration in light of the guidance document issued by the Department of Education and Department of Justice." The case had been scheduled for argument at the Supreme Court on March 28.

This result was not unexpected, although both parties in the case, Grimm and the Gloucester County, Virginia, School District, had asked the Court to keep the case on the docket and decide whether Title IX and the bathroom regulation required the district to let Grimm use boys' restrooms at the high school. Represented by the ACLU LGBT Rights Project, Grimm urged the Court to hold the previously scheduled hearing. The school district urged the Court to delay the hearing, in order to give the Trump Administration an opportunity to weigh in formally, but

then to hear and decide the case. Had the Court granted the school district's request, the case might have been argued before the end of the Court's current term or delayed to next fall.

The case dates back to 2015, when Grimm and his mother had met with school administrators during the summer prior to his sophomore year to tell them about his gender transition and they had agreed to let him use the boys' restrooms, which he did for several weeks with no problems. Complaints by parents led the school board to adopt a resolution requiring students to use restrooms consistent with the sex indicated on their birth certificates—so-called "biological sex"—regardless of their gender identity. The school also provided an alternative, unacceptable to Grimm, of using a single-user restroom that he found inconvenient and stigmatizing.

Grimm sued the school district, alleging a violation of his rights under Title IX and the 14th Amendment. The Education Department sent a letter at the request of the ACLU informing the district court that the Department interpreted Title IX and the bathroom regulation as "generally" requiring schools to let transgender students use facilities consistent with their gender identity. Following the lead of several federal courts and the Equal Employment Opportunity Commission interpreting other federal statutes that forbid sex discrimination, the Obama Administration took the position that laws against sex discrimination protect people from discrimination because of their gender identity.

The district judge, Robert Doumar, rejected the Obama Administration's interpretation and granted the school district's motion to dismiss the Title IX claim on September 17, 2015. *G.G. ex rel. Grimm v. Gloucester County School Board*, 132 F. Supp. 3d 736 (E.D. Va.), while reserving judgment on Grimm's alternative claim that the policy violated his right to equal protection of the law guaranteed by the 14th Amendment.

Doumar opined that when adopting Title IX in 1972, Congress had not intended to forbid gender identity discrimination, notwithstanding the Obama Administration's more recent interpretation of the statute.

The ACLU appealed Doumar's ruling to the Richmond-based 4th Circuit, where a three-judge panel voted 2-1 on April 19, 2016, *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, to reverse Judge Doumar's decision. The panel, applying a Supreme Court precedent called the *Auer* Doctrine, held that the district court should have deferred to the Obama Administration's interpretation of the bathroom regulation because the regulation was ambiguous as to how transgender students should be accommodated and the court considered the Obama Administration's interpretation to be "reasonable." A dissenting judge agreed with Judge Doumar that Title IX did not forbid the school district's policy. The panel voted 2-1 to deny the school district's motion for rehearing by the full 4th Circuit bench on May 31 (824 F.3d 450).

Shortly after the 4th Circuit issued its decision, the Education and Justice Departments sent a "Dear Colleague" letter to school administrators nationwide, advising them that the government would interpret Title IX to protect transgender students and providing detailed guidance on compliance with that requirement. The letter informed recipients that failure to comply might subject them to Education Department investigations and possible loss of eligibility for federal funding. This letter stirred up a storm of protest led by state officials in Texas, who filed a lawsuit joined by ten other states challenging the Obama Administration's interpretation as inappropriate. Subsequently, another lawsuit was filed in Nebraska by state officials joined by several other states making the same argument.

Judge Doumar reacted quickly to the 4th Circuit's reversal of his ruling, issuing a preliminary injunction on June 23 requiring the school district to allow Grimm to use boys' restrooms while the case proceeded on the merits (2016 WL 3581852). The 4th Circuit

panel voted on July 12 to deny the school district's motion to stay the preliminary injunction, but on August 3, the Supreme Court granted an emergency motion by the school district to stay the injunction while the district petitioned the Supreme Court to review the 4th Circuit's decision (136 S. Ct. 2442).

It takes five votes on the Supreme Court to grant a stay of a lower court ruling pending appeal. Usually the Court issues no written opinion explaining why it is granting a stay. In this case, however, Justice Stephen Breyer issued a one-paragraph statement explaining that he had voted for the stay as a "courtesy," citing an earlier case in which the conservative justices (then numbering five) had refused to extend such a "courtesy" and grant a stay of execution to a death row inmate, in a case presenting a serious 8th Amendment challenge to his death sentence. Justices Ruth Bader Ginsberg, Sonia Sotomayor and Elena Kagan indicated that they would have denied the motion, so all four of the conservative justices had voted for the stay. Since it takes five votes to grant a stay but only four votes to grant a petition for certiorari (a request to the Court to review a lower court decision), it was clear to all the justices that the school district's subsequent petition for review would be granted, and it was, in part, on October 28 (137 S. Ct. 369). The stay of the preliminary injunction was to be in effect until either the Court denied a certiorari petition from the school board or finally disposed of the case. Presumably, the Court's March 6 announcement means that the stay was lifted, but because the 4th Circuit's ruling was vacated, the district court would probably quash the preliminary injunction, in line with its original decision to dismiss the Title IX claim. Grimm's counsel asked the 4th Circuit to expedite its reconsideration of the appeal from Judge Doumar's dismissal, in hopes that perhaps Grimm would have a chance to use the boys' restroom at his high school before he graduates at the end of this semester, but that request was denied on April 7.

Meanwhile, however, U.S. District Judge Reed O'Connor in Wichita Falls, Texas, had granted a "nationwide" preliminary injunction later in August

in the Texas case challenging the Obama Administration guidance, blocking federal agencies from undertaking any new investigations or initiating any new cases involving gender identity discrimination claims under Title IX. *Texas v. United States*, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016). The Obama Administration filed an appeal with the Houston-based 5th Circuit Court of Appeals, asking that court to cut down the scope of O'Connor's injunction to cover just the states that had joined that lawsuit, pending litigation on the merits in that case.

The Gloucester school district's petition for certiorari asked the Supreme Court to consider three questions: whether its doctrine of deferral to agency interpretations of regulations should be abandoned; whether, assuming the doctrine was retained, it should be applied in the case of an "unpublished" letter submitted by the agency in response to a particular lawsuit; and finally, whether the Obama Administration's interpretation of Title IX and the regulation were correct. The Court agreed only to address the second and third questions.

Donald Trump was elected a week later. During the election campaign, he stated that he would be revoking Obama Administration executive orders and administrative actions, so the election quickly led to speculation that the Gloucester County case would be affected by the new administration's actions, since the Guidance had been subjected to strong criticism by Republicans. This seemed certain after Trump announced that he would nominate Senator Jeff Sessions of Alabama to be Attorney General, as Sessions has a long history of opposition to LGBT rights. The announcement that Trump would nominate Betsy DeVos to be Secretary of Education fueled the speculation further, since her family was notorious for giving substantial financial support to anti-LGBT organizations. It seemed unlikely that the Obama Administration's Title IX Guidance would survive very long in a Trump Administration.

The other shoe dropped on February 22, just a day before the deadline for Gavin Grimm's counsel to

submit their merits brief and a week before amicus curiae (“friend of the court”) briefs on his behalf were due. The Solicitor General’s office had not filed a brief in support of the school district at the earlier deadline, and there had been hope that the government would file a brief on behalf of Grimm or just stay out of the case. According to numerous press reports, Secretary DeVos, who reportedly does not share her family’s anti-gay sentiments, had not wanted to withdraw the Guidance, but Attorney General Sessions insisted that the Obama Administration letters should be withdrawn, and Trump sided with Sessions in a White House showdown over the issue.

The February 22 “Dear Colleagues” letter was curiously contradictory, however. While announcing that the prior letters were “withdrawn” and their interpretation would not be followed by the government, the letter did not take a position directly on whether Title IX applied to gender identity discrimination claims. Instead, it said that further study was needed on the Title IX issue, while asserting that the question of bathroom access should be left to states and local school boards and that schools were still obligated by Title IX not to discriminate against any students, regardless of their sexual orientation or gender identity. The letter was seemingly an attempt to compromise between DeVos’s position against bullying and discrimination and Sessions’ opposition to a broad reading of Title IX to encompass gender identity discrimination claims. White House Press Secretary Sean Spicer said that the question of Title IX’s interpretation was still being considered by the administration.

In any event, the Obama Administration interpretation to which the 4th Circuit panel had deferred was clearly no longer operative, effectively rendering moot the first question on which the Supreme Court had granted review. Although the parties urged the Court to continue with the case and address the second question, it was not surprising that the Court decided not to do so.

The usual role of the Supreme Court is to decide whether to affirm or reverse a ruling on the merits of a case by the lower court. In this case, however, the

4th Circuit had not issued a ruling on the merits as such, since the basis for its ruling was deference to an administrative interpretation. The 4th Circuit held that the Obama Administration’s interpretation was “reasonable,” but not that it was the only correct interpretation of the regulation or the statute. The only ruling on the merits in the case so far is Judge Doumar’s original 2015 ruling that Grimm’s complaint failed to state a valid claim under Title IX. Thus, it was not particularly surprising that the Supreme Court would reject the parties’ request to hear and decide the issue of interpretation of Title IX, and instead to send it back to the 4th Circuit to reconsider in light of the February 22 letter. The Court usually grants review because there are conflicting rulings in the courts of appeals that need to be resolved. Here there are no such conflicting rulings under Title IX and the bathroom regulation, since the only other decisions on this question are by federal trial courts.

Despite the issuance of the February 22 letter, the Supreme Court received a flood of amicus briefs in support of Grimm’s position the following week, including briefs from medical associations, school administrators, domestic violence and sexual assault prevention organizations, student groups, transgender individuals, businesses, and religious leaders. Presumably these can be repurposed to persuade the 4th Circuit on remand to adopt a sensible construction of Title IX and the bathroom regulation in this case.

After issuing its February 22 letter, the Justice Department abandoned its appeal of the scope of Judge O’Connor’s preliminary injunction in the Texas case and asked the 5th Circuit to cancel a scheduled argument, which it did. Furthermore, withdrawal of the Obama Administration Guidance rendered the *Texas v. U.S.* case moot, since the relief sought by the plaintiffs was a declaration that the Guidance was invalid, so Judge O’Connor will dissolve his injunction and the case will be withdrawn, as will be the Nebraska case.

In the meantime, there were several other relevant cases pending. The Cincinnati-based 6th Circuit and the Philadelphia-based 3rd Circuit will be considering appeals from district

court rulings on transgender student rights from Ohio and Pennsylvania, there are cases pending before trial courts elsewhere, and there are multiple lawsuits pending challenging North Carolina’s H.B. 2, now revised by the state legislature to no longer mandate that transgender people in that state use public restrooms consistent with their birth certificates. One case challenging H.B. 2 was filed by the Obama Justice Department and the Trump Administration signaled early in March its intention to drop that case, with Justice Department lawyers notifying the district court of the withdrawal of the Obama Administration Guidance and moving that the case be stayed while they decide how to proceed. But in a separate case challenging H.B. 2 filed by the ACLU and Lambda Legal, the 4th Circuit is shortly to hear arguments on an appeal by three transgender plaintiffs who are students or staff members at the University of North Carolina, who won a preliminary injunction when the trial judge in their case deferred to the Obama Administration Guidance as required by the 4th Circuit’s ruling in Grimm’s case, but declined to rule on the plaintiffs’ claim that H.B. 2 also violated their constitutional rights. *Carcano v. McCrory*, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016). The appeal, scheduled before the state legislature acted on March 30 for oral argument on May 10, is focused on their constitutional claim and their argument that the preliminary injunction, which was narrowly focused on the three of them, should have been broadly applied to all transgender people affected by H.B. 2. The case pending in the 3rd Circuit also focuses on the constitutional claim, as a trial judge in Pittsburgh ruled that a western Pennsylvania school district violated the 14th Amendment by adopting a resolution forbidding three transgender high school students from using restrooms consistent with their gender identity. *Evancho v. Pine-Richland School District*, 2017 U.S. Dist. LEXIS 26767, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017).

Meanwhile, Gavin Grimm is scheduled to graduate at the end of this spring semester, which may moot his

case since he was seeking injunctive relief to allow him to use the boys' restrooms, unless the court is convinced that a live controversy still exists because the school district's policy continues in effect and will still prevent Grimm from using the boys' restrooms if he comes to the school to attend alumni events.

It seems likely that whatever happens next in the Gavin Grimm case, the issue of transgender people and their access to gender-identity-consistent public facilities will continue to be litigated in many federal courts in the months ahead, and may be back to the Supreme Court soon, perhaps as early as its 2017-18 Term. By then, the Court will be back to a five-member conservative majority, as the Senate has confirmed Trump's nomination of Judge Neil Gorsuch. It is even possible that Trump may have a second vacancy to fill before this issue gets back to the Court, in which case the plaintiffs may face very long odds against success.

On a heartening note, though, as part of various procedural orders issued by the 4th Circuit in Grimm's case on April 7, Senior Judge Andre Davis took the opportunity to add a concurrence to the order vacating the district court's preliminary injunction and pen a moving four-page tribute of sorts to Grimm and his fight, joined by Judge Henry Floyd. In his eyes, "G.G.'s case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected." He also compared Grimm to the historic civil rights figures Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell. ■

North Carolina Repeals HB2 in Questionable "Compromise"

Democrat Roy Cooper was elected Governor of North Carolina last year on a campaign promise to seek the repeal of H.B. 2, a measure enacted in March 2016 in reaction to the City of Charlotte's adoption of an ordinance that required businesses and other places of public accommodate to allow transgender people to use multi-user sex-designated facilities consistent with their gender identity. The Republican majorities in the legislature, together with the Republican Governor, Pat McCrory, found this offensive and upsetting on various levels and rushed to take action shortly before the ordinance was to go into effect. H.B. 2 mandated that in all government buildings, access to sex-designated facilities be restricted to those whose sexual

stopping McCrory's reelection in a year that otherwise saw a Republican tide in North Carolina, preserving the Republican majorities (veto-proof) in the legislature and awarding the state's electoral votes to Donald Trump.

Upon taking office, Cooper pushed for repeal of H.B.2. After several futile attempts to reach agreement with Republican leaders in the legislature, a "compromise" measure that Cooper was willing to sign emerged late in March. The bill passed both houses on March 30, by 32-16 in the Senate and 70-48 in the House, with most of the opposition coming from the minority Democrats, and Cooper signed the bill promptly, describing it as "not perfect," but an "important step" to repair the state's tattered reputation.

Cooper described the bill as "not perfect," but an "important step" to repair the state's reputation.

identification on their birth certificate matched the designation of the facility. Furthermore, the measure preempted political subdivisions from legislating about discrimination. The uproar that ensued was met by Governor McCrory adopting an executive order barring discrimination in the state government on grounds of sexual orientation or gender identity, but making clear that it did not override H.B. 2 with respect to facilities access. McCrory also emphasized that private entities and businesses were free to make their own access rules for such facilities. These moves were not sufficient to stifle criticism. Several lawsuits ensured, preliminary relief was awarded, and various businesses and institutions put boycotts of North Carolina into place to protest H.B. 2. The controversy is widely credited with helping Cooper, then the attorney general who refused to defend H.B. 2 in court, in narrowly

The new measure, H.B. 142, does three things. It repeals H.B. 2. It enacts a measure preempting any governmental body in North Carolina from "regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly." And it provides: "No local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations" until December 1, 2020, a few weeks after the 2020 general election. In order to understand the effect of this, one must appreciate the underlying reality that North Carolina's civil rights law does not prohibit discrimination in employment or public accommodations because of sexual orientation or gender identity.

Consequently, what this means is that access to multiple occupancy facilities stands unregulated, unless the legislature

passes (presumably over Governor Cooper's veto) a new law embodying the restriction that was contained in H.B.2. Beginning on December 1, 2020, local governments will regain the authority to regulate such access by enacting new anti-discrimination measures. Until then, however, nobody in North Carolina will be protected by state or local law against discrimination in employment or public accommodations because of their sexual orientation or gender identity, including the residents of municipalities or the staff and students of state educational institutions that have previously provided such protections.

This leaves open interesting questions. Presumably, a transgender person is free to use whichever facility he or she finds appropriate, as there is no state or local law standing in the way. On the other hand, if the operator of such a facility denies them access, there is no law making such denial illegal. The issues is essentially deregulated for now. Indeed, the "horrible" that proponents of H.B. 2 claimed to be protecting against, that men masquerading as women would invade restrooms in order to ogle or harass biological women in states of undress, could take place with impunity. (Well, actually not. There are probably other provisions of state or local law that could be summoned to deal with disorderly conduct, harassment and the like. And that's the point – H.B. 2 was never needed to deal with such problems.)

Republicans in the legislature and former Governor McCrory professed to be satisfied with this "compromise" for now. Governor Cooper pointed out that at least there was no longer a state law prohibiting transgender people from using facilities consistent with their gender identity. And LGBT rights advocates, progressive Democrats, and editorialists labelled this a fake compromise that left LGBT people in North Carolina without any protection from discrimination, with local governments disempowered from acting for more than three years. No word at month's end about what will happen to the pending lawsuits attacking H.B. 2. They are likely mooted, but the newly-enacted measure may generate new lawsuits. ■

11th Circuit Rules That Title VII Does Not Prohibit Sexual Orientation Discrimination

In a 2-1 decision, the 11th Circuit Court of Appeals ruled that Title VII of the Civil Rights Act of 1964 does not prohibit employers from discriminating against their employees on the basis of sexual orientation. *Evans v. Georgia Regional Hospital*, 2017 U.S. App. LEXIS 4301, 2017 WL 943925 (11th Cir. Mar. 10, 2017). The decision throws a counterpunch to several recent rulings by the Equal Employment Opportunity Commission and district courts that concluded otherwise.

On appeal, the 11th Circuit reviewed an order from the District Court for the Southern District of Georgia, which

The court recounted that Jameka Evans worked as a security officer at Georgia Regional Hospital from August 2012 to October 2013. Though she did not broadcast her homosexuality at work, her masculine appearance—including male uniform, short haircut, and shoes—suggested such. Evans became the target of the Hospital's Chief, Charlie Moss, because she did not carry herself "in a traditional womanly manner." Moss increased his efforts to either terminate Evans' employment or push her to resign, after she complained of his harassment. E-mails revealed that Moss purposefully created an unpleasant

U.S. District Judge Jose E. Martinez wrote the opinion of the court. Meanwhile, former Supreme Court hopeful, Circuit Judge William H. Pryor Jr., and Circuit Judge Robin S. Rosenbaum directly sparred in their respective concurring and dissenting opinions.

dismissed a lesbian plaintiff's Title VII claims against her former employer, with prejudice. Ultimately, the 11th Circuit vacated and remanded the plaintiff's claim for discrimination based on gender non-conformity; however, the Court upheld the dismissal of her claims for retaliation and discrimination based on sexual orientation. Each of the three judges on the 11th Circuit panel separately discussed whether or not Title VII prohibits sexual orientation discrimination. U.S. District Judge Jose E. Martinez wrote the opinion of the court. Meanwhile, former Supreme Court hopeful, Circuit Judge William H. Pryor Jr., and Circuit Judge Robin S. Rosenbaum directly sparred in their respective concurring and dissenting opinions.

work environment for Evans by denying her equal pay or work, scheduling her for bad shifts, and promoting a less qualified worker as her supervisor. Additionally, the Senior Human Resources Manager inquired into Evans' sexual orientation, further leading Evans to believe that Moss' harassment was based on her homosexuality.

Next, the 11th Circuit promptly rejected the district court's conclusion that Evans' claim for discrimination based on gender non-conformity was not actionable under Title VII and "just another way to claim discrimination based on sexual orientation." The 11th Circuit ruled in *Glenn v. Brumby*, 633 F.3d 1312 (11th Cir. 2011) that gender non-conformity discrimination is a prohibited form of sex-based

discrimination under Title VII. Thus, Evans should have been granted leave to amend her claim to plead a sex stereotyping case.

The 11th Circuit quickly addressed and upheld the dismissal of Evans' retaliation claim because she failed to object in a timely manner. Interestingly, Evans began her suit as a *pro se* plaintiff who was allowed to proceed *in forma pauperis*. Lambda Legal, which appealed the dismissal of the retaliation claim, did not become a party to the suit until it was appointed during the appellate stage. Litigation can be so unfair, sometimes.

Even so, the importance of *Evans* centers on the three judges' analyses as to why or why not sexual orientation discrimination is distinct from the gender non-conformity discrimination actionable under Title VII.

Writing with the conviction of an impressionable teenager, Judge Martinez concluded Title VII does not prohibit sexual orientation discrimination by pointing to: (1) "binding precedent" from *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (in the form of a one-sentence throw-away line in a case premised on other grounds); and (2) other circuits' determinations between 1989 and 2006. Judge Martinez clutched firmly onto the 5th Circuit's one-liner in *Blum*, and refused to concede that the Supreme Court's rulings in *Price Waterhouse v. Hopkins*, 409 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), implicitly overruled the decision. He emphasized that *Price Waterhouse* and *Oncale* did not clearly state that Title VII encompasses sexual orientation discrimination in its prohibition against sex-based discrimination. As for Judge Martinez's second point concerning the other circuits' decisions, Judge Rosenbaum effectively summed up that, "the mere fact that our friends may jump off a bridge does not . . . make it a good idea for us to do so." Turns out that after school specials actually contain valuable lessons!

Perhaps unsatisfied with Judge Martinez's mere recitals, Judge

Pryor clumsily pieced together a concurrence to discuss how sexual orientation discrimination is actually distinguishable from gender non-conformity discrimination. He made multiple tangents exposing his belief that homosexuality is a choice, and gay individuals do not always act upon that choice through gender non-conforming behavior! In support of his observation, he even referenced the mixed-orientation marriages exemplified in the amicus brief submitted by Same-Sex Attracted Men and Their Wives during *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); but I digress.

According to Judge Pryor, *Price Waterhouse* and *Glenn* concerned claims that an employee's behavior—not LGBT status—did not conform to a gender stereotype held by an employer; thus, Title VII protects individuals because they engaged in gender-nonconforming behavior, not because of their LGBT status. Yet, as Judge Rosenbaum later countered, Judge Pryor's distinction irrationally concludes that only individuals who act upon their homosexuality enjoy Title VII's protections, which does not make sense from a practical, textual, or doctrinal point of view. Judge Pryor failed to consider that when a woman alleges she was discriminated against for being a lesbian, she necessarily alleges she was discriminated against for failing to conform to her employer's perception of how women should behave—sexually attracted to men.

In addition to the counterarguments mentioned, Judge Rosenbaum's dissenting opinion pointed out other flaws presented by the majority's exclusion of sexual orientation discrimination from Title VII's prohibition against gender non-conformity discrimination. First, she addressed the majority's outdated reliance on *Blum* rather than *Price Waterhouse*. *Price Waterhouse* broadened actionable discriminatory stereotyping when the Supreme Court ruled that Title VII encompasses discrimination based on an employees' *failure to conform* to gender stereotypes. When *Blum* was

decided, actionable discrimination only included claims based on an employers' assumptions that an employee *would conform* to certain stereotypes—clearly, homosexuality does not conform to either gender's stereotype. Thus, *Price Waterhouse* effectively abrogated the 5th Circuit's interpretation in *Blum*.

Furthermore, Judge Rosenbaum criticized the majority's failure to account for the Supreme Court's interpretation of Title VII in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, the Supreme Court stated Title VII's prohibition against sex-based discrimination intended to strike the entire spectrum of disparate treatment resulting from sex stereotypes. Thus, even if a woman does not conform to the stereotype of being sexually attracted to men, her employer may not hold that against her.

Judge Rosenbaum then delivered a knockout blow to Judge Pryor's limiting of Title VII's protections to discrimination based on an individual's behavior rather than status. She did so by applying his test to a protected religious class—Catholics. In short, Title VII would protect a person from discrimination whether she either merely identified as a Catholic or practiced Catholicism; status and behavior are treated similarly. Judge Rosenbaum stated that discrimination does not occur due to a woman's behavior—it occurs because she is a woman. Lastly, she concluded that due to the majority's belief that *Blum* remains binding precedent on interpreting Title VII, the case and issue should be reheard *en banc*. – *Timothy Ramos (NYLS '19)*

[Editor: Lambda Legal promptly took up Judge Rosenbaum's invitation, filing a petition for rehearing *en banc* with the 11th Circuit on March 31, No. 15-15234. Lambda attorneys Greg Nevins and Omar Gonzalez-Pagan are on the brief to the 11th Circuit. Nevins argued the case on behalf of Evans to the 11th Circuit panel.]

2nd Circuit Panel Rejects Sexual Orientation Discrimination Claim under Title VII, but Revives Sex-Stereotyping Claim by Gay Man

A three-judge panel of the U.S. Court of Appeals for the 2nd Circuit, based in Manhattan, has issued a mixed ruling concerning a gay man's claim that he was sexually harassed in his workplace in violation of Title VII of the Civil Rights Act of 1964. In a per curiam opinion in *Christiansen v. Omnicom Group*, 2017 U.S. App. LEXIS 5278, 2017 WL 1130183, the court ruled on March 27 that plaintiff Matthew Christiansen could not sue under Title VII on a claim of sexual orientation discrimination because of existing circuit precedents, but that he could maintain his lawsuit on a claim that he was the victim of unlawful sex stereotyping by his employer. Thus, the case was sent back to U.S. District Judge Katherine Polk Failla (S.D.N.Y.), who last year had granted the employer's motion to dismiss all federal claims in the case and to decline to exercise jurisdiction over state law claims; see 167 F. Supp. 3d 598.

The ruling on this appeal, which was argued on January 20, was much awaited because it was the first time for the 2nd Circuit to address the sexual orientation issue since the Equal Employment Opportunity Commission (EEOC) reversed its position, held for half a century, and ruled in 2015 that sexual orientation discrimination claims should be treated as sex discrimination claims subject to Title VII, which prohibits discrimination "because of sex."

In a separate concurring opinion, Chief Judge Robert Katzmann, joined by U.S. District Judge Margo K. Brodie, suggested that if the full 2nd Circuit bench, which can change a circuit precedent, were to consider the question, Katzmann and Brodie would find that sexual orientation discrimination claims can be litigated under Title VII. The other member of the panel, Circuit Judge Debra Ann Livingston, did not join the concurring opinion.

Christiansen, described in the opinion as "an openly gay man who

is HIV-positive," worked at DDB Worldwide Communications Group, an advertising agency based in New York that is a subsidiary of Omnicom Group. He alleged that his direct supervisor subjected him to humiliating harassment "targeting his effeminacy and sexual orientation." This began in the spring and summer of 2011, a time when marriage equality in New York was much in the news as the legislature prepared to vote upon and pass the marriage equality bill. The supervisor, who is not named in the opinion, "drew multiple sexually suggestive and explicit drawings of Christiansen on an office whiteboard." These graphic drawings "depicted a naked, muscular Christiansen with an erect penis, holding a manual air pump and accompanied by a text bubble reading, 'I'm so pumped for marriage equality.'"

There was another picture that "depicted Christiansen in tights and a low-cut shirt 'prancing around.'" Yet another showed his "torso on the body of 'a four legged animal with a tail and penis, urinating and defecating.'" Later in 2011, the same supervisor "circulated at work and posted to Facebook a 'Muscle Beach Party' poster that depicted various employees' heads on the bodies of people in beach attire," including Christiansen's head "attached to a female body clad in a bikini, lying on the ground with her legs upright in the air in a manner that one coworker thought depicted Christiansen as 'a submissive sissy.'"

The supervisor also made remarks about "the connection between effeminacy, sexual orientation, and HIV status," and allegedly told other employees that Christiansen "was effeminate and gay so he must have AIDS." The supervisor made other references to AIDS in connection with Christiansen, although at the time Christiansen was keeping his HIV-status private. Christiansen included a disability discrimination claim in his complaint, but the district court found

that his factual allegations were not sufficient to maintain a claim under the Americans with Disabilities Act, a conclusion that Christiansen did not appeal.

Christiansen filed a complaint with the EEOC in 2014, describing the harassment in detail, and upon receiving the agency's notice of right to sue, filed his lawsuit in the federal court in Manhattan, which the defendants quickly moved to dismiss. Christiansen alleged violations of the Americans with Disabilities Act and Title VII for his federal claims, and also alleged violations of New York State and city anti-discrimination laws. The employer argued that his claim under Title VII was really a sexual orientation discrimination claim rather than a gender stereotyping claim, and the district judge agreed.

The state of precedent in the 2nd Circuit has frequently been questioned by federal trial courts in the circuit as confusing and difficult to apply. The Circuit has ruled that under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), an employee, including a gay or lesbian employee, can bring a sex discrimination claim involving sex stereotyping, but if the court perceives that the employer's mistreatment of the employee was really due to the employee's sexual orientation, the claim will be rejected. These precedents date from 2000 (*Simonton v. Runyon*, 232 F.3d 33) and 2005 (*Dawson v. Bumble & Bumble*, 398 F.3d 211). They predate the Supreme Court's decisions striking down the Defense of Marriage Act (*U.S. v. Windsor*, 133 S.Ct. 2675) and state bans on same-sex marriage (*Obergefell v. Windsor*, 135 S. Ct. 2584), as well as the EEOC's *Baldwin* 2015 ruling recognizing sexual orientation discrimination claims under Title VII. While none of these later rulings produced a precedent binding on the 2nd Circuit that sexual orientation claims are covered under Title VII, they have "changed the

landscape,” as Judge Katzmman wrote in his concurring opinion.

The per curiam opinion premised its holding squarely on the rule that circuit precedents can only be revised or reversed by the Supreme Court or the full circuit bench sitting en banc. Thus, the panel ruled that it was precluded from reconsidering *Simonton* and *Dawson*.

However, the panel disagreed with Judge Failla’s conclusion that there was too much about sexual orientation in Christiansen’s complaint to allow him to proceed with a gender stereotyping sex discrimination claim under Title VII. The panel pointed out that the 2nd Circuit has never ruled that gay people may not sue under Title VII when they have substantial evidence of gender stereotyping to present, provided that such evidence is not limited to the argument that sexual orientation discrimination is itself a form of sex stereotyping. That is, the Title VII claim may not be based, under current circuit precedent, on the argument that men loving men and women loving men is a violation of gender stereotypes in and of itself. In this case, the panel wrote that there were enough allegations of gender stereotyping as such to survive the employer’s motion to dismiss.

“The district court commented that much more of the complaint was devoted to sexual orientation discrimination allegations than gender stereotyping discrimination allegations and that it thus might be difficult for Christiansen to withstand summary judgment or prove at trial that he was harassed because of his perceived effeminacy and flouting of gender stereotypes rather than because of his sexual orientation.” But the court pointed out that Christiansen’s burden at this initial stage of the litigation was not to show that he would prevail at later stages. Rather, it was enough for him to “state a claim that is plausible on its face” that he was subjected to harassment because of non-conformity to male gender stereotypes.

Judge Katzmman noted in his concurrence that because Christiansen was also alleging violations of state and

local laws forbidding sexual orientation discrimination as well as a violation of Title VII, it was to be expected that his factual allegations would cover both kinds of claims. While joining in the per curiam opinion, Judge Katzmman wrote separately to express his view “that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue confronted in *Simonton* and *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued.”

He went on to identify three theories under which sexual orientation discrimination claims should be treated as sex discrimination claims under Title VII, drawing heavily on the EEOC’s 2015 decision. First, he wrote, “sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex.” The EEOC has observed, he wrote, that “sexual orientation ‘cannot be defined or understood without reference to sex,’ because sexual orientation is defined by whether a person is attracted to people of the same sex or opposite sex (or both, or neither).” Thus, according to the EEOC, “sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”

The second theory follows a 2nd Circuit ruling from 2008, *Holcomb v. Iona College*, 521 F.3d 130 (2008), where the circuit formally embraced the associational discrimination theory that other courts have applied in race discrimination cases. If an employee suffers discrimination because he is involved in an interracial relationship, the courts will recognize his claim of race discrimination in violation of Title VII. By analogy, discriminating against an employee because of a same-sex relationship is quite simply sex discrimination. In *Price Waterhouse*, the Supreme Court had commented that Title VII “on its face treats each of the enumerated categories exactly the

same.” Thus, if employees in interracial relationships are protected from race discrimination, then employees in same-sex relationships should be protected from sex discrimination.

Finally, of course, there is gender stereotyping, including the kind of stereotyping that the 2nd Circuit has not yet accepted as violating Title VII, the stereotype that men should be attracted only to women and women only to men. “Relying on common sense and intuition rather than any ‘special training,’” wrote Katzmman, “courts have explained that sexual orientation discrimination ‘is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.’” Katzmman noted that the circuit in *Dawson* had pointed out that “stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” He continued, “Having conceded this, it is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*,” and concluded that this particular stereotype about sexual attraction is “as clear a gender stereotype as any.”

At the same time, he rejected the argument, raised by some courts, that because Congress has been considering unsuccessful efforts to pass a federal ban on sexual orientation discrimination since the 1970s, the courts are precluded through interpreting Title VII to ban such discrimination. When the circuit decided *Simonton* in 2000, it reached the same conclusion that all other federal circuit courts had then reached on this issue. “But in the years since,” he wrote, “the legal landscape has substantially changed,” citing *Lawrence v. Texas*, 539 U.S. 558 (the sodomy law case) and *Obergefell v. Hodges* (the marriage equality case), “affording greater legal protection to gay, lesbian, and bisexual individuals. During the same period,” he observed, “societal understanding of same-sex relationships has evolved

considerably.” Thus, he wrote, despite the failed legislative proposals, there is “no justification in the statutory language for a categorical rule” excluding sexual orientation claims.

“I respectfully think that in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII. Other federal courts are also grappling with this question, and it well may be that the Supreme Court will ultimately address it.”

The other cases are in the 7th Circuit, where the full bench overturned their circuit equivalents to *Simonton* in a landmark opinion on April 4, and the 11th Circuit, where a petition for en banc review is being filed by Lambda seeking reversal of a 2-1 adverse panel decision issued a few weeks ago. There is also another panel case argued in January in the 2nd Circuit, *Zarda v. Altitude Express*, although the circuit rule on precedent will likely produce the same result in that case, which does not include a separate gender non-conformity allegation.

Christiansen is represented by Susan Chana Lask, a New York attorney whose Complaint originally cast the federal claim as a sex stereotyping claim. Now that the case is being sent back to the district court to be litigated on the stereotyping theory, the plaintiff need not seek full circuit *en banc* review to proceed and seek discovery to produce evidence in support of his claim. However, in what may be a race to the Supreme Court, filing a petition for *certiorari* might give this case priority over the similar 11th Circuit case, *Evans v. Georgia Regional Hospital*, in which Lambda Legal filed an *en banc* petition during March.

The case attracted widespread amicus participation, including a brief filed by the EEOC, another from a long list of civil rights organizations led by the ACLU, and briefs on behalf of 128 members of Congress, the National Center for Lesbian Rights, and Lambda Legal, all arguing that the court should allow the case to proceed as a sexual orientation discrimination case. ■

Two More Federal District Judges Allow Sexual Orientation Discrimination Claims Under Title VII

U.S. District Judges Edmund A. Sargus, Jr. (S.D. Ohio) and Lawrence F. Stengel (E.D. Pa.) ruled on consecutive days in March, refusing to dismiss sexual orientation discrimination claims filed under Title VII of the Civil Rights Act of 1964, which prohibits discrimination against an individual because of their sex. In the Pennsylvania case, *Ellingsworth*, a non-gay employee claims to have suffered discrimination because she was wrongly perceived to be a lesbian. In the Ohio case, *Spellman*, a lesbian claimed to have suffered severe and pervasive harassment from a homophobic supervisor.

The plaintiff’s allegations in *Spellman v. Ohio Department of Transportation*, 2017 U.S. Dist. LEXIS 41636, 2017 WL 1093281 (S.D. Ohio, March 22, 2017), sound an all-too-common theme. Lori Spellman started working as a Highway Technician for ODOT in November 1009, and claims that she “suffered gender-based and sexual harassment at the hands of her supervisor Robert Mock, her coworker Jenny Sowers, and her manager Ray Dailey, among others at ODOT.” She also claimed that she was subjected to a “campaign of retaliation” after she reported this harassment to management. Eventually, all three of these employees “faced disciplinary action, transfer, or termination for their conduct.” Judge Sargus’s opinion goes on for several hundred words detailing Spellman’s factual allegations, including the responses of the employer when she finally submitted formal complaints.

But the most significant part of the opinion, in light of current litigation battles, is devoted to the question, contested by ODOT, whether a sexual orientation discrimination claim is actionable under Title VII. Judge Sargus addresses that question by first noting the EEOC’s decision in *Baldwin v. Dep’t of Transportation*, 2015 WL 4397641 (July 15, 2015), quoting from its explanation, goes on to refer to and summarize the Supreme Court’s sexual stereotyping holding in *Price*

Waterhouse v. Hopkins, 490 U.S. 228 (1989) and its same-sex harassment ruling in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and then continues: “Spellman alleges that the statements and conduct of her ODOT coworkers were harassment ‘because of sex’ because they concerned her sexual orientation or gender non-conforming behavior. Spellman alleges that Bob Mock repeatedly asked Spellman if she knew a particular woman because ‘she’s like you’ because ‘she plays softball.’ Bob Mock would also compliment other women on how they looked in front of Spellman, which she perceived as criticism of her appearance because she wore baggy clothes, wore no makeup, and had shorter hair – in other words, failed to conform to traditional sex stereotypes. Additionally, Jenny Sowers made several offensive comments about Spellman concerning her sex.” These included a comment to several men that Spellman “doesn’t want what you got between your legs . . . she wants what I got between mine.” “It is reasonable to infer,” continued the judge, “that these comments would not have been made to someone of the opposite sex. Thus, Spellman may assert a claim of sexual harassment on the basis of her gender or sexual orientation here because she offers evidence that she was harassed by both men and women ‘because of her sex.’”

However, because ODOT responded appropriately to her complaints, the court found that Spellman could not hold the employer liable under Title VII for the hostile environment about which she had complained. Also, although accepting that sexual orientation could be actionable as straightforward sex discrimination, the court agreed with ODOT that Spellman did not suffer “adverse employment action” of a type that would make the employer liable regardless of whatever disciplinary steps it took against particular employees for their conduct towards Spellman. The judge did find, however, that Spellman

had presented “sufficient evidence to meet the relatively low bar for adverse action in her retaliation claim,” however, ODOT had, according to the court, offered a “legitimate nondiscriminatory reason” for actions it took in response to her complaint. The full story revealed by her allegations and the department’s responses is too lengthy to recount here, but is worth reading for those who may find themselves in a position to represent employees or employers embroiled in potential litigation over these issues.

In *Ellingsworth v. Hartford Fire Insurance Co.*, 2017 U.S. Dist. LEXIS 42061, 2017 WL 1092341 (E.D. Pa., March 23, 2017), Marykate Ellingsworth alleged that she was discriminated against and harassed “because of the way she dressed, her appearance, style, and perceived (by co-workers) sexual orientation,” and she sued under Title VII and the Pennsylvania Human Rights Law (neither of which expressly bans sexual orientation discrimination). Judge Stengel denied the motion to dismiss, rejecting, among other things, the employer’s argument that a sexual orientation discrimination claim was not actionable. Ellingsworth is a married heterosexual woman, who began working for The Hartford in March 2012. She claimed to have suffered harassment from her female supervisor, Angela Ferrier, who told her that she “dresses like a dyke,” called her “stupid,” and told her that she “sucks.” The supervisor made similar comments about Ellingsworth to her co-workers, and also said that she had a “lesbian tattoo.” “At times,” wrote Judge Stengel, “Ferrier would force Ellingsworth to show her tattoo to coworkers and then ask those coworkers whether they thought it was a ‘lesbian tattoo.’ Ferrier went so far as to tell Ellingsworth’s coworkers that Ellingsworth was a lesbian.”

“Because of this persistent harassment,” continued Stengel, “Ellingsworth’s coworkers began to adopt the belief that Ellingsworth was gay, even though she is not. Eventually, it became ‘generally accepted’ in the workplace that Ellingsworth was gay,” and this situation “began to exacerbate Ellingsworth’s pre-existing depression and anxiety.” She complained to a supervisor, submitted grievance

statements, and received a letter from an Employee Relations Investigator telling her that they would investigate her complaints and take them seriously, but she does not know what action was taken, if any, and received no further communications about her complaints. She eventually went on a maternity leave, but when she returned from leave she continued to suffer anxiety and depression from comments by her supervisor, took a leave of absence, and ultimately complained that she had been constructively discharged when The Hartford took no actions in response to her complaints.

The employer, moving to dismiss, argued that she had failed to state a claim under Title VII because it does not prohibit sexual orientation discrimination. “Because Title VII prohibits gender stereotyping and discrimination ‘because of sex,’” wrote Stengel, “defendant’s argument lacks merit Over the years, the United States Supreme Court has taken an increasingly broad view of Title VII’s ‘because of sex’ language,” he wrote. “Most notable for purposes of this case, the Supreme Court has held that Title VII’s ‘because of sex’ language prohibits discrimination based upon employers’ subjectively held gender stereotypes,” citing the 3rd Circuit’s leading precedent on point, *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009), which was in turn relying on *Price Waterhouse*. After a lengthy summary of *Price Waterhouse* and that cases impact in subsequent 3rd Circuit litigation, he noted the recent opinion by another judge of his court, Judge Bissoon, in *EEOC v. Scott Medical Health Center*, 2016 WL 6569233 (W.D. Pa. 2016). “Critical to Judge Bissoon’s decision was the idea that ‘gender stereotyping’ necessarily encompasses employers’ views on the propriety of one’s sexual preference or appearance as a man or woman: ‘That someone can be subjected to a barrage of insults, humiliation, hostility and/or changes to the terms and conditions of their employment, based upon nothing more than the aggressor’s view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate.’”

Judge Stengel takes the idea and runs with it, finding that Ellingsworth’s complaint “presents a plausible claim that she was discriminated against ‘because of sex.’ The complaint clearly shows that Ms. Ellingsworth did not fit her employer’s view of what it means to be a woman. Even though she identifies as heterosexual, Ms. Ellingsworth was repeatedly called a ‘dyke’ in front of her coworkers because of how she dressed and looked. Apparently, Ms. Ellingsworth’s ‘lesbian tattoo’ was not acceptable to her supervisor because Ms. Ferrier constantly ridiculed Ms. Ellingsworth for the tattoo. In fact, according to the complaint, Ms. Ferrier went so far as to make a spectacle out of Ms. Ellingsworth’s perceived lack of effeminacy. Faced with this constant harassment, Ms. Ellingsworth was put in a position where she actually had to ‘explain to co-workers she was not a lesbian’ because it ‘had become generally accepted’ that she was gay.” Stengel found this to fall neatly into the *Price Waterhouse* paradigm, and the fact that Ellingsworth does not identify as gay was irrelevant.

“Calling a female employee a ‘dyke,’ ridiculing her publicly for ‘dressing like a dyke,’ and forcing her to peel back her clothing to show her coworkers her ‘lesbian tattoo’ is not only offensive and inappropriate – it is prohibited by Title VII,” wrote Stengel. “This is the case regardless of whether or not Ms. Ellingsworth is or is not actually gay.” Stengel also found that the plaintiff adequately pled a retaliation case stemming from the employer’s response (or non-response) to her complaints, rejecting the argument that she had never engaged in “protected activity” because she had complained of sexual orientation discrimination. And he found that the same analysis could apply to her Pennsylvania Human Rights Act sex discrimination complaint. Finally, he rejected the employer’s argument that the discrimination claims were untimely filed.

Lori Spellman is represented by Jessica Olsheski or Columbus, Ohio. Marykate Ellingsworth is represented by Thomas More Holland of Philadelphia, Pennsylvania. ■

Florida Supreme Court Rules “Sexual Intercourse” Includes Same-Sex Conduct With Respect to HIV Exposure Conviction

The Supreme Court of Florida has ruled the term “sexual intercourse” applies beyond “the penetration of the female sex organ by the male sex organ” to include same-sex oral and anal sex and upheld an HIV transmission conviction against a man who lied to a sexual partner about his positive HIV status in *Debaun v. State of Florida*, 2017 Fla. LEXIS 583, 2017 WL 1024526 (March 16, 2017).

The Florida statute at issue, Section 384.24(2), Florida Statutes (2011) provides that “it is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected . . . and when such person has been informed that he or she may communicate this disease to another

to the oral and anal sex he had with his same-sex partner. The trial court agreed, relying on a persuasive non-binding ruling by Florida’s Second District Court of Appeal, *L.A.P. v. State*, 62 So.3d 693 (2011), which appropriated a definition of “sexual intercourse” found in the state’s incest statute. On appeal, however, the Third District Court of Appeal reversed, finding that “sexual intercourse” for purposes of Chapter 384 encompasses same-sex anal and oral sex. See *State v. Debaun*, 129 So. 3d 1089 (2013).

Justice Charles Canady wrote the Florida Supreme Court’s opinion in response to Debaun’s appeal. He noted that the case presented a question of statutory interpretation, which the court must review *de novo*. According to the

vaginal, anal, and oral sex, and that while gay, bisexual, and other men who have sex with men represent only about 2% of the U.S. population, “they are the population most severely affected by HIV,” and concluded that interpreting “sexual intercourse” to mean “the plain meaning of the term ‘sexual intercourse’ – which includes oral and anal intercourse between two men” was consistent with legislative intent.

Justice Canady addressed appellant’s argument that a separate incest statute which expressly defined “sexual intercourse” as “penetration of the female sex organ by the male sex organ” should govern the meaning of the term under Section 384.24(2), stating that the incest statute’s “obvious purposes” is to “address the evil of sexual intercourse between persons who are related to each other” and that society’s interests in prohibiting incest “include the prevention of pregnancies which may involve a high risk of abnormal or defective offspring,” which is unrelated to the purpose of Section 384.24(2). Justice Canady further found that the “application of such a limited definition would exempt from prosecution HIV-positive individuals who knowingly expose their unwitting partners to HIV by engaging in penile-anal or penile-oral intercourse [and] nothing in the statutory text or context indicates that the Legislature intended to reduce the incidence of HIV only among those who partake exclusively in heterosexual penile-vaginal intercourse while allowing the incidence of HIV to continue to ‘rise at an alarming rate,’” ruling that “such incongruous results would vitiate the intent of the Legislature to curtail the spread of HIV.”

Accordingly, Justice Canady upheld the Third District Court of Appeal’s interpretation, and overruled the cited-to precedential opinion to the extent it conflicted with the instant opinion. Of the remaining Justices of the Florida Supreme Court, five concurred with Justice Canady’s opinion and one did not participate in the case. – *Bryan Johnson-Xenitelis*

Justice Canady found that the plain meaning of “sexual intercourse . . . clearly encompasses acts beyond penile-vaginal intercourse.”

person through sexual intercourse, to have sexual intercourse with any other person . . . [unless the sexual partner knows of the infection and consents to the intercourse].”

Gary G. Debaun, the appellant, engaged in a homosexual relationship and provided his partner with a forged doctor’s letter “confirming” he was HIV negative when his partner requested documentation of his status. When his partner subsequently discovered the forgery he went to law enforcement, and assisted them in obtaining admissions from Debaun during a “controlled phone call.” Debaun was charged with a violation of Section 384.24(2), a felony. He moved to dismiss the charges, arguing that the term “sexual intercourse,” a term not expressly defined in Chapter 384, applies only to “penetration of the female sex organ by the male sex organ” and did not apply

to the oral and anal sex he had with his same-sex partner. The trial court agreed, relying on a persuasive non-binding ruling by Florida’s Second District Court of Appeal, *L.A.P. v. State*, 62 So.3d 693 (2011), which appropriated a definition of “sexual intercourse” found in the state’s incest statute. On appeal, however, the Third District Court of Appeal reversed, finding that “sexual intercourse” for purposes of Chapter 384 encompasses same-sex anal and oral sex. See *State v. Debaun*, 129 So. 3d 1089 (2013).

Justice Charles Canady wrote the Florida Supreme Court’s opinion in response to Debaun’s appeal. He noted that the case presented a question of statutory interpretation, which the court must review *de novo*. According to the

court, the statute’s “plain and ordinary meaning” must control unless such interpretation leads to an “unreasonable result or a result clearly contrary to legislative intent.” In reviewing several widely-recognized dictionary definitions of “sexual intercourse,” Justice Canady found that the plain meaning of “sexual intercourse . . . clearly encompasses acts beyond penile-vaginal intercourse.”

In assessing the legislative intent behind Section 384.24(2), Judge Canady found the legislature intended to “reduce the incidence of sexually transmissible diseases by making it unlawful for any person with HIV to knowingly expose another person to HIV through sexual intercourse without informing the other person of the presence of the disease and obtaining that person’s consent to the intercourse and exposure to the disease.” Justice Canady cited CDC reports that HIV can be spread through

Florida Ordered to Correct Death Certificates to List Surviving Same-Sex Spouses Without Requiring Individual Court Orders

U.S. District Judge Robert L. Hinkle, who rendered a decision prior to *Obergefell v. Hodges* finding that Florida's ban on same-sex marriages was unconstitutional, had the opportunity to apply his ruling further in *Birchfield v. Armstrong*, Case No. 4:15-cv-00615 (N.D. Fla.), issued on March 23, 2017. The case was brought by Lambda Legal as a class action on behalf of all survivors of same-sex spouses who died in Florida prior to the *Obergefell* decision, and who were thus not listed as surviving spouses on their death certificates. Those certificate identify the decedents as being unmarried at death because Florida did not recognize their same-sex marriages, which had been performed out-of-state in jurisdictions that allowed such marriages.

There are two named plaintiffs, Hal B. Birchfield and Paul G. Mocko. Birchfield married James Merrick Smith in New York in 2012, the year after New York adopted its Marriage Equality Law. Smith died in Florida in 2013. Mocko married William Gregory Patterson in California in 2014, the year after the U.S. Supreme Court dismissed an appeal and left standing a federal court order striking down California Proposition 8, thus allowing the resumption of same-sex marriages in California as decreed by that state's Supreme Court in 2008. Patterson died in Florida later in 2014. In both cases, the decedents were identified as unmarried on their death certificates, and any mention of their surviving spouses was omitted.

A proper death certificate is an important document for a surviving spouse to have as they settle the affairs of their decedent, especially when it comes to dealing with issues involving property ownership, bank accounts, survivor benefits under government programs, insurance policies and the like. To have to initiate litigation to obtain a proper death certificate is an inconvenience at a difficult time.

After the *Obergefell* decision, Birchfield and Mocko sought to get corrected death certificates. But the state insisted, pursuant to a statute and an interpretive rule, that they could only get such certificates by obtaining an individual court order. Lambda sued on their behalf in federal court seeking class relief, arguing that the *Obergefell* decision must be applied retroactively and that the state should have to issue corrected death certificates upon presentation of documentation of the out-of-state weddings, without requiring surviving spouses to go to state court for an order.

The state relied on Fla. Stat. Sec. 382.016(2), which states: "CERTIFICATE OF DEATH AMENDMENTS – Except for a misspelling or an omission on a

ago through an interpretive rule adopted by the Health Department, which allows an amendment to marital status *or* the name of a surviving spouse, *but not both*, without a court order. "The defendants refused to depart from that interpretation," the judge observed, without noting an explanation offered for such refusal. The obvious explanation is sheer cussedness. As far as Florida officials are concerned, apparently, they won't do anything voluntarily to effectuate marriage equality beyond what a court orders them to do. Witness, for example, the state's obstinacy on the issue of parental status presumption for same-sex spouses of women who give birth. Thus, the need for this wasteful litigation.

A proper death certificate is an important document for a surviving spouse to have as they settle the affairs of their decedent.

death certificate with regard to the name of the surviving spouse, the department may not change the name of a surviving spouse on the certificate except by order of a court of competent jurisdiction."

Judge Hinkle pointed out that one might plausibly read this statute to authorize exactly the relief that Lambda Legal was seeking in this case. "One might conclude that the explicit exception to the court-order requirement – the exception for 'an omission on a death certificate with regard to the name of the surviving spouse' – applies to a death certificate that both omits the fact that the decedent was married and omits the name of the surviving spouse." The problem, however, is that the ambiguity created by the wording of the statute had been addressed years

"As a matter of federal constitutional law," wrote Judge Hinkle, "a state cannot properly refuse to correct a federal constitutional violation going forward, even if the violation arose before the dispute over the constitutional issue was settled. If the law were otherwise, the schools might still be segregated." Florida concedes in this case that as a result of *Obergefell*, declaring a constitutional right under a provision adopted as part of the Constitution shortly after the Civil War, its failure to recognize these marriages at the time of death was unconstitutional. "They are willing to correct any pre-*Obergefell* constitutional violation," Hinkle continued. "But the defendants insist that, as a prior condition to any correction, an affected party must obtain an order in response to an

individual claim in state court. Not so. As the Supreme Court said long ago, 42 U.S.C. Section 1983 affords a person whose federal constitutional rights have been violated ‘a federal right in federal courts.’ In short, a federal court has jurisdiction to remedy a federal violation, including, when otherwise proper, through a class action.”

Hinkle found this was an appropriate case for such class relief. “To the extent the defendant state officials simply need a clear resolution of the perceived conflict between the federal constitutional requirement and the state statute, this order provides it.” Acknowledging that state officials could legitimately seek proof that the marriages in question took place, Hinkle said that the state could require the submission of an application, affidavit, and appropriate documentary evidence. “This order provides that, upon submission of the same materials, the defendants must correct a constitutional error that affected a death certificate’s information on both marital status and a spouse’s identity.” If they were going to insist on a “court order” to make such a change, then a copy of Judge Hinkle’s order in this case can accompany the application. “This injunction binds the defendants [Florida’s Surgeon General/Secretary of Health and the State Registrar of Vital Statistics] and their officers, agents, servants, employees, and attorneys – and others in active concert or participation with any of them – who receive actual notice of this injunction by personal service or otherwise.”

Hinkle indicated that he would retain jurisdiction of the case “to enforce the injunction” if necessary and to “award costs and attorney’s fees” to the plaintiffs. If past is prologue, expect haggling about the amount of attorney’s fees the state will be ordered to pay. Lambda Legal attorneys Karen L. Loewy and Tara L. Borelli represent the plaintiffs with volunteer co-counsel David P. Draigh and Stephanie S. Silk of White & Case LLP. ■

Ninth Circuit En Banc Decision Restores Gay Mexican’s Asylum Application

In a significant decision from the U.S. Court of Appeals for the Ninth Circuit, the court, sitting en banc, restored a gay Mexican citizen’s application for asylum, which alleged that the Mexican government failed to protect him from past persecution for being gay. The majority, in a 9-2 decision, reversed a prior Ninth Circuit three-judge panel as well as the Board of Immigration Appeals (BIA) and an Immigration Judge (IJ) to hold that the applicant, Carlos Bringas-Rodriguez, had presented sufficient evidence to establish past persecution and the Mexican government’s inability or unwillingness to control the persecution. The decision, *Bringas-Rodriguez*

By the time Bringas was twelve years old, the abuse intensified and his uncle, cousins, and neighbor repeatedly raped him. Bringas alleged that his uncle once told him the abuse was occurring because Bringas was gay. According to Bringas, his uncle, cousins, and neighbor never referred to him by his name, but rather only referred to him as “fag, fucking faggot, [or] queer.” During one incident, Bringas refused to comply with his neighbor’s demand for oral copulation and as a result, his neighbor brutally beat and raped him. Bringas further alleged his abusers threatened him that if he ever tried to report the abuse they would hurt him and his grandmother.

The decision notably overruled prior Ninth Circuit precedent, which had imposed heightened evidentiary requirements on asylum applicants for proving past persecution.

v. Sessions, 2017 WL 908546 (9th Cir. Mar. 8, 2017), notably overruled prior Ninth Circuit precedent, which had imposed heightened evidentiary requirements on asylum applicants for proving past persecution.

Bringas was born in Tres Valles, Veracruz, Mexico. As a young child, Bringas was abused by his father, an uncle, cousins, and a neighbor, who, according to Bringas, “perceived him to be gay or to exhibit effeminate characteristics.” Bringas testified that at as early as four years old, his uncle began raping him on a regular basis. Three of his male cousins and a neighbor also began sexually abusing Bringas. In addition to the sexual abuse, Bringas’ father began physically abusing him because of his effeminate nature, telling him, “Act like a boy. You are not a woman.”

In 2004, Bringas fled Mexico at the age of fourteen to escape his abusers. Bringas entered the country illegally at El Paso, Texas, lived with his mother in Kansas for three years, and then eventually settled in Colorado. In August of 2010, Bringas pleaded guilty to attempted contributing to the delinquency of a minor. According to Bringas, “he had been at home drinking with some friends when another friend brought over a minor who became drunk.” Shortly thereafter, the Department of Homeland Security issued Bringas a Notice to Appear. It was then that Bringas sought asylum, withholding of removal, and relief under the Convention Against Torture, claiming he suffered past persecution because of his sexual orientation.

In support of his asylum application, Bringas testified regarding the abuse

he experienced in Mexico on account of his sexual orientation, which the IJ found credible. Bringas also testified about the experiences of his other gay friends in Veracruz. He claimed that when his gay friends reported being raped to the authorities in Veracruz, the officers ignored their reports and “laugh[ed] on [sic] their faces.” Further, Bringas submitted 2009 and 2010 U.S. Department of State Country Reports for Mexico and various newspaper articles documenting violence against gays and lesbians in Mexico. The reports concluded that even as Mexican laws became more tolerant of gay rights, violence against gays continued to rise. However, the IJ ultimately denied Bringas’ asylum claim as untimely.

While the BIA elected to review Bringas’ claim on the merits and also recognized “the serious abuse that [Bringas] endured as a child,” it ultimately held that Bringas did not establish past persecution under the heightened standard set forth in *Castro-Martinez v. Holder*, 674 F.3d 1073 (9th Cir. 2011). Bringas also asked the BIA to consider his recent HIV diagnosis, which he discovered after filing his notice of appeal. The BIA denied this request as having no bearing on his claim. The majority of a divided panel of the Ninth Circuit agreed with the BIA and held that under *Castro-Martinez* Bringas did not establish past persecution. Accordingly, Bringas petitioned for a rehearing en banc, which the Ninth Circuit granted.

Generally, a person applying for asylum must establish “refugee” status, meaning he or she is “unable or unwilling to return to his [or her] home country because of a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” One of the methods to establish a well-founded fear of future persecution is through past persecution. Under established Ninth Circuit law, an applicant alleging past persecution bears the burden of showing three elements: (1) the treatment rises to the level of persecution; (2) the persecution was on account of a protected ground;

and (3) the persecution was committed by the government, or by “forces that the government was unable or unwilling to control.” *Bringas*, 2017 WL 908546, at *7 (citing *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)).

Judge Kim McLane Wardlaw, writing for the majority of the Ninth Circuit sitting in en banc, concluded that there was no dispute as to the first two elements. Bringas had sufficiently established that he was persecuted as a child on account of his sexual orientation. The real issue before the court was whether or not Bringas had set forth sufficient evidence to show that the Mexican government was unable or unwilling to control the private forces that had persecuted him. The Ninth Circuit, in *Castro-Martinez*, interpreted the “unable and unwilling” language in the context of gay child molestation to require proof that the police were unable or unwilling to control the abuse of children. The majority explicitly overruled *Castro-Martinez*, finding this heightened standard for asylum applicants who experience abuse as children as inappropriate. Because, as Judge Wardlaw wrote, children are far less likely to report abuse to the proper authorities, it was inappropriate to require “evidence regarding the treatment of gay children rather than the treatment of gay Mexicans generally.”

Bringas did not have to establish the Mexican government’s inability or unwillingness to specifically control the abuse of children, but rather the inability or unwillingness to control the persecution of gays generally. Thus, according to the majority, Bringas had set forth sufficient evidence to show that the Mexican government was unable or unwilling to control his persecutors. Bringas had credibly testified that a number of his gay friends had reported being raped to Veracruz authorities to no avail. Furthermore, the 2010 country report submitted by Bringas notably documented that “rape victims rarely filed complaints to the police, in part because of the authorities’ ineffective and unsupportive response

to victims.” Because this evidence was sufficient to establish past persecution, the majority held that Bringas was entitled to a presumption of a well-founded fear of future persecution and remanded Bringas’ claim to the BIA for consideration of whether this presumption has been rebutted. Judge Wardlaw also directed the BIA to consider Bringas’ recent HIV diagnosis as material to his claim.

A dissent by Judge Carlos T. Bea, joined by Judge Diarmuid F. O’Scannlain, George W. Bush and Ronald Reagan appointees, respectively, argued that the BIA’s denial of Bringas’ asylum application was entitled to higher deference. Additionally, the dissenters disagreed with the overruling of *Castro-Martinez* and criticized the majority for their “lack-of-evidence-be-damned approach.” Judge Bea discounted Bringas’s evidence as “unspecific hearsay testimony describing his friends’ experiences” and newspaper articles documenting isolated incidents. Judge Bea also argued that the majority undervalued evidence of social progress in Mexico, and that Bringas could simply chose to relocate to a new area within Mexico, such as Mexico City.

This decision, now lauded by immigrant rights and other civil rights organizations, received much attention for its potential effect on gay Mexican immigrants seeking asylum. Bringas was represented by the University of California, Irvine School of Law Appellate Litigation Clinic, and Dean Erwin Chemerinsky argued the case before the en banc court. Numerous amicus briefs were filed in support of Bringas, including those by the Public Law Center, the National Immigrant Justice Center, the Lambda Legal Defense and Education Fund, the HIV Law Project, and the United Nations High Commissioner for Refugees, among others. – *Michael Leone Lynch*

Michael Leone Lynch is a law clerk for Justice Paul Feinman of the Appellate Division of the Supreme Court of the State of New York, First Department.

Judge Incurs Sanctions for Wrong Answer to Question Whether She Would Perform Same-Sex Marriages

On March 7, the Supreme Court of Wyoming found that a municipal judge and part-time circuit court magistrate, Ruth Neely, violated Wyoming's Code of Judicial Conduct (WCJC) when she told a reporter for a local newspaper that she would not perform same-sex marriages. The question was posed in light of the U.S. Supreme Court's *Obergefell* decision and the *Guzzo v. Mead* decision by the U.S. District Court for the District of Wyoming, *Neely v. Wyoming Commission on Judicial Conduct and Ethics*, 2017 WL 900088; 2017 Wyo. LEXIS 26. The court

not required, to perform marriages. Neely is a devout Christian who holds the "sincere belief that marriage is the union of one man and one woman."

In December of 2014, a reporter for the town's local newspaper contacted Neely and asked her if she was "excited" to be able to perform same-sex marriages following the *Guzzo* decision. In *Guzzo v. Mead*, 2014 WL 5317797, the U.S. District Court in Wyoming enjoined that state from enforcing or applying any state law, policy, or practice, as a basis to deny marriage to same-sex couples. Neely stated, "I will not be able to do them

on Neely's petition for rejection of the Commission's recommendation: whether either of (1) the U.S. or (2) the Wyoming Constitutions permitted the court to discipline Neely for announcing that her religious beliefs prevented her from officiating same-sex marriages; (3) whether the provisions of the WCJC allegedly violated by Neely were void for vagueness; and, (4) whether Neely violated the WCJC. The court answered yes to all four questions, insisting over the dissent of two justices that the case was not about same-sex marriage or imposing a religious test on judges but about "maintaining the public's faith in an independent and impartial judiciary that conducts its judicial functions according to the rule of law . . . whether a law is popular or unpopular."

Neely first urged the court to find discipline under the WCJC an impermissible infringement of her First Amendment right to free exercise of religion. In essence, Neely argued discipline was tantamount to punishing her for her religious views on marriage. The court, however, stated it was not concerned with Neely's *views* on same-sex marriage, but instead with her *conduct* — i.e., her refusal to equally apply the law to homosexuals. Applying strict scrutiny to Neely's free exercise claim, the court found the state had a compelling interest in maintaining the "integrity, independence and impartiality of the judiciary[.]" Further, the court found that discipline could be imposed despite Neely's argument that such discipline would be under-inclusive or overbroad. Neely claimed "removing her for her religious beliefs and expression about marriage" was not narrowly tailored insofar she argued it was analogous to an ordinance the Supreme Court struck down which prohibited animal sacrifice by a religious group while other ordinances permitted animal deaths, like euthanasia of strays. While the court agreed removal was not narrowly

Neely argued discipline was tantamount to punishing her for her religious views on marriage. The court, however, stated it was not concerned with Neely's views on same-sex marriage, but instead with her conduct — i.e., her refusal to equally apply the law to homosexuals.

described its decision as aligned with those of other state and federal courts which had considered the question of whether "a judge who will perform marriages only for opposite-sex couples violates the Code of Judicial Conduct." The court, however, declined to remove Judge Neely from the bench, ordering instead that "Judge Neely shall either perform no marriage ceremonies or she shall perform marriage ceremonies regardless of the couple's sexual orientation[.]" This was characterized as a public censure.

Neely, who is not a lawyer and has no formal legal training, was appointed as municipal judge for the town of Pinedale in 1994. In 2001, Neely was also made a part-time circuit court magistrate, in which capacity she is permitted, but

. . . We have at least one magistrate who will do same-sex marriages, but I will not be able to." Neely called the reporter back twenty minutes later and asked that he instead quote her as saying: "When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage." The reporter declined, because Neely would not also provide him a statement of her willingness to perform same-sex marriages. On cross motions for summary judgment, the Adjudicatory Panel of the Wyoming Commission on Judicial Conduct and Ethics (Commission) found Neely had violated the WCJC and recommended she be removed from the bench.

In a 3-2 decision, the Wyoming Supreme Court decided four issues

tailored to serve the state's interest, other discipline – e.g. public censure – was.

Here, the court also disposed of Neely's argument that disciplining her violated free speech rights and that other magistrates could perform the marriages she was unwilling to solemnize. Allowing Neely to opt-out, said the court, was just as unacceptable as those cases in which public safety officers have sought modification of their duties based on their religious objections (e.g. a policeman who does not want to guard an abortion clinic). Contradictorily, however, opting out is just what the court allowed her to do in its final decision on sanctions.

In considering the second question presented, the Court held the religious freedom provisions of the Wyoming Constitution did not prohibit the state from proceeding with disciplinary action against Neely. In so ruling, the Court relied in part on *Miller v. Davis*, in which the Eastern District of Kentucky found that county clerk Kim Miller must issue marriage licenses to same-sex couples. "Just like [Miller]," quoted the Court, ". . . Neely 'remains free to believe marriage is a union between one man and one woman . . . However, her religious convictions cannot excuse her from performing the duties she took an oath to perform[.]'"

On this question, the court also relied on Alabama Court of the Judiciary's decision last year to remove Alabama Chief Justice Roy Moore. "[A]n individual judge's interpretation of divine law must give way to the 'law of the land.'" Again, the distinction between conduct and views was central.

The court more quickly disposed of Neely's "void for vagueness" argument raised in the third question. According to Neely, the language of WCJC Rule 1.2 (promoting confidence in the judiciary), is so vague as to allow the Commission to use it to "punish a judge who expresses her moral belief that human life begins at conception[.]" The court returned to the distinction of "views versus conduct" to point out Neely was being disciplined for conduct

and, not as she mistakenly argued, for "honestly conveying her religious beliefs[.]" In any event, the court relied upon Neely's 21 years on the bench and her service in 2008 on the Select Committee to review the WCJC had more than adequately familiarized her with prohibited conduct and that "an ordinary judge would also understand refusal to conduct some marriages on the basis of sexual orientation of the couple did not comply with the Code[.]"

As to the fourth question, the Court, in the end, found Neely had violated rules 1.2, 2.2, and 2.3(B) of the WCJC. This amounted to a finding that Neely's conduct: (1) undermined public confidence in the integrity of the judiciary insofar as it suggested that judges may refuse to follow the law of the land; (2) signaled Neely's inability to be impartial and unfair; and, (3) manifested an impermissible negative bias with respect to sexual orientation. The court also held Neely's conduct a violation of rules 1.1 (A Judge Shall Comply with the Law, Including the Code of Judicial Conduct) but only insofar as she had not complied with the WCJC. Pointing to the discretionary nature of Neely's marriage duties, the Court rejected the Commission's application of rule 1.1 in which the Commission likened Neely's conduct to a failure to follow procedural rules of law.

The dissent, too, focused on "conduct versus views," but essentially took the position that because Neely had never been asked to perform a same-sex wedding, she had never had an opportunity to violate her ethical responsibilities as a judge. As has been seen, the court nevertheless found Neely in violation of the WCJC. Yet, they saw fit to characterize Neely's conduct as "an isolated response to a quickly-changing legal landscape, one in which many judges have experienced similar turmoil." – *Matthew Goodwin*

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



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Federal Magistrate Recommends Denial of Preliminary Injunction against Prison Rule Separating Romantic Inmates

It was inevitable after *Obergefell v. Hodges* that LGBT inmates would challenge prison rules prohibiting their development of a relationship behind the walls – too bad this is a poor test case. Transgender inmate Christopher (Crystal) Beaulieu, *pro se*, has been in federal court previously, when she sued and lost in her claims of failure to protect her and for excessive force in *Beaulieu v. Aulis*, 2016 U.S. Dist. LEXIS 133324 (D. N.H., September 28, 2016), reported in *Law Notes* (November 2016 at page 492). Now, Beaulieu sues and loses again in *Beaulieu v. Orlando*, 2017 WL 1075438 (D. N.H., February 23, 2017), but the

discriminatory because transgender and non-transgender inmates needing protection were subjected to the same determinations and safeguards, including individualized assessments and housing decisions. Beaulieu is portrayed as an inmate dissatisfied with almost any housing arrangement.

The order that Beaulieu “Keep Away” from Newcombe, described as her “romantic partner,” was one of ten “Keep Away” orders separating Beaulieu from other inmates. In New Hampshire, a “Keep Away” order is issued “where contact between particular inmates poses a threat to the safety and security of either particular

that basis”; and (5) inmates “involved in a romantic nonsexual relationship are not allowed to have contact with one another, because the relationship could result in sexual contact between the inmates.”

Although the precise sequence of events is unclear, Beaulieu and Newcombe were previously engaged to be married while prisoners, although their relationship is described as “nonsexual.” When the institution became aware of the relationship, it issued a “Keep Away” order; and the two were prohibited from having contact. This put a “significant strain on Beaulieu’s relationship with Newcombe.” The two fought, and Beaulieu had a “jealous rampage” upon learning that Newcombe was involved with a different inmate. Beaulieu then falsely accused Newcombe of sexually assaulting her – and later recanted. By the time of the filing of the motion for a preliminary injunction, Beaulieu and Newcombe were “attempting to rekindle their romantic relationship.” (The R & R found that the “current” state of their relationship was “not material” to the recommendations.)

During her incarceration, Beaulieu reported thirteen sexual assaults (all but one deemed “unsubstantiated” (i.e., the investigators “could not determine” whether the allegation was true or false). The R & R found that Beaulieu admitted to mutual consensual encounters, sex in exchange for canteen items, and group sex “turn outs” between transgender inmates and inmates claiming to be heterosexual.

The R & R has extended discussion of inmates’ First Amendment “right of association,” recognizing that the “Keep Away” order potentially violated such right. The R & R’s proposed conclusions of law find that the First Amendment protects two types of “freedom of association” that merit constitutional protection: (1) “choices to enter into and maintain

Beaulieu lost again, but the decision is notable for its treatment of constitutional issues involving a transgender prisoner’s relationship with another inmate to whom she was previously engaged.

decision is notable for its treatment of constitutional issues involving her relationship with another inmate to whom she was previously engaged.

U.S. Magistrate Judge Andrea K. Johnstone issued a Report and Recommendation [R & R] that recommended that Beaulieu be denied a preliminary injunction on her housing and contact with her “boyfriend” (Steven Newcombe – from whom she was ordered to “Keep Away”), because she failed to demonstrate a likelihood of success on the merits. (First Circuit string cites and related discussion omitted). The R & R found that Beaulieu’s housing placement was for her own protection, since she had previously claimed sexual assault (*see* previous case). The R & R also found that officials’ actions were not

inmates or to the institution generally.”

Among the R & R’s proposed findings are the following about New Hampshire DOC’s policies: (1) “inmates are not allowed to have sexual contact with one another, consensual or otherwise”; (2) sexual contact between inmates “poses a potential threat . . . , as it is difficult or impossible . . . to distinguish between genuinely consensual sexual contact, and sexual contact which has been coerced by force or threats of force”; (3) “sexual acts between inmates that appear consensual can result in extortion or blackmail, or can be used as payment for goods or services”; (4) if an official “believes that inmates at the DOC are involved in a romantic and/or sexual relationship with one another, the official may seek a ‘Keep Away’ on

certain intimate human relationships”; and (2) association “for the purpose of engaging in those activities protected by the First Amendment” (internal quotations and citations omitted), relying on the leading case of *Overton v. Bazzetta*, 539 U.S. 126, 1312 (2003). Oddly, the R & R does not cite *Turner v. Safley*, 482 U.S. 78, 98 (1987), on this point, although it expressly held that the fundamental right to marry survives incarceration in the case of an inmate marrying a civilian.

Instead, the R & R uses the *Turner* balancing test (inmates’ rights versus reasonable security concerns) to recommend upholding the broad sweep of the New Hampshire “Keep Away” policies. The R & R found the policy was “designed to prevent tensions, assault, blackmail, exploitation, and other problems,” holding Beaulieu was unlikely to prevail on a facial constitutional challenge. As applied, the R & R used Beaulieu’s own history and the history of her relationship with Newcombe to demonstrate that correctional fears were not exaggerated, noting that Newcombe did not join as a plaintiff.

Read as a whole, this case stands for the proposition that, while inmates’ marrying is subject to some protection under *Turner*, officials can keep them from dating within the institution. In this writer’s view, correctional officials’ total “Keep Away” policy can be shown to be based on exaggerated justifications for such a broad rule, and unconstitutional “as applied” in a proper case. Counsel, of course, must take their plaintiffs as they find them and wait for an inmate couple, who both want to sue – and who have no history of rifts, triangles, prostitution, group sex, or impeachable credibility. – *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.

10th Circuit Rejects Anti-Gay Student’s First Amendment Claim Against University and Faculty Members

After being nominated for a seat on the Supreme Court, 10th Circuit Judge Neil Gorsuch withdrew from further participation in panel decisions of cases to which he had been assigned. According to a footnote in *Pompeo v. Board of Regents*, 2017 WL 1149501, 2017 U.S. App. LEXIS 5384 (10th Cir., March 28, 2017), Gorsuch “considered this appeal originally but did not participate in this Opinion.” The circuit’s practice is to let cases be decided by a unanimous two-member panel in such circumstances. There is no indication how Gorsuch would have voted in this case, but it would have

wrote in response to the 1985 film, *Desert Hearts*, generally considered a classic lesbian romance film.

Pompeo’s paper condemned the film, asserting it would be unwatchable for anybody who was not a lesbian, and making various negative assertions about lesbians, such as that “lesbianism is a very death-like state as far as its inability to reproduce naturally.” She also wrote that the “only signs of potency in the form of the male cock exist in the emasculated body” of one character’s fiancé, and portrays the bath water as “essentially drowning out any chance of life considering their fatal

The student stated that the film “can be viewed as entirely perverse in its desire and attempt to reverse the natural roles of man and woman in addition to championing the barren wombs of these women.”

been very interesting in connection with his consideration for the Court.

Monica Pompeo was enrolled in a course at University of New Mexico taught by Professor Caroline Hinkley titled “Images of (Wo)men: From Icons to Iconoclasts.” A wide range of material was assigned for discussion in the class, including books, plays, movies, and the like. Each student was assigned to write “response papers” discussing the assignment material, in order to learn how to “write a critical and analytic paper,” “think critically,” and “discern a critical argument from opinions and polemics,” and the professor emphasized that she would as students to re-write their papers “if they did not satisfy the requirements.” Pompeo got good grades on three of her papers, but Hinkley did not assign a grade for a paper Pompeo

attraction for one another.” She stated that the film “can be viewed as entirely perverse in its desire and attempt to reverse the natural roles of man and woman in addition to championing the barren wombs of these women.”

Rather than assign a grade, Hinkley summoned Pompeo to a meeting to discuss re-writing the paper. Of course Hinkley’s recollection of the meeting differs from Pompeo’s recollection, and similarly recollections vary on subsequent meetings Pompeo had with administrators. Hinkley remembers a diplomatic conversation in which she talked about avoiding the kind of inflammatory language Pompeo had used and stating reasons for her opinions rather than just asserting them. Pompeo remembered being told it would be in her interest to withdraw from the

class, which Hinkley later denied have said. At one point in the context of Pompeo's meeting with the Department Chair and another professor, it seemed that an agreement was worked out for Pompeo to continue with the subject matter in an independent study with the Department Chair supervising her, but ultimately Pompeo refused to re-write the paper, initiated an internal grievance proceeding, and received a refund for her tuition for the course, for which she received no credit or grade. Then she sued the university and the staff members involved in federal court, claiming a violation of her First Amendment rights. The district court ruled against her.

Circuit Judge Carlos Lucero wrote the opinion for the reduced panel, consisting of himself and Circuit Judge David Ebel. Judge Lucero summarized the court's reasoning in an introduction to the opinion. "She claims that UNM officials retaliated against her in violation of her free speech rights because they disagreed with viewpoints she expressed in an assignment class paper. We held in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), that courts may not override an educator's decision in the school-sponsored speech context 'unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment' and instead used 'the proffered goal or methodology [as] a sham pretext for an impermissible ulterior motive.' In that case, we held that a compelled speech requirement may have been imposed as 'a pretext for religious discrimination.' We are asked by Pompeo to draw an analogy between the religious discrimination at issue in *Axson-Flynn* and the viewpoint discrimination she brings to us. Yet our court has specifically held that precedent 'allows educators to make viewpoint-based decisions about school-sponsored speech' and may restrict speech they believe contains 'inflammatory and divisive statements.' *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918, 926, 934 (10th Cir. 2002). Exercising jurisdiction under 28 U.S.C. sec. 1291, for the reasons we elaborate herein, we affirm."

After a lengthy recitation of the factual allegations, Lucero moved to address the question whether Pompeo's constitutional rights were so clearly established that the individual defendants would not be immune from personal liability for violating her free speech rights. He found that the parties in this case agreed that it involves "school-sponsored speech," since it concerns an assignment made within the scope of a course as "part of the school curriculum." He then summarized past 10th Circuit decisions in student speech cases, emphasizing the leeway that educators have under the First Amendment to pursue pedagogical goals. Pompeo argued that the circuit's precedents make it settled law that "an instructor cannot restrict a student's speech based on the instructor's hostility to the viewpoint expressed in the speech" and 'pretextual explanations for the 'legitimate' reason for the restriction of speech will not pass constitutional muster.'" Lucero disagreed with this characterization of the circuit's precedent, stating: "We disagree that our prior opinion placed the 'constitutional question beyond debate' such that any reasonable official would have understood the conduct at issue in this case as impermissible," and characterized Pompeo's assertion to the contrary as "incorrect." "Our circuit jurisprudence 'entrusts to educators these decisions that require judgments based on viewpoint.'" Unless it was shown that the instructor's alleged pedagogical goals were a "sham" for outright viewpoint discrimination, the court's tendency will be to defer to the educators judgment, shielding it with qualified immunity from liability.

"This is not to say that viewpoint discrimination in educational settings is always desirable," wrote Lucero, "or even fair. . . . But in the context of school-sponsored speech, we have recognized that court must 'entrust to educators these decisions that require judgments based on viewpoint. Regardless of the competing policy goals that might be considered in assessing whether school-sponsored speech should be restricted, [the circuit's precedent] does not clearly prohibit educators from restricting

school-sponsored speech based on viewpoints that they believe are offensive or inflammatory.'" Ultimately, the court concluded that both Hinkley and the department chair are shielded from liability in this case by qualified immunity. Regardless whether these two defendants were personally offended by Pompeo's writing or were acting based on objective pedagogical concerns, the immunity conclusion would be the same.

"From an objective standpoint," wrote Lucero, "Hinkley's actions are related to legitimate pedagogical goals. Criticizing a student's paper, even in harsh terms, and asking her to rewrite it relate to the pedagogical goals of encouraging critical analysis, avoiding unsupported generalizations, and maintaining a focus on assigned material rather than a student's general opinions." Pompeo had also objected to Hinkley's action inviting the department chair to sit in on the next session of the class so she could see for herself that Pompeo was a disruptive presence in class discussion. Lucero said that asking a super to attend class for this reason "cannot be deemed unreasonable." Even using a subjective standard, the court said Hinkley would not lose her immunity just because she was personally offended by what Pompeo wrote. The court reached a similar analysis in considering the department chair's actions.

Concluding succinctly, Lucero wrote: "In assessing defendants' claims of qualified immunity, we are mindful of the Supreme Court's admonition to 'define the clearly established right at issue on the basis of the specific context of the case.' *Tolan*, 134 S. Ct. at 1866. Pompeo claims a right to use language in a course assignment that her professors found to be inflammatory without being criticized or pressured to make revisions. Because we conclude that such a right is not clearly established, the district court's grant of summary judgment in favor of defendants is Affirmed."

Pompeo is represented by Robert J. Gorence (lead counsel) and Louren Oliveros and Christian Cavaleri, of Gorence & Oliveros, Albuquerque. ■

Federal Court Refuses to Let Homophobic Veteran Directly Sue Gay-Friendly VA Counselor

An Ohio federal district court dismissed a veteran's suit against his former counselor and several other staff members with whom he interacted at a Cincinnati Department of Veterans Affairs (VA) hospital for allegedly violating his constitutional rights by retaliating against him after he made it known he opposed gays in the military and gay marriage, based on his beliefs as a Roman Catholic. *Waksmundski v. Williams*, 2017 U.S. Dist. LEXIS 27131 (S.D. Ohio Feb. 27, 2017). Judge Timothy S. Black found both that the veteran, John Waksmundski, had no remedy for damages against the individual employees of the VA, and that the court also lacked jurisdiction to hear the claims because of the exclusive scheme Congress created to address veterans' benefits disputes.

A veteran of Operations Desert Shield and Desert Storm, Waksmundski started receiving psychological counseling from Dr. Crystal Williams at the Cincinnati VA Hospital in 2008. She met with him once a week for several years and helped him open up about his depression, anxiety, and trust issues. During a group therapy session with other veterans in 2013 or 2014, he made known his opposition to gays serving in the military and to gay marriage as a devout Roman Catholic. From that point on, he sensed hostility from Dr. Williams, a pro-gay individual with symbols broadcasting such views around her office, and, according to him, he was not allowed to participate as previously promised in a new therapy group. He further alleged that she eventually told him she would no longer see him and would not refer him to any of her colleagues in the hospital, leading Waksmundski into a deep depression and leaving him without necessary psychological treatment for two years.

He ultimately filed a lawsuit alleging that Dr. Williams and the two other defendants failed to provide

the psychological counseling to which he was entitled, because of his political and religious views on gay marriage and gays in the military. He specifically asserted three causes of action: retaliation in violation of the First and Fourteenth Amendments, violation of the First Amendment's free exercise clause, and violation of the Fourteenth Amendment's equal protection clause. He sought damages from them in their individual capacity. The three defendants moved to dismiss for failure to state a claim and lack of subject-matter jurisdiction.

Responding first to the failure to state a claim basis for the motion to dismiss, Judge Black noted that no

Act (VJRA). Surveying precedent, he concluded that "the VJRA is a comprehensive remedial scheme that precludes *Bivens* claims for damages against VA employees premised on the assertion that the employees denied, or interfered, with a party's benefits."

Moving to the jurisdictional issue, Judge Black also agreed with the defendants that the VJRA preempts Waksmundski's federal court claims. Section 511(a) of the VJRA, in particular, gives the agency exclusive, final, and conclusive review authority to "decide all questions of law and fact" related to the provision of veterans' benefits, and where appeals of those decisions go is also addressed

Judge Black noted that no statutory right of action or remedy for damages exists for plaintiffs suing federal employees for violating a party's First or Fourteenth Amendment rights.

statutory right of action or remedy for damages exists for plaintiffs suing federal employees for violating a party's First or Fourteenth Amendment rights. He reviewed the famous 1971 constitutional tort case of *Bivens v. Six Unknown Federal Narcotics Agents* and its progeny, highlighting that the Supreme Court has only recognized implied remedies for damages in three limited contexts. As he added, the Supreme Court has especially hesitated to do so "when the design of a government program suggests that Congress believes that it has provided adequate remedial mechanisms for constitutional violations that may occur over the course of its administration," as when there are Civil Service Commission regulations, administrative remedies for Social Security claimants, or, here, the Veterans' Judicial Review

in nearby statutory provisions. With that provision in mind and plenty of precedent to back him up, Judge Black found, "Section 511(a) precludes federal district court jurisdiction over claims by veterans regarding deprivation of benefits, including claims for constitutional violations." Waksmundski's claims were precluded by 511(a) because "[h]ere, the relevant question is whether adjudication of the claims would require the district court to determine whether the VA acted properly in denying the plaintiff a veterans' benefit." Since the answer to that question was yes, Judge Black also found he had no jurisdiction to keep the case. – *Matthew Skinner*

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

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U.S. COURT OF APPEALS, THIRD CIRCUIT

– A 3rd Circuit panel ruled on March 7 that a teaching hospital was subject to Title IX of the Education Amendments of 1972, adopting an expansive reading of the phrase “educational institution” in the statute, which forbids sex discrimination by educational institutions that receive federal money. *Doe v. Mercy Catholic Medical Center*, 2017 U.S. App. LEXIS 4004. Thus, individuals who might be characterized either as employees or students would have federal statutory protection, either under Title VII of the Civil Rights Act or Title IX, or potentially both. BloombergBNA’s *Daily Labor Report* (March 31) pointed out that this holding would oblige teaching hospitals to appoint Title IX coordinators and adopt policies necessary to enforce Title IX requirements. Furthermore, and of particular consequences, unlike Title VII, Title IX does not require individuals with discrimination claims to exhaust administrative remedies before filing suit against the educational institution. Although they can file a complaint with the Office of Civil Rights of the U.S. Department of Education, alternatively they can go directly to court. Title IX also does not have the relatively short limitations period for filing charges an agency. The Obama Administration construed Title IX’s ban on sex discrimination to include discrimination because of sexual orientation or gender identity, similar to the construction it had given to Title VII. Whether those administrative interpretations will continue in the Trump Administration is subject to question, especially as the administration has withdrawn the Obama Administration’s guidance letter to educators concerning Title IX protection for transgender students.

CALIFORNIA – Ruling on a long-term disability benefits claim by an HIV-positive plaintiff in *Doe v. Prudential Insurance Company of America*, 2017

U.S. Dist. LEXIS 45774, 2017 WL 1156725 (C.D. Cal., March 27, 2017), U.S. District Judge Andre Birotte, Jr., found that the insurance contract’s 24-month cap on long-term disability benefits caused in whole or part by mental illness did not apply, as the most persuasive medical evidence in the plaintiff’s file supported the conclusion that “brain damage stemming from HIV is the but-for cause of Plaintiff’s disability.” This is a fascinating opinion with detailed description of numerous physician reports concerning a top talent agent at the William Morris Agency who suffered from life-long depression issues. As described by the court, the job he performed required a high level of cognitive functioning. Although he had been functioning at the necessary high level for many years consistent with his high IQ, his performance began to deteriorate. When he first went on disability leave and applied for benefits, Prudential found him to be totally disabled from performing his job due to mental health problems, as supported by various specialist reports. He was notified, however, of the 24-month cap. Before the cap period ended, all but one of the medical specialist reports on his case concluded that his disability was due to mental illness. It was not until after his 24 months of benefits expired that new specialists, using more up-to-date tests, determined that HIV infection and the treatments for such infection probably caused the further deterioration of his mental functioning. These new diagnoses emerged when he was in the process of appealing Prudential’s termination of his benefits. After extensive analysis, Judge Birotte concluded that the insurance policy should be construed to require that mental illness was the “but-for” cause of the disability if the cap were to apply. In this case, the court found that even if “John Doe’s” depression was fully controlled by medication, the brain function deterioration associated with HIV infection and treatment in about half

of long-term survivors of HIV infection would still be present. Having found HIV infection was the “but-for” cause by a preponderance of the evidence, the court concluded that this was a medical disability, not subject to the cap. Doe is represented by James P. Keenley, Brian Henry Kim, and Emily A. Bolt of Bolt Keenley Kim LLP, Berkeley, California. The insurer is represented by Cindy Nguyen Mader, Linda Marie Lawson, and Jason A. James of Meserve Mumper & Hughes LLP, Los Angeles. An appeal by Prudential seems likely.

CALIFORNIA – California’s statutory ban on sexual orientation discrimination protects everybody, regardless whether they are gay. In *Vincent v. Ralphs Grocery Co.*, 2016 Cal. App. Unpub. LEXIS 2156, 2017 WL 1152453 (Cal. 2nd Dist. Ct. App., March 28, 2017), the Court of Appeal affirmed the trial court’s grant of summary judgment in favor of the employer in a case brought by a heterosexual employee claiming that she was discharged because of her sexual orientation. The district manager overseeing the store that was co-managed by plaintiff-appellant Diane Vincent was Brigitte Andersen, a lesbian. After Vincent was discharged, she claimed that Andersen was trying to replace heterosexual managers with gay people. The claim was based on no evidence whatsoever. Although discovery disclosed some emails between Andersen and the company’s vice-president for human resources, who made the discharge decision, the court found no basis for concluding that Andersen played any significant role in the discharge decision, although in one she state, “I’m hoping we have enough to support a termination or demotion at this point?” Vincent was discharged after being caught by a loss prevention investigation violating company rules concerning refunds of purchases, and she had been transferred to the store at which she was working from a larger store due

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to concerns about her management style at the previous assignment. In other words, there were legitimate reasons for her discharge even though, as the court noted, some might question whether the refund incident, which involved a trivial amount of money, was sufficient ground for a discharge on its own. It did reflect on the plaintiff's honesty and ability to abide by and enforce company rules as a manager. The court reviewed Vincent's allegations about Andersen and found that they did not support any sort of claim that either Vincent's or Andersen's sexual orientation had anything to do with Vincent's discharge. "Vincent admitted that Andersen never discussed her sexual orientation with her; did not ask her on a date; and never touched her. Vincent could not recall Andersen saying anything sexually explicit." One suspects that in looking for some way to challenge her discharge, Vincent, or her attorney, thought to seize upon Andersen's sexual orientation and try to construct a discrimination theory. But it didn't fly.

CALIFORNIA – A gay man claiming to be the victim of sexual orientation employment discrimination is caught up in litigation about whether he must submit his claims to arbitration. Ruling in *Williams v. Alorica, Inc.*, 2017 Cal. App. Unpub. LEXIS 1929, 2017 WL 1034386 (Cal. 4th Dist. Ct. App. March 17, 2017), the court of appeal reversed Orange County Superior Court Judge Geoffrey T. Glass's ruling that the employer had failed to establish the existence of an agreement to arbitrate. Williams had worked for five years as a trainer. He alleged that he had been subjected to sexual orientation and disability discrimination (hostile environment harassment by a manager and failure to accommodate his disability), and that the day after he notified the regional manager about the post-traumatic stress disorder he suffered, he was discharged. He sued in state court under the Fair

Employment and Housing Act, which prohibits discrimination because of sexual orientation and disabilities. The employer moved to dismiss, producing a copy of an email it sent to employees stating that if they continued to work past a certain date, they would be taken to have accepted the employer's arbitration agreement, and requiring them to signify their acceptance by electronic acknowledgment of receiving, reading and understanding the email. In order to continue working, they had to click on that link, which the employer claimed Williams had done. Judge Glass had rejected the argument that this constituted a valid agreement to the arbitration provision, which Williams had also challenged as unenforceable under the state's unconscionability doctrine. Because Glass found no valid acceptance by Williams, he did not rule on the unconscionability claim. In reversing, the court of appeal remanded for consideration of the unconscionability claim. So it is still possible that Williams will be able to litigate, depending on how the unconscionability issue plays out. Of course, if Williams agrees to submit the dispute to arbitration, there will be no ruling on unconscionability. California courts have been in continuous dispute with the U.S. Supreme Court about the enforceability of agreements to arbitrate employment discrimination claims.

CONNECTICUT – In *Bailey v. Grocery Haulers, Inc.*, 2017 U.S. Dist. LEXIS 38460, 2017 WL 1025664 (D. Conn. March 16, 2017), U.S. District Judge Janet Bond Arterton ruled on the employer's motion to dismiss an employment discrimination and wrongful discharge case under state law brought by a truck driver who was dismissed after he refused an assignment on the ground that accepting it would require him to violate a U.S. Department of Transportation regulation on duty and drive time maximums. Judge Arterton found that

the plaintiffs' attempt to make out a case for wrongful discharge in violation of public policy failed because he was not an at-will employee, due to his coverage under a collective bargaining agreement. The plaintiff alleged that he was the recipient of offensive comments from a new dispatcher based on the perception that he was bisexual, and sought to assert claims under Title VII and Connecticut's employment discrimination law. The court accepted the employer's argument that neither Title VII nor Connecticut's general employment discrimination provisions would cover a sexual orientation discrimination case, but noted that in a separate section Connecticut had included an express ban on sexual orientation discrimination. While granting judgment to the employer on the plaintiff's other claims, the court refused to dismiss the state sexual orientation discrimination claim.

DISTRICT OF COLUMBIA – It's rarely advisable to initiate complex employment discrimination litigation *pro se*, as Jimmy Lance will discover upon reading a decision by U.S. District Judge Rudolph Contreras in his case, *Lance v. Greyhound Lines, Inc.*, 2017 WL 1154958, 2017 U.S. Dist. LEXIS 44138 (D.D.C., March 27, 2017). Lance filed his lawsuit on December 23, 2015, alleging discrimination because of his sexual orientation in violation of Title VII, retaliation against him for filing his discrimination charge with the EEOC, constructive discharge in violation of the National Labor Relations Act and his collective bargaining agreement, and violation by his union of its duty under federal labor law to provide him with fair representation. Lance had filed charges with the EEOC, but not with the National Labor Relations Board (NLRB), which is the exclusive route to litigating unfair labor practice charges against employers and unions, so it was an easy call for Judge Contreras to grant

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the motion to dismiss claims arising under that statute, and to note that Section 301 of the NLRA would preempt the court from addressing his constructive discharge claim on the merits when it was subject to a collectively bargained grievance procedure. Turning to the Title VII claims, it seems that Lance either got bad advice or, more likely, misunderstood the advice he was given about when to file his lawsuit. The right to sue letter he received in response to his initial discrimination claim informed him that he had 90 days to file suit in federal court, which would have been by mid-November. He had a meeting with his supervisor and others on September 15. A few weeks after the September 15 meeting, Lance went to the D.C. Employment Justice Center seeking advice about his case, and was told he could file a retaliation charge with the EEOC based on the September 15 meeting, and that it would be good to allege both discrimination and retaliation in a subsequent lawsuit. He believed he could file a timely lawsuit within 90 days of receiving the right to sue letter in response to his retaliation charge, thus inadvertently missing the earlier deadline to file suit on his discrimination charge. Tough luck! The court found his discrimination lawsuit must be dismissed as untimely, since it was filed more than 90 days after he received his initial right to sue letter from the EEOC. However, Judge Contreras concluded, a lawsuit based on the retaliation claim could proceed, as Lance's factual allegations about the meeting were sufficient to ground such a claim, as he was threatened with adverse consequences as a result of having filed his initial charge with the EEOC. Thus, in ruling on Greyhound's motion, the court whittled down the case to a retaliation suit.

DISTRICT OF COLUMBIA – A straight Hispanic man, representing himself, alleged that he was discharged as a

probationary recruit police officer by the Washington Metropolitan Area Transit Authority (WMATA) because of his national origin and perceived (gay) sexual orientation. In a March 22 opinion granting summary judgment to the defendant agency in *Diaz v. WMATA*, 2017 U.S. Dist. LEXIS 40917, 2017 WL 1080919 (D.D.C.), District Judge Colleen Kollar-Kotelly pointed out that sexual orientation discrimination claims are not actionable under Title VII, but “gender or sex-stereotype” discrimination claims are. However, Clifton Diaz made no factual allegations specifically supporting the idea that he was gender-non-conforming. Furthermore, she found, WMATA dismissed him because of a serious rules violation followed by his false statements during an investigation of the incident. Even if he could have made out a prima facie case, nothing he introduced in opposition to the motion for summary judgment was sufficient to overcome WMATA's un rebutted account of why he was dismissed. Similarly, the fact that he was the only Hispanic person in his training group, standing alone, was not sufficient to raise an inference of discriminatory intent concerning his national origin. And the court saw little relevance to the allegation that Diaz overheard some other trainees refer to him using “a derogatory term for homosexuals,” since they had nothing to do with his discharge, and his discharge was the only potentially actionable conduct by WMATA that could be addressed in his Title VII suit. One suspects that only a *pro se* plaintiff would think he had a cause of action under Title VII because he felt the uniform pants issued to him were too tight!

DISTRICT OF COLUMBIA – Rejecting an employer's motion to dismiss one count of a transgender plaintiff's hostile environment discrimination claim under the D.C. Human Rights Act on the

ground that she had been employed in the employer's Maryland location, U.S. District Judge Colleen Kollar-Kotelly focused on the factual allegations that implicated D.C. personnel of the employer. Plaintiff Breana Higgs, a transgender woman who has presented as female since age 14, applied on December 9, 2015, for a Customer Service Representative position at the defendant's establishment Cava Chinatown. She was invited to interview and claims to have been mistreated during the interview and not offered the position. After she complained about this on her Facebook page, a Cava representative contacted her and suggested she apply for a position at the establishment's Silver Spring, Maryland, location, where she was hired. But she claims that while working there she experienced hostility, disrespect, and mistreatment from coworkers and supervisors. She complained to Cava representations in the District of Columbia, but claims they minimized her complaints and failed to attempt to correct the situation. Eventually she was terminated for “having a bad attitude and not smiling enough.” She claimed the discharge decision came from Cava employees located in D.C. and included a count under D.C. law in her complaint, which the employer ought to dismiss on the ground that plaintiff was not employed in D.C. While finding that the D.C. Human Rights Act does not have territorial effect, Judge Kollar-Kotelly concluded that plaintiff had “sufficiently alleged that certain decisions underlying her hostile work environment claim were allegedly made in the District of Columbia,” to which its Human Rights Act applies. Although defendant contested these factual allegations, the court concluded that a motion to dismiss, which is determined by focusing on the plaintiff's factual allegations, was not properly granted when there is a material fact dispute to be resolved that would be disposition of the jurisdictional issue. Depending how

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facts are developed during discovery, the defendant can renew the motion later. *Higgs v. Cava Group, Inc.*, 2017 U.S. Dist. LEXIS 34251, 2017 WL 972090 (D. D.C. March 10, 2017).

FLORIDA – A heterosexual Sunni Muslim man who was employed as a deputy sheriff patrol officer in the Orange County Sheriff's office survived a motion for summary judgment on his claim of being subjected to hostile environment harassment in violation of Title VII, much of it verbal harassment of a sexual nature employing homophobic rhetoric against him by his supervising officer. *Albakri v. Sheriff of Orange County*, 2017 U.S. Dist. LEXIS 48941, 2017 WL 1196664 (M.D. Fla., March 31, 2017). Apparently the problem started when Officer Albakri proved adept in performing prostitution sting operations against both male and female prostitutes, in the former case convincing posing as gay. Recognizing his skill at this, his supervisor, Sergeant Batie, "began harassing him with statements like, 'Man, you're killing it. You are a faggot because you know how to pick up those dudes and those girls.'" Albakri asked Batie to "knock it off" and told him that "homosexuality was 'not taken lightly in my faith,'" but Batie persisted, both directly to Albakri and in the presence of other officers, to refer to him as "faggot," "gay" or "fag." Batie made similar remarks to service people in restaurants when present with Albakri and other officers, when Albakri objected to this name calling, Batie called him a "fag and a loser" and said, "Shut up, fag . . . you're nothing but a whining cry baby." Batie also made humiliating remarks about Albakri's wife and daughter and, focusing on his ethnicity, called him "terrorist," "seven eleven," "Haji" and "sand nigger." Once Albakri was sufficiently fed up to make formal complaints, the sheriff's office investigated, with results not satisfactory to Albakri, who by then found himself in

trouble because of fraud charges against him relating to a claim about a stolen computer. The story becomes quite complicated. But the bottom line for this report is that District Judge Gregory A. Presnell concluded that the defendant's summary judgment motion on the hostile environment claim should be denied. Because some of the harassment was clearly focused on Albakri's national origin and religion, the court did not have to get in the question whether homophobic harassment as such against a straight employee can provide the basis for a hostile environment claim under Title VII. Albakri's counsel include Katherine Heffner and Thania Diaz Clevenger of Tampa and Peter Frederick Helwig of Lakeland.

FLORIDA – *BloombergBNA Daily Labor Report* reported on March 24 that a group of victims of the June 2016 shooting massacre at the Pulse nightclub in Orlando, Florida, have brought an action in U.S. District Court against a private security company that employed the shooter, Omar Mateen, naming Mateen's wife as a co-defendant. *Colon v. G4S PLC*, No. 2:17-cv-14100 (S.D. Fla., Complaint filed March 22, 2017). The claim is that Mateen's conduct should have put his employer on notice of potential danger to others, but it failed to take any steps to have Mateen's firearm license revoked or to alert authorities about the dangers he posed. The complaint also alleges that Mrs. Mateen knew what her husband was planning and assisted him in his preparations for the massacre. Plaintiffs are represented by Antonio Romanucci, Romanucci & Blandin LLC (Chicago), Rodney Gregory (Jacksonville), and Conrad Benedetto (Philadelphia).

ILLINOIS – U.S. Magistrate Judge Maria Valdez found that a Social Security administrative law judge fell short in dealing with the issue

whether an HIV-positive disability benefits claimant had sufficient residual functional capacity, despite the disabling effects of her infection and its treatment, to be able to work. *Reinhart v. Berryhill*, 2017 U.S. Dist. LEXIS 31467, 2017 WL 8778450 (N.D. Ill., March 6, 2017). Wrote Valdez, "the evidence in the record simply does not support the ALJ's RFC determinations. The ALJ failed to sufficiently cite to, rely upon, or request any additional medical evidence that supported his determinations. Likewise, the ALJ did not discuss the medical evidence, treatment notes, or assessments. Rather, the ALJ impermissibly filled in evidentiary gaps with his own medical determinations of Plaintiff's RFC. Thus, upon remand, the ALJ should revisit his RFC determinations and provide a narrative description of how he reaches his RFC conclusions." The judge concluded that due to the problems with the RFC determination, it would not address the other errors that the plaintiff alleged in her appeal of the ALJ's decision.

INDIANA – A transgender asylee from Mexico failed in his attempt to challenge an Indiana law that restricts legal name-changes to U.S. citizens when Chief Judge Jane Magnus-Stinson of the U.S. District Court for the Southern District of Indiana dismissed his case for lack of jurisdiction on March 13. *Doe v. Pence*, 2017 WL 956365, 2017 U.S. Dist. LEXIS 35263. The John Doe plaintiff was brought to the United States by his parents as a child in 1990 and has lived in Indiana for more than a quarter century. Doe, now 31, was designated female on his birth certificate, but his gender identity is male. He won asylum in 2015, on a finding that he would risk facing persecution as a transgender man if he returned to Mexico, and he became eligible to apply for permanent residence in September 2016. He was diagnosed with gender dysphoria and

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has been on hormone therapy since 2011, which “has deepened Mr. Doe’s voice, increased his growth of facial hair, and given him a more masculine appearance,” and he has “also undergone gender-affirming surgery,” according to the court. His official documents, including his Indiana ID and all his immigration documents from the asylum case, identify him as male, but his legal name, which of course appears on those documents, still is traditionally female, and he has recounted incidents where this has caused problems for him because of the discord between his name and his appearance, especially with law enforcement. He is afraid of being physically attacked, since every time he has to show his ID to somebody he is “outed” as transgender. He seeks a legal name-change, but under Indiana Code Section 34-28-2-2.5, as faithfully echoed in the name-change forms used by the Marion County Clerk’s Office, being a U.S. citizen is a legal requirement to apply for a name-change in Indiana. When he inquired at the clerk’s office, he was told that “if you do become a citizen, then we would have no problem changing your name.” He was also told that another non-citizen who filed a name-change application was rejected by a judge. Judge Magnus-Stinson reports that the court’s research has “revealed no other state statute requiring proof of U.S. citizenship as a requirement for a name-change petition.” He filed suit in federal court, asserting that the citizenship requirement for a legal name change violates his 1st and 14th Amendment rights, naming as defendants then-Governor Mike Pence, Attorney General Gregory Zoeller, Marion County Clerk Myla Eldridge, and Lilia Judson, Executive Director of the Indiana Supreme Court Division of State Court Administration, all in their official capacities. Defendants moved to dismiss, claiming Doe lacked standing to sue them in federal court, and the judge agreed. Since Doe has not actually been denied a name-change,

having never formally applied, he has not suffered an injury in fact, they argued, and furthermore their particular job duties did not give them discretion to decide whether to grant or deny such an application. The only one who can pass on an application for a name-change is a state court judge. So Doe’s attempt to get this adjudicated in federal court is stymied. The obvious step is to submit a name-change application in Marion County, make a constitutional argument to the state trial judge, and if the name-change is denied, file an appeal. State courts have full authority to hear federal constitutional arguments, and Doe might have good arguments under the Indiana Constitution as well. IT is hard to imagine a “rational basis” for denying a name change on the ground that a person who has been granted asylum by the federal government and is legally present and residing in Indiana is not yet a citizen. Doe is represented by Barbara J. Baird, and two attorneys from the Transgender Law Center, Ilona M. Turner and Shawn Thomas Meerkemper.

KENTUCKY – Yet another chapter in the continuing saga of Rowan County Clerk Kim Davis, whose religious beliefs led her to refuse to have her office issue marriage licenses to same-sex couples. On March 6, U.S. Magistrate Judge Edward B. Atkins issued a Recommended Disposition and Order responding to the ACLU’s motion for prevailing party attorneys’ fees in *Miller v. Davis*, the case that led Kentucky to amend its law so that the signatures of county clerks and their employees are no longer required on the license form attesting to the applicants’ eligibility to marry in Kentucky. Davis had been held in contempt by the district court for failing to comply with an order (embodied in a preliminary injunction) to issue marriage licenses to same-sex couples, but she was released from jail after agreeing to let other employees in

her office issue the licenses. Kentucky Senate Bill 216, changing the license law to accommodate Davis and other religious objectors, went into effect before the scheduled hearing on her appeal in the 6th Circuit. As a result, the 6th Circuit declared the case moot on July 13, 2016, 2016 U.S. App. LEXIS 13048, 2016 WL 3755870 (unpublished disposition), and ordered the district court to vacate the injunction it had issued against Davis. However, the court refused to vacate the district court’s order holding Miller in contempt. Yet, Magistrate Atkins recommended against awarding attorneys’ fees to plaintiffs’ counsel. In this case, because the district court’s preliminary injunction had been vacated by order of the court of appeals, Atkins opined, “Plaintiffs are not ‘prevailing parties’ within the meaning of Section 1988, and are therefore not entitled to an award of attorneys’ fees.” This despite the fact that their lawsuit ultimately accomplished everything they sought to achieve, which was the ability of same-sex couples in Kentucky to get the marriage licenses to which they were constitutionally entitled by virtue of the Supreme Court’s ruling in *Obergefell v. Hodges*. Perhaps they were not prevailing parties in law (although an appeal to the district court might change this), but they were certainly prevailing parties in fact.

KENTUCKY – In *Wombles v. City of Mt. Washington*, 2017 WL 927238, 2017 U.S. Dist. LEXIS 32725 (W.D. Ky. March 8, 2017), Senior U.S. District Judge Thomas B. Russell rejected a 14th Amendment challenge to a city ordinance that prohibited issuing a business license to a person who had been convicted of a crime of moral turpitude, in the context of a suit by a gay man who could not obtain a license to operate a business because of a past conviction, and was foiled in his attempt to transfer the business to his same-sex partner. The city was not

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fooled by the subterfuge, denying the partner a business license because of his association with the plaintiff, who would actually be involved in operating the business. Judge Russell quoted 6th Circuit precedents upholding similar ordinances in other jurisdictions, and rejected the argument that the application of the ordinance in this case unconstitutionally burdened a right of intimate association between the two men. “Sixth Circuit precedent is clear that ‘a direct *and* substantial interference with intimate associations is subject to strict scrutiny,’” he wrote, “while lesser interferences are subject to rational basis review The Sixth Circuit has developed a general rule that we will find ‘direct *and* substantial’ burdens on intimate associations ‘only where a large portion of those affected by a rule are absolutely or largely prevented from [forming intimate associations], or where those affected by the rule are absolutely or largely prevent from [forming intimate associations] with a large portion of the otherwise eligible population of [people with whom they could form intimate associations]. Applying this standard here, the Court cannot say that Defendants’ decision to deny Almon’s business license application operated as a ‘direct *and* substantial’ burden on his right to intimate association with Wombles.” Thus, it was a rational basis case, and the court found it rational for the city to refuse a license to Almon based on his continuing association with Wombles. On the claim that the plaintiff was denied a license because of his sexual orientation, the court held that rational basis review would be used on a sexual orientation discrimination claim, and that the application of the ordinance to the partner because of his association with the plaintiff survived such review. Russell agreed with city officials that there was nothing in the record to indicate that the partner was denied the license because of his sexual orientation.

LOUISIANA – Most applications of *Obergefell v. Hodges* since that landmark Supreme Court decision was announced in June 2015 have concerned its impact on federal and state treatment of same-sex marriages. On March 23, Senior U.S. District Judge Ivan L. R. Lemelle of the Eastern District of Louisiana decided an unusual case applying the holding, *Vo v. Gee*, 2017 WL 1091261, in which a man of Vietnamese national origin was challenging a Louisiana statutory requirement for certain identification verification in order to obtain a marriage license. Mr. Vo is a child of Vietnamese nationals who fled to Indonesia, where he was born in a refugee camp. Neither Indonesian nor Vietnamese authorities formally recognized his birth by issuing a birth certificate, so he has never been issued such a document by a government. He came with his parents to Louisiana as a refugee when he was three months old and became a naturalized U.S. citizen at age 8. In 2016, he and his girlfriend, also a U.S. citizen, sought to marry, but were turned down by three different clerk offices in Louisiana pursuant to the state’s Act 436, requiring that all applicants for a marriage license provide a certified birth certificate, a valid and unexpired passport, or an unexpired visa accompanied by a Form I-94 from the State Department. Vo does not possess any of these documents. Act 436 allows a waiver of these requirements for a U.S. citizen who was born in the U.S. or one of its territories, but he does not meet either of those requirements. Although he has a Social Security Card issued by the federal government and a Louisiana state driver’s license, neither of those forms of ID are recognized under Act 436. He sued seeking a declaration that Act 436 is unconstitutional, arguing that under *Obergefell* the right to marry is a fundamental right and the state has no compelling reason to require these particular forms of identification as prerequisites to getting married, and that the Act unconstitutionally discriminates

because of national origin. Judge Lemelle denied the state’s motion to dismiss and granted Vo’s motion for preliminary relief. He found that Vo was highly likely to succeed on the merits, with a fundamental constitutional right at issue, and that the other factors going to preliminary injunctive relief all weighed in his favor. “The state of Louisiana is not harmed by having to issue a marriage license to, in this case, a United States citizen who merely lacks a birth certificate due to circumstances beyond his control,” wrote the judge. “Louisiana’s enjoyment from enforcing a likely unconstitutional law does not outweigh the Plaintiff’s fundamental right to marriage.” In addition to the fundamental rights analysis, the judge noted that Vo was seeking “the right to be free from unconstitutional discriminatory classifications based on national origin.” Indeed, the court granted class relief: “The Plaintiff’s Motion for Preliminary Injunction is appropriate and applies to all individuals whose constitutional rights would be curtailed by Act 436. As a nation we should welcome all United States citizens, born in the United States or naturalized, to enjoy all of the rights and privileges that are bestowed upon them through their citizenship. These rights should not be abridged just because a United States citizen was naturalized instead of being born on our soil.” Judge Lemelle was appointed by President Bill Clinton. It would seem that Louisiana could easily cure this problem by amending Act 436 to recognize naturalization documents issued by the U.S. government as an acceptable form of identification, although it could easily do what many other states do and let people use a driver’s license as valid ID.

MICHIGAN – In *Fields v. Commissioner of Social Security*, 2017 U.S. Dist. LEXIS 47219, 2017 WL 1177688 (E.D. Mich., March 30, 2017), Senior U.S.

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District Judge Bernard A. Friedman granted an HIV-positive man's motion for summary judgment on a Social Security Disability Claim, remanding the case for reconsideration. Dwight Fields claims that he has been disabled since August 2013 due to having HIV, Hepatitis B, hypertension, and a long list of symptoms and side-effects from treatment. The ALJ found, however that despite having severe impairments, had had the residual functional capacity (RFC) to perform "a full range of work at all exertional levels" with some specified limitations, and as such was not sufficiently disabled to qualify for benefits, a determination that was denied review by the Appeals Council. Judge Friedman concluded that this decision was flawed. For one thing, the ALJ "failed to consider the side effects of plaintiff's medications." Although Fields testified as to a wide range of disabling side effects at his hearing, the ALJ failed to make any findings on the record as to this issue, violating express 6th Circuit precedent. Furthermore, wrote Friedman, "The RFC evaluation in this matter is flawed because the ALJ did not adequately explain why he discounted plaintiff's credibility." While the ALJ is not required to accept a claimant's testimony without question, the ALJ may not reject it without stating reasons for doing so. Friedman criticized this part of the ALJ's opinion as a "boilerplate credibility determination" that was not "sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." The final flaw cited by Friedman was that "the ALJ failed to explain sufficiently why he disregarded the opinions of one of plaintiff's treating physicians." There is a "treating physician rule" generally followed in disability cases, under which the ALJ is supposed to accord significant weight to a treating physician's conclusion about the limiting effects of a claimant's

disabling conditions unless there are specific reasons in the record to question that opinion. "On remand," wrote Friedman, "the ALJ must reassess Dr. Truccone's opinions in compliance with the treating physician rule and, as necessary, revise plaintiff's RFC evaluation and the hypothetical questions to the [vocational expert]." Friedman concluded that the record at present was not a sufficient basis for the court to award benefits to Fields, thus the remand for further consideration of his claim at the administrative level applying the appropriate rules and procedures. Fields is represented by James Lamey, of Disability Attorneys of Michigan, in Warren, MI.

MISSISSIPPI – Failure to file timely, fact-specific charges with the EEOC doomed Linda Carlow's sexual orientation discrimination and retaliation claims under Title VII in *Carlow v. Chevron U.S.A.*, 2017 U.S. Dist. LEXIS 37076, 2017 WL 1015012 (S.D. Miss. March 15, 2017). From the factual allegations related by Chief U.S. District Judge Louis Guirola, Jr., in his opinion, it appears that Linda Carlow may have had good claims of discrimination and retaliation on the merits. However, her discrimination claim was clearly time-barred, and although she promptly filed her retaliation charge with the EEOC, she omitted many of the factual assertions that formed the basis for her lawsuit. Thus, the court found that she had failed to exhaust administrative remedies, and her federal law claims were dismissed with prejudice. Having decided not to assert jurisdiction over supplementary state law claims, Judge Guirola dismissed them without prejudice. Because the case was disposed of on these procedural bases, the court did not have occasion to discuss whether the sexual orientation discrimination claim by the lesbian plaintiff was actionable on the merits.

NEBRASKA – Reacting to the U.S. Education Department's new "Dear Colleague" letter that withdraws the Obama Administration's guidance on the rights of transgender students under Title IX, Nebraska's attorney general's office filed a request with the federal district court to withdraw the lawsuit challenging the Obama measure which had been filed on behalf of ten states last July.

NEW HAMPSHIRE – In the course of sorting through a host of pretrial motions responding to a second amended complaint filed by Sanjeev Lath against the condominium association and various association officers of the building in which he lives, U.S. District Judge Landya McCafferty had to determine whether to dismiss a sexual orientation discrimination claim asserted under the Fair Housing Act, a federal statute that prohibits housing discrimination because of sex. *Lath v. Oak Brook Condominium Owners' Association*, 2017 U.S. Dist. LEXIS 39617, 2017 WL 1051001 (D. N.H., March 20, 2017). Lath alleged, *inter alia*, that Warren Mills, then the president of the condo association, had "assaulted Lath, by forcing his way into Lath's residence, and shouting obscenities at Lath, calling him a 'faggot' and 'sand nigger.' Such actions of Mills were motivated because of Lath's sexual orientation as a bisexual man, and Lath's national origin and race." The court rejected defendants' argument that the FHA applied only to the acquisition of real estate, noting prior rulings that the act applies to post-acquisition discrimination as well. "While the court of appeals for this circuit has not yet been called upon to do so, other courts have recognized a cause of action against those who discriminate by creating a 'hostile housing environment' based upon the classifications identified in 42 U.S.C. sec. 3604(b)," wrote Judge McCafferty. "This court will assume, favorably to

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Lath, that if asked to do so, the First Circuit would recognize a cause of action based upon the creation of a hostile housing environment based upon sexual orientation, race or national origin.” In a footnote, the judge commented that sexual orientation is not listed, as such, as a prohibited ground of discrimination under the statute, and that various decisions by district courts have ruled that the FHA does not prohibit sexual orientation discrimination. “However,” she wrote, “in a recent case out of the Northern District of Alabama, Judge Acker cited guidance promulgated by the Department of Housing and Urban Development interpreting the FHA’s prohibition of sex discrimination to include ‘gender stereotyping’ discrimination on the basis of sexual orientation. *Thomas v. Osegueda*, 2015 WL 3751994, at *4 (N.D. Ala. June 16, 2015). Construing Lath’s complaint liberally, the court cannot say at this early stage that his claim of sexual orientation discrimination is not cognizable under the FHA.” Thus, this claim would not be dismissed. One wonders, however, whether HUD will withdraw this interpretation now that the openly homophobic Ben Carson is the new Secretary, having been appointed by that loud and proud supporter of LGBT rights, Donald J. Trump, because of his great expertise in housing policy – not! Lath is representing himself *pro se*, unfortunately. On March 30, the court denied a motion by another resident of the condo to intervene as a co-plaintiff. See 2017 WL 1193994.

NEW JERSEY – The Northern New Jersey Council of the Boy Scouts of America agreed to pay \$18,000 and issued an apology to plaintiff Joe Maldonado, a transgender boy who had been asked to leave a Cub Scout pack last year. Maldonado and his mother had filed a public accommodations discrimination complaint with the State Division on Civil Rights. It seemed

possible that this complaint would fail in light of the U.S. Supreme Court’s *Boy Scouts of America v. Dale* ruling, although that case might be distinguished on the ground that the Court emphasized James Dale’s identity as an openly gay Scout troop leader in finding that the organization’s expressive association rights were violated by a state court order to restore him to membership. By contrast, Maldonado was just a kid who wanted to be part of a Cub Scout troop as a boy, and could hardly be branded an LGBT rights activist. At any rate, media publicity about the case shamed the BSA into reconsidering its position, and Maldonado was welcomed to rejoin the BSA. The Northern New Jersey Council agreed as part of the settlement to create “revised policies and procedures” relating to the “admission of transgender youth” and to distribute its new policy to all local councils in New Jersey. The BSA’s new policy is to accept children based “on the gender identity indicated on the application,” mirroring the policy followed by the Girl Scouts of America, which has never formally excluded LGBT people from participating in its activities. *The Daily Journal* (Vineland, NJ), March 4.

NEW JERSEY – U.S. District Judge John Michael Vazquez granted summary judgment to the employer on discrimination claims by a discharged HIV-positive employee under the Americans with Disabilities Act, the New Jersey Law Against Discrimination and the New Jersey Worker’s Compensation Act in *Hoskins v. Valcor Engineering*, 2017 U.S. Dist. LEXIS 38044, 2017 WL 1023353 (D.N.J., March 16, 2017). Although Judge Vazquez rejected the employer’s argument that James Hoskins did not have a disability under the ADA, finding that the allegations in his *pro se* complaint were sufficient to withstand summary judgment, he ultimately concluded that the employer had pleaded, without any real contradiction,

legitimate grounds for its discharge decision. Hoskins had been accorded medical leave under the Family and Medical Leave Act, for which he was supposed to provide documentation of his disability, a status update every four weeks during the 12 week leave, and of course to report back to work at the end of the leave. Hoskins never provided the requested documentation of his disability, did not communicate with the employer during the leave, and did not report for work at the end of the leave. Thus, the court found, the employer had successfully rebutted the plaintiff’s prima facie case under the ADA and the NJLAD. Further, the court found the plaintiff’s factual assertions insufficient to ground a retaliation claim under the Worker’s Compensation Act, as it was unclear whether Hoskins filed his Worker’s Compensation claim before or after his discharge, but in any event there was no evidence in the record that the employer was aware of the claim before it discharged Hoskins. Hoskins had been diagnosed as HIV-positive in 1993, and was hired by Valcor in 2010. Valcor claimed in this case that Hoskins had never disclosed his HIV status to the company. He claimed that he disclosed it in a meeting prior to his medical leave. The company’s vice president for Human Resources took notes of the meeting that do not mention Hoskins’ HIV status but do mention his statement that “his problem is the immune system.” Unfortunately, this individual died before she could be deposed in this case, so the dispute between Hoskins and the company about whether it knew he was HIV positive would be difficult to resolve. However, the court’s conclusion that the company had a legitimate reason to dismiss Hoskins made it unnecessary to resolve this factual dispute.

NEW JERSEY – U.S. Magistrate Judge Joel Schneider awarded summary judgment to the Pennsauken School

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District and individual defendants, rejecting claims that the district and various of its officials should be held liable under Title IX for alleged bullying of a nine-year old boy, whose main advocate and intermediary with the school district was his gay uncle. The suit also alleged that the district retaliated for bullying complaints by reporting to the Division of Youth and Family Services possible improper conduct towards the youth by his gay uncle. *D.V. v. Pennsauken School District*, 2017 WL 1170829, 2017 U.S. Dist. LEXIS 46137 (D.N.J., Camden Vicinage, March 29, 2017). The story is long and a bit convoluted, but ultimately Judge Schneider concluded that the factual allegations did not add up to actionable discrimination in violation of federal law. The alleged bullying, he found, was neither so severe nor pervasive to be actionable, and, he wrote, “the jury cannot help but find that the District reasonably addressed the one reported sexual orientation/ bullying incident,” taking account of “the ages of the involved students, development and maturity levels, school culture and atmosphere, rareness or frequency of conduct, duration of harassment, extent and severity of the conduct, whether violence was involved, effectiveness of the school district’s response, the consideration of alternative responses and the swiftness of the school’s reaction.” Although he found that “the records is not developed as to all these factors,” he concluded that “the record that exists does not permit a jury to reasonably conclude that the District did not act reasonably to end the sexual orientation harassment directed to D.V.” As to the retaliation claim, “Simply put, there are no facts in the record from which a jury can reasonably infer or conclude that there was a causal link between plaintiffs’ educational advocacy and the calls to DYFS.” The court reached these conclusions while acknowledging a conclusion in a prior case by a different

judge that “Title IX encompasses same-sex sexual harassment,” but asserting that a “deliberate indifference” standard applies to determine school district liability. Judge Schneider found that the record would not support a conclusion that the district acted with deliberate indifference to plaintiffs’ complaints, or that it refused to take action in response to them. “The fact that plaintiffs were not satisfied with the District’s investigation is not determinative as to whether a Title IX violation occurred.” Plaintiffs are represented by Amelia Carolla and Catherine Merino Reisman, of Reisman Carolla Gran LLP, Haddonfield.

NEW YORK – In an extraordinary custody case involving what N.Y. Supreme Court Justice H. Patrick Leis III called a “logical extension” of the New York Court of Appeals’ decision in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), the court issued an unprecedented (for New York, at least) tri-custody order, granting the custody petition brought by the divorcing wife of the child’s biological father. *Dawn M. v. Michael M.*, 2017 N.Y. Slip Op. 27073, 47 N.Y.S.3d 898, 2017 N.Y. Misc. LEXIS 807 (Sup. Ct., Suffolk Co., March 8, 2017). The wife had miscarried and subsequently consented to her husband impregnating a woman with whom they had formed a polyamorous living-together relationship. The three parents raised the resulting son together, with both women equally participating as mothers, but the wife never adopted the child. There was a falling out of the relationship, with the result that the two women are living together with the child while the wife divorces the husband. She sought to protect her relationship with the child (and his with her) by obtaining a custody order, which the biological mother supported but the father opposed. “The Court of Appeals in *Brooke S.B.* stressed that its decision only addressed the ability of a person who was not a biological or adoptive

parent to establish standing as a parent to petition for custody and visitation, and that the ultimate determination of whether to grant those rights rests in the sound discretion of trial courts in determining the best interests of the child,” wrote Leis, who found, based on “the evidence adduced at trial, including the demeanor and credibility of all three witnesses, the in camera interview [of the ten year old child] and the factual findings made by this court,” it is clear that the best interests of J.M. will be served by granting plaintiff’s application for shared legal custody with defendant.” Explained the judge, “Such joint legal custody will actually be a tri-custodial arrangement as Audria [the birth mother] and defendant already share joint legal custody. As it appears from Audria’s testimony that she wholeheartedly supports such an arrangement, this Court finds no issue with regards to Audria’s rights in granting this relief. Indeed, tri-custody is the logical evolution of the Court of Appeals’ decision in *Brooke S.B.*, and the passage of the Marriage Equality Act and DRL Sec. 10-1 which permits same-sex couples to marry in New York.” “No one told these three people to create this unique relationship,” he wrote. “Nor did anyone tell defendant to conceive a child with his wife’s best friend or to raise that child knowing two women as his mother.” He found defendant’s opposition to the arrangement to be “unconscionable” in these circumstances in light of J.M.’s bond with the plaintiff.

OHIO – In ruling on a motion for summary judgment by a public employer to dismiss a sexual orientation discrimination claim grounded in Title VII and the 14th Amendment, U.S. District Judge James L. Graham avoided having to determine whether such claims are cognizable on those grounds by finding that Timothy Scott McKeny, who claims to have been

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denied tenure at Ohio State University because of his sexual orientation, waited too long to file his Title VII complaint with the EEOC or to initiate litigation under 42 U.C.S. Section 1983 under the Equal Protection Clause. The denial of tenure was announced to McKeny by the relevant dean on April 1, 2012, but he waited more than 300 days before filing his Title VII claim with the EEOC and more than two years (the statute of limitations in Ohio for Section 1983 claims) before filing his lawsuit. There is no question that the decision-maker on this tenure decision knew McKeny was gay, in light of his activities with an LGBT organization at the University, including speaking at a Department of Education diversity forum. *McKeny v. Middleton*, 2017 U.S. Dist. LEXIS 37912, 2017 WL 1021352 (S.D. Ohio March 16, 2017).

OHIO – A puzzler. Why would anyone think that they could get a state court to interfere with a Catholic seminary's decision to expel a student based on a "credible accusation of homosexual activity" by the student? Well, for one, Joshua Adam Engel, an attorney representing the John Doe plaintiff in a lawsuit against Pontifical College Josephinum in suit asserting claims of breach of contract, intentional infliction of emotional distress, unauthorized disclosure of confidential educational records, and unjust enrichment, also seeking an award of attorney fees for bad-faith conduct. The complaint was filed anonymously with a motion for leave to proceed as a "John Doe" plaintiff, which was denied by the Court of Common Pleas in Franklin County (Columbus), so the plaintiff refiled under his own name. But perhaps in sympathy with his plight, the 10th District Court of Appeals published its opinion affirming the trial court's dismissal of the case redacting the plaintiff's name, listing "John Doe" in brackets as the appellant. In any event, "Doe" enrolled

in the defendant seminary to study for the priesthood in August 2010, and was scheduled to graduate in May 2016 with a master's degree in theology. But he was called into a meeting with the Rector and Vice Rector in October 2015 and notified that he was being dismissed. The Vice Rector had conducted an investigation and determined that an accusation of homosexual activity against "Doe" was credible. He was asked to turn in his ID card and room key and advised to leave the campus. The school then posted a public notice that he had been expelled. He sought copies of his records from the school, but they provided him with redacted records that omitted any information about the investigation of his alleged misconduct and dismissal. He asserted that he had exhausted internal remedies by appealing the dismissal under canon law, without success because he lacked the records necessary to make a case. Josephinum moved to dismiss the court case for lack of jurisdiction, arguing that decision of any of Doe's claims would involve the court in entanglement with religion, and the trial judge and court of appeals both agreed. In a lengthy concurring opinion devoted mainly to the possible applicability of the federal Family Educational Rights and Privacy Act of 1974, Judge Brunner summed up, in conclusion: "The trial court had no recourse but to decline jurisdiction on First Amendment grounds; it was unable to consider the decision to expel appellant from the college. That decision (whether to retain a student at a Catholic school for training priests) was the quintessential 'who should preach from the pulpit' decision and not a matter in which the secular sovereign should interfere.' Since these claims are related to a review of the decision to expel him, an ecclesiastical decision, the trial court appropriately found it did not have jurisdiction." The opinion for the court by Judge Tyack explains how judicial consideration of each of Doe's several claims would involve the court

inquiring into policies and actions of the school authorities that implicate religious doctrine and concerns. Doe's offense – violating the "don't ask, don't tell" rules that are apparently followed within the Catholic priesthood, which is rumored to include many closeted gay men – may have consisted of crossing that line and actually propositioning somebody. . .

OREGON – On March 2 the Oregon Court of Appeals heard oral argument in *Klein v. Bureau of Labor and Industries*, an appeal from an administration ruling that Sweet Cakes by Melissa, a bakery owned by Aaron and Melissa Klein, had violated the state's public accommodations law by refusing to make a wedding cake for Rachel and Laurel Bowman-Cryer. The Bureau ordered the Kleins to pay \$135,000 in damages to the complainants, which they eventually paid into a government escrow account while appealing. Conservatives rallied to their cause, donating the money necessary to cover the damage award. The appellants argued that they should be allowed to refrain from baking wedding cakes for same-sex couples on multiple grounds, including their religious beliefs and their freedom of expression. As in the Colorado Masterpiece Cakeshop case, the bakers are styling themselves as artists who express themselves through their cakes. In addition, they argued that requiring them to bake the cake was a form of compelled speech, implicating endorsement of the same-sex wedding. They face an uphill battle. To date, appellate courts in four states have rejected similar arguments in cases involving bakers, florists, photographers, and commercial wedding venues. *Statesman Journal* (Salem, Oregon), March 3.

OREGON – The Associated Press reported that Multnomah County Judge

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Amy Holmes Hehn granted a petition on March 10 allowing Patrick Abbatiello to go from “male” to “agender” and switch to a single name, Patch. Patch does not fully identify as either male or female, first heard the term “agender” six or seven years ago, and decide that it was a fitting description. Judge Hehn had previously allowed Jamie Shupe to change to “non-binary” in June 2016.

PENNSYLVANIA – U.S. District Judge Lawrence Stengel rejected a motion to dismiss a Title IX harassment case brought by parents on behalf of their daughter, alleging she had suffered “student-on-student” sexual harassment and that school officials had failed to respond. *Bittenbender v. Bangor Area School District*, 2017 WL 1150642, 2017 U.S. Dist. LEXIS 45151 (E.D. Pa., March 27, 2017). The school district’s motion advanced two reasons why the case should be dismissed. First, it argued, plaintiff failed to allege facts to show that the harassment was *severe* and *pervasive*. Not so, wrote Stengel. “Plaintiff alleges verbal harassment targeted at plaintiff’s gender consistently throughout the relevant five-year period. The alleged verbal harassment was premised upon her sexual orientation and gender with comments regularly targeting her because she did not conform to gender stereotypes and because the harassers believed she was lesbian. When taken in the light most favorable to the plaintiff, the plaintiff’s sexuality was the crux of the harassment that lead to repeated comments such as ‘slut,’ ‘lesbian,’ ‘gay,’ and ‘you have a disease because you’re a lesbian.’” The complaint focused on eight fellow students who “consistently harassed her over a five-year period,” which was longer and involved more students than in a Supreme Court case to which the court referred as a comparator. The second reason was a claim that plaintiff failed to inform an “appropriate person” of the sexual

harassment, thus relieving the school district of any responsibility. Again not so, wrote Stengel. “An appropriate person is, at a minimum, an official of the defendant entity with the ability to take remedial action and terminate the discrimination. For example, a school principal. But Stengel wrote that he did not consider individuals to be “an appropriate person ‘solely by virtue of their position.’” In this case, plaintiff alleged the “she or her parents informed various teachers, guidance counselors, the principals of Bangor Middle School and Five Points Elementary School, a school psychiatrist, the superintendent, the head of BASD security, and a BASD police officer of the sexual harassment that she was experiencing.” Having notified “over eight school officials of varying levels of authority,” Stengel concluded that plaintiff satisfied the pleading requirement sufficient to ground a Title IX violation. Plaintiffs are represented by Jason D. Schiffer of Cohen Feeley Altemose & Rambo, of Bethlehem, PA. The school district is represented by John E. Freund, III, as lead counsel, from King, Spry, Herman, Freund & Faul, LLC, also of Bethlehem. After reading Judge Stengel’s opinion, one questions whether Mr. Freund (or more likely the associate who drafted the motion) actually bothered to analyze the factual allegations in the complaint by comparing them to factual allegations in similar cases that had survived motions to dismiss.

PENNSYLVANIA – Alliance Defending Freedom, the religious litigation group ever at the ready to attack LGBT rights, filed a lawsuit on March 21 in the U.S. District Court for the Eastern District of Pennsylvania on behalf of a “Joel Doe” plaintiff, allegedly a teenage boy who is a student in the Boyertown Area School District, who claims his fundamental right to bodily privacy was violated when he saw a transgender boy changing clothes in the boys’ locker room at

Boyertown Area High School. *Doe v. Boyertown Area School District*. In an imaginative complaint, “Doe” asserts a deprivation of 14th Amendment rights, a violation of Title IX, the Pennsylvania Constitution and common law, and the Public School Code of 1949. He seeks declaratory relief, nominal and compensatory damages, and an award of attorney’s fees to fill the coffers of ADF and local counsel in Pittsburgh and Harrisburg. One imagines ADF has probably launched a major fund-raising drive using this litigation. This is in many respects a copycat lawsuit to those filed by ADF in other jurisdictions, including one in Illinois challenging a settlement of a Title IX case in which a school district agreed to abandon its restrictive restroom policy. In Paragraph 40 of the Complaint, Doe alleges: “On or about October 31, 2016, Joel Doe began changing in the locker room for PE class, and when he was standing in his underwear about to put his gym clothes on, he suddenly realized there was a member of the opposite sex changing with him in the locker room, who was at the time wearing nothing but shorts and a bra.” In Paragraph 41, he alleges: “Joel Doe experienced immediate confusion, embarrassment, humiliation, and loss of dignity upon finding himself in this circumstance and quickly put his clothes on and left the locker room.” Sounds like his fundamental rights were violated, alright. After all, the right to avoid encountering a member of the “opposite sex” in your and their underwear is deeply embedded in the history and tradition of our people. One hopes Doe was not permanently scarred by this chance encounter. He went to the assistant principal to complain, but Dr. Wayne Foley told him to “tolerate” it and to make it as “natural” as he possibly can, because the school was going to accommodate transgender students as required by Title IX. Part of Doe’s Complaint was that the school made no general announcement or warning that students might confront

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transgender classmates in the locker rooms. Poor Doe is so traumatized by this that he fears using the boys' restrooms at school as he might encounter a transgender student, so is holding his urine, inviting infections. Talk about symmetry; part of the Gavin Grimm case in Virginia alleges that the transgender plaintiff, having been banished from using the boys' restroom at his high school, holds his urine during the day and has experienced urinary tract infections as a result. So, it appears, Joel Doe has experienced the same physical discomfort, or so he claims, that a transgender boy excluded from access to an appropriate restroom would experience. Is this what they mean by "experiential learning"?

SOUTH CAROLINA – *South Carolina Lawyers Weekly* (March 21) reported that York County Family Court Judge Thomas White ruled on March 10 that *Obergefell* should be applied retroactively to recognize common law marriages of same-sex couples. The case involved two women, Debra Lynn Parks and Sharon Ann Lee, who lived together for 28 years after one divorced her husband, and then split up in April 2016. Parks, who was disabled due to multiple strokes, as a result of which she was dependent on Lee, sought marital benefits, including alimony and Social Security. Lee claimed she never intended to be married and opposed the recognition. She also argued that if it were recognized, it could not date back prior to *Obergefell*. Judge White wrote, "Simply declaring after more than 28 years of committed, devoted, loving relationship that one did not consider herself to be married is not strong, cogent evidence. Her actions throughout this relationship, however, speak volumes. Quoting William Shakespeare, 'a rose by any other name would smell as sweet.'" Interlocutory appeal is not available to Lee because White's order is not a final judgment in

the case. *Parks v. Lee*, *Lawyers Weekly* No. 008-001-17.

UTAH – You knew this would happen sooner or later. Some idiot trying to "make a point" or reduce marriage equality to a joke reportedly filed a lawsuit last year against Utah County Clerk Bryan Thompson for refusing to issue a marriage license to Brian Sevier to marry his laptop computer. According to an April 1 report by fox13now.com in Salt Lake City, U.S. Magistrate Judge Evelyn Furse denied a motion to dismiss the complaint with prejudice on March 28, instead allowing Sevier to file an amended complaint and rejecting the argument by Thompson and co-defendants Governor Gary Herbert and Attorney General Sean Reyes that the complaint is "moot." Presumably their argument in opposing *Sevier v. Thompson*, Case No. 2:16-cv-00659, is that there is no constitutional basis for claiming any kind of constitutional right on behalf of an inanimate object. Although pet rocks are likely to dispute that We suspect Judge Furse wants to keep the case alive for its entertainment value. Could this be the first time she has ever gotten her name in the papers? According to the news report, Judge Furse wrote that Sevier's complaint "contains extraneous and inflammatory statements that make understanding the nature of the claims difficult." Despite this, Judge Furse noted that Sevier has proposed to amend his complaint to add a marriage recognition claim, contending that he had previously wed a laptop in New Mexico (we always knew that was a progressive state!), so there might be a justiciable claim there. (After all, computer programs can enter into contracts with electronic signatures, right??) In moving to dismiss, the Attorney General argued that computers are incapable of consenting to marry. (In addition, we suspect that the laptop is probably too young to give effective consent without the permission of its

parent?) Judge Furse advised that she would rule on such claims after Sevier has had a chance to file his amended complaint. At first we thought the April 1 date on the news story signified that this was an April Fool's spoof article, but then we discovered that there is a long paper trail on Pacer of documents filed in the Utah federal district court, including the complaint, the motion, responses to the motion, affidavits, etc. * ** It appears that Sevier has filed similar lawsuits in several jurisdictions. After writing the above, we obtained a copy of *Sevier v. Bevin*, Case No. 0:16-cv-00080-HRW (E.D. Ky., March 31, 2017), an opinion released on March 31 by U.S. District Judge Henry R. Wilholt, Jr., dismissing a similar case, this time with a co-plaintiff who seeks to marry an animal. Judge Wilholt also denied a motion for summary judgment by the plaintiffs. "Plaintiffs are asking this Court to recognize their constitutional rights to marry an inanimate object and an animal. No such constitutional rights exist," wrote the judge, "nor are any known constitutional rights violated by the denial of a marriage license under these circumstances." And, he noted, "Plaintiffs have filed similar lawsuits in Texas, Tennessee, Utah and South Carolina. They have yet to prevail. Magistrate Judge Shiva Hodges recommended to the South Carolina District Court that the case be dismissed *sua sponte* because the claims alleged 'are implausible, fanciful and frivolous.' This court agrees."

VERMONT – Herewith a new development in the long-running litigation initiated by Janet Jenkins for herself and her daughter Isabella Miller-Jenkins, who was kidnapped and taken out of the country by her birth mother, Lisa Miller, to void complying with court orders to allow Jenkins to assert visitation and custody rights. (It's a long, complicated story, summarized briefly by the court in this new decision

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on March 20, 2017. Most to the point, after protracted litigation, a Vermont court awarded custody to Jenkins with visitation rights for Miller, a ruling upheld by the Vermont Supreme Court and accorded comity by the courts in Virginia, where Miller had been living before she fled the country with Isabella.) In *Jenkins v. Miller*, 2017 U.S. Dist. LEXIS 39276, 2017 WL 1052582 (D. Vt.), the court responded to a motion to lift a stay of proceedings that had been granted while Philip Zodhiates stood trial on charges of involvement with the kidnaping of Isabella. A federal jury in Buffalo, N.Y., convicted Zodhiates on September 29, 2016, and a sentencing hearing was to take place on March 22, with post-trial motions pending in that case. Meanwhile, Jenkins moved on October 7, 2016, for the court to lift its stay in light of the conviction and to add several co-defendants to this case. Among them are attorneys Rena Lindevaldsen and Mathew Staver of Liberty Counsel, the “Christian” law firm that has been representing Miller, as well as Liberty University and Response Unlimited, Inc., an organization that allegedly assisted with the kidnaping but was previously dismissed from the case on jurisdictional grounds. Plaintiffs presented information to the court obtained as a result of the criminal trial to support its motions to add more parties and resolve the jurisdictional issues. In this March 20 ruling, Judge William K. Sessions III granted the plaintiff’s motion to lift the stay and to amend the complaint to join all those proposed as new co-defendants. The lengthy opinion rehashes the facts with emphasis on new facts revealed since the stay was granted. The stay was to be lifted when Zodhiates was sentenced. Judge Sessions made clear that nothing in this order was intended to prevent Zodhiates or the other defendants from pleading the Fifth Amendment in this case. The Associated Press reported that Zodhiates was sentenced to three years in prison by the federal court in

Buffalo on March 22, so the stay on this civil proceeding is lifted and the case can proceed.

VIRGINIA – The Virginia Supreme Court heard oral argument on March 2 in *Doe v. Fairfax County School Board*, in which the lower court held that the school board had not caused any injury to John Doe, a 16-year-old high school student who claimed his privacy rights had been violated when the board adopted a policy allowing transgender boys to use the boys’ restrooms at the high school. Doe’s attorney is relying in part on the state’s “Dillon Rule,” which provides that local governments cannot adopt broader anti-discrimination measures than are contained in state law. Virginia at present does not by statute or regulation prohibit discrimination on account of gender identity in its public schools. Daniel Schmidt, Doe’s lawyer from Liberty Counsel, argued that this applies to the Fairfax County School Board, which he contends may not adopt a broader non-discrimination policy. Schmidt took heart from the court’s agreement to review the lower court decision, which is discretionary on its part, stating that “it’s hard to imagine the Supreme Court taking the case and then say the lower court was right and affirm it.” *Washington Times*, March 3.

WASHINGTON – In the March issue of *Law Notes*, we reported on *Carlson v. Lewis County Hospital District No. 1*, 2017 U.S. Dist. LEXIS 17331 (W.D. Wash., Feb. 7, 2017), in which the district court refused to grant summary judgment in favor of the plaintiff, a gay man who was dismissed as chief financial officer of a public hospital, finding that material fact issues need to be resolved. Carlson alleges that he was discharged because the board of the hospital did not want to have a gay man serving as CFO. The board claims in defense that it sought his dismissal when

it learned about his involvement in a prior bankruptcy proceeding in which a judge voiced suspicion that Carlson was involved in defrauding somebody, and when a former employer of Carlson told board members that he was not to be trusted handling their money. The main evidentiary support for the plaintiff’s case is an affidavit executed by his former boss, Hiram Whitmer, then the chief executive officer of the hospital, stating that Whitmer had been pressured by the board to discharge the plaintiff because of his sexual orientation. Subsequent rulings by District Judge Robert J. Bryan issued on March 6 suggest that the plaintiff’s case may be collapsing. In the first, reported at 2017 U.S. Dist. LEXIS 31455, 2017 WL 881387, the court was dealing with the hospital’s request for the court to reconsider its December 14, 2016, ruling finding that defendants had waived attorney-client privilege, compelling the defendants to respond to plaintiff’s interrogatories and requests for production of all documents related to “the evaluation of how to terminate Plaintiff’s employment, including those that contained the advice of counsel.” The court had granted the motion in part on January 10, giving defendants leave to file, under seal, the documents they were ordered to provide. They filed the documents under seal on January 12, the judge reviewed them in camera, and a hearing was held on January 17 on the motion for reconsideration. The court subsequently told the parties it would not make a final ruling on the motion until after the deposition of the now-former CEO (who is himself suing the hospital for wrongful discharge). But it turns out that Whitmer, who has since moved to Missouri, is resisting submission to a deposition. So the court decided in this March 6 ruling to stay its December 14 order on the plaintiff’s motion to compel discovery and for waiver of privilege. Judge Bryan advised that a motion to lift the stay should be filed after the deposition of Whitmer, and the motion for reconsideration would be denied

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without prejudice, to be “renoted” with the addition of Whitmer’s deposition testimony, if the stay is lifted. In the other March 6 ruling, reported at 2017 U.S. Dist. LEXIS 31462, 2017 WL 889281, the court denied plaintiff’s motion for leave to amend his complaint to add Whitmer as a co-defendant. In light of Whitmer’s refusal to submit voluntarily to a deposition, Carlson sought to add him as a defendant so that he could be compelled as a party to testify. The defendants responded that Carlson’s stated reason for adding Whitmer as a defendant is not a proper basis for amendment, long past the normal deadline for filing of an amended complaint. “Plaintiff’s motion to amend should be denied without prejudice,” wrote Bryan. “While Plaintiff has shown good cause under Rule 16 for an extension of the deadline to add Mr. Whitmer as a defendant in this matter, Plaintiff’s difficulty in getting Mr. Whitmer to cooperate in a deposition does not provide a basis to add Mr. Whitmer as a defendant in this case. It will be a different matter if Plaintiff moves to amend because Plaintiff, in good faith, believes he has a meritorious claim against Mr. Whitmer.” But so far there are no allegations to that effect. As Carlson’s case relies heavily on Whitmer’s testimony, and Whitmer has now moved to Missouri, Carlson’s case has become much more complicated.

WASHINGTON – Jasmine Kaiser, a transgender woman, sought to donate blood plasma at CSL Plasma, Inc., in Kent, Washington, where it operates and advertises a plasma center that pays individuals for their plasma “donations.” Kaiser alleges that she was turned away because she is transgender, having been told that CSL Plasma placed a “lifetime” deferral on any donation by her and would notify other plasma centers to put her name on their deferral lists as well. She filed suit in King County state court under the Washington Consumer

Protection Act and the Washington Law against Discrimination. Defendant removed to federal court and sought to get rid of the case on several grounds, all rejected by Chief U.S. District Judge Ricardo S. Martinez in *Kaiser v. CSL Plasma, Inc.*, 2017 U.S. Dist. LEXIS 29829, 2017 WL 840198 (W.D. Wash., March 2, 2017). CSL argued that the state law causes of action were preempted by federal law under the Commerce Clause and federal regulations under the U.S. Food and Drug Administration. Judge Martinez found that neither Congress nor the FDA has expressly preempted all state and local regulation of plasma collection, and rejected CSL’s argument that requiring it to accept plasma from transgender individuals would prevent CSL from meeting its obligations under the FDA’s regulatory scheme and would interfere with protection of the blood supply. Martinez found that CSL’s argument misconstrued the relief sought by Kaiser. She wanted a ruling that CSL could not maintain a categorical rejection of all donations from transgender individuals, not that they were barred from undertaking reasonable screening for health purposes on a case by case basis. Martinez concluded that there is “no conflict between FDA regulations and guidelines and Washington law,” referring to a similar conclusion in *Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961 (D. Minn. 2015). The *Scott* opinion was also quoted at length to support rejecting CSL’s motion on primary jurisdiction grounds, i.e., that the FDA had primary jurisdiction over disputes concerning blood and plasma collection, ousting the district court of jurisdiction. The court similarly rejected the argument that the state’s consumer protection law did not apply because it exempts activities that are regulated under other statutes. Once again, although FDA does regulate in the area of blood and plasma collection, Martinez wrote, “this Court has previously explained [that the state law exemption] does not exempt actions or transactions merely because

they are regulated generally; the exemption applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited, or regulated.” In this case, “Defendant has not pointed to any regulation or law that requires it to prohibit donations based solely on gender identity.” When CSL argued that it was trying to protect against blood-borne infections transmitted through man-to-man sex, Kaiser countered that she had never had sex with a man.

WASHINGTON – Finding that U.S. District Judge John C. Coughenour had given an incorrect jury charge in a sexual orientation discrimination trial, a 9th Circuit panel reversed the verdict for the employer and remanded for a new trial in *Price v. Shell Oil Co.*, 2017 U.S. App. LEXIS 4655, 2017 WL 1019071 (9th Cir. March 16, 2017). Plaintiffs Rachel Price and Tessa Gerhardt were denied promotions in 2011 and 2012 by their employer, Equilon Enterprises, an LLC operating as a subsidiary or affiliate of Shell Oil Company. They claimed the decisions not to promote them were based on their gender and sexual orientation in violation of state law. The case was in federal court under diversity jurisdiction. In an instruction to the jury, the trial judge stated: “The Defendant, Equilon Enterprises, LLC, doing business as Shell Oil Products US, is sued as principal. The Plaintiffs claim that the employees involved in making the promotion decisions in 2011 and 2012 were acting as Equilon Enterprises’ agents. Equilon Enterprises admits that those employees were acting as Equilon Enterprises’ agents, and denied that those employees were acting within the scope of authority. If you find that those employees were agents of Equilon Enterprises and were acting within the scope of authority, then any act or omission of those employees was the act or omission of Equilon Enterprises. If you find that those employees were

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not acting within the scope of authority as Equilon Enterprises' agent, then you must find for Equilon Enterprises, LLC." The 9th Circuit found that the last part of this instruction was "an incorrect statement of Washington employment law." Washington cases support the proposition that discrimination statements "not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant, circumstantial evidence of discrimination," wrote the court, quoting from state appellate rulings. "Thus, the jury was not required to find for Equilon if it found that discriminatory statements were made or discriminatory actions were undertaken by employees not authorized to engage in the promotion decisions. Rather, the jury could consider those matters, together with other evidence, to determine whether discrimination was a substantial factor in the adverse employment decisions." The court found that the challenged instruction also contradicted another instruction to the jury, "which accurately stated that Plaintiffs' burden was to prove that discrimination was a substantial factor in the failure to promote, regardless of its source." The court also found that the challenge instruction failed to "fairly and adequately cover the issues presented," since there was "no contest that at least two Equilon employees accused of discrimination were among those authorized to make the 2011 promotion decision." Since Equilon did not argue on appeal that any instructional error was harmless, the court of appeals presumed prejudice, vacated the jury verdict, and remanded for a new trial.

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CALIFORNIA – The California 4th District Court of Appeal ruled on March 30 that many of the probation restrictions placed on a teenage boy

who had admitted to engaging in anal sex with his teenage girlfriend exceeded what was allowed under state law precedents as well as violating, in some cases, the boy's 1st Amendment rights. *In re Mike H.*, 2017 WL 1179426 (March 30, 2017). Mike H., then 14, and C.C., then 15, started dating in February 2015. That summer they would sneak out of their houses late at night to meet a "make out." Mike had resisted C.C.'s request to have sexual intercourse, "due to religious convictions and pregnancy concerns," but he agreed to oral sex. Then one night Mike turned C.C. around, leaned her against a wall, and entered her anally. She told him to stop but he continued to ejaculation. He later claimed that she had agreed to anal sex and he assumed their activity was consensual, and he later told a psychologist that C.c. had "likely panicked later, when confronted by her father." Wrote Judge O'Rourke for the Court of Appeal, "There is no indication Mike used the Internet, a computer, or social media to contact or lure C.C. or otherwise plan his offense." They did communicate by text message. Mike "denied planning or fantasizing about the offense ahead of time," and after the fact, he "felt it was the 'stupidest thing' he had ever done." After he pled guilty to a charge of sodomy with a minor, his probation officer and psychologist both agreed that he was low risk for recidivism. Nonetheless, he was subjected to probation condition limiting his Internet, social media and computer use, restricting his access to pornography and sexually explicit content, prevent him from anonymous Internet use or encrypted use of electronic devices, and facilitating searches of his electronic devices and Internet history. On appeal, the court found that the greater portion of these restrictions were not appropriate, in some cases applying the state law precedent of *People v. Lent*, 15 Cal.3d 481 (1975), which prescribes limitations on probation conditions, and in some cases going beyond *Lent* to address 1st Amendment concerns. Most

significantly, the court rejected the idea that the kind of offense committed in this case justified a wide-ranging restriction on the individual's ability to use the internet and electronic communications devices in ways totally unrelated to his offense. The restrictions the court left in place were deemed necessary to assist probation officers in determining whether Mike was complying with requirements to avoid contact with C.C. The court's detailed opinion explaining the application of *Lent* in the context of the Internet should be useful to counsel representing minors charged with sexual offenses.

CALIFORNIA – The 5th District Court of Appeal sustained the convictions of Tomas Zavaleta, a gay man who was convicted by a jury of having committed sodomy on unconscious and intoxicated men without their consent. *People v. Zavaleta*, 2017 Cal. App. Unpub. LEXIS 1644, 2017 WL 933031 (March 9, 2017). According to the court's summary of the trial record, Zavaleta met Michael B. on Grindr and invited him to Zavaleta's home for drinks and viewing a movie. Michael "asked to stay the night at Zavaleta's apartment because he did not want to drive home after he had been drinking." There was no discussion of sex, and Michael testified that he did not intend to have sex with Zavaleta that night. But Zavaleta kept pouring vodka shots for Michael until Michael became inebriated and ultimately Michael lost control of himself. "When he went to the bathroom to vomit, he noticed he was naked, but he did not know how his clothes were removed. He next remembered waking up in Zavaleta's bed naked, but he did not know how he got there. He was weak and felt cramps throughout his body. Michael felt something had happened and he was embarrassed and just wanted to get dressed and leave." He did not file a police report because "he did not know what, if anything, had happened." But

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this incident did come to the attention of the police because Zavaleta recorded scenes of the night on his cellphone, which was subsequently examined when he was arrested on the complaint of another young man, Oscar, who worked at the same restaurant where Zavaleta was the assistant manager. Oscar ended up in somewhat the same situation as Michael B., accepting a social invitation from Zavaleta, drinking to inebriation and, after possibly being drugged by Zavaleta, subjected to nonconsensual sex, which, again, Zavaleta recorded on his cellphone. Subsequent medical investigation showed evidence of anal and oral sex, and the investigation led to discovery of the cellphone recordings of Michael B. and Oscar, both passed out naked on the floor of Zavaleta's bathroom being subjected to sexual activity by Zavaleta. Appealing his conviction on multiple counts, Zavaleta challenged the trial court allowing the prosecution to present selective excerpts from his interview with police detectives, in which he made inculpatory statements but denied having taken advantage of or drugged the two young men, and he challenged various statements made by the prosecutor during the trial, but the court found no errors sufficient to justify overturning the jury verdict. Zavaleta came closest to establishing prosecutorial misconduct when he challenged the prosecutor's appeal to the passions of the jury during closing argument by talking about the crime from the victims' perspectives. "A prosecutor may generally not appeal to sympathy for the victims by exhorting the jurors to step into the victims' shoes and imagine their thoughts and feeling as crimes were committed against them," wrote the court. "By directing the jury to see the crime through the eyes of the victims, the prosecutor appealed to the jury's sympathy for the victims, and, as such, the statements were improper. However, it is also true that a litigant's appeal to sympathy does not grant a reviewing court carte blanche to reverse

the judgment of the jury. Generally, 'a defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct,' the court continued. "In light of the extensive and substantial evidence of Zavaleta's guilt presented at trial, we find there is not reasonable probability of a more favorable result in the absence of this misconduct. The testimony of the victims, the expert, and the police, as well as the photo and video evidence, supported the jury's verdict and findings."

CALIFORNIA – The 2nd District Court of Appeal, upholding the conviction of a gay man from Mexico on drug possession charges, rejected his argument that the prosecution should not have been able to question him at trial about his sexual orientation. *People v. Sandoval*, 2017 Cal. App. Unpub. LEXIS 1839 (Cal. 2nd Dist. Ct. App. March 16, 2017). Sandoval came to the U.S. on a visitor's visa and overstayed, marrying a woman and seeking to say in the U.S. as spouse of a U.S. citizen. However, he continued to have sex with men despite his marriage, and became caught up in a drug case against his brother when his cell phone was found in his brother's apartment during a police investigation, together with a man that Sandoval was supposed to meet there for sex. During his trial he sought to prove that he did not reside in the apartment, introducing letters from the Department of Homeland Security addressed to him at another location. One of the letters indicated that his application for permanent residency as spouse of a U.S. citizen had been approved. Introduction of this letter led to a line of questioning on cross examination delving into his marriage and immigration status, as well as his filing for divorce after he was approved as a permanent resident. On appeal, he claims this questioning about his

immigration status unfairly prejudiced his defense. The court disagreed. "In this case, appellant admitted that he married his wife, apparently a United States citizen, despite the fact that he was gay. Thereafter he continued to have, unbeknownst to his wife, multiple ongoing sexual relations with other men. Sometime after the marriage, the government approved his application for permanent residency. After his arrest and sometime during his prosecution, appellant filed for divorce. At trial, he tried to explain this chronology by telling the jury that he wanted 'to change' his sexual orientation and that he loved his wife's daughters, but could not overcome his desire for men. The jury was not required to accept this explanation. Instead, it could draw the reasonable inference that despite his sexual orientation, appellant married his wife for the sole purpose of obtaining legal residency, and then chose to divorce her after he achieved that purpose. Such conduct is essentially fraudulent, and is directly relevant to appellant's credibility as a witness We find no abuse of discretion" by the trial judge in allowing this line of questioning that was sparked by Sandoval's submission of the Homeland Security letters in evidence.

CALIFORNIA – Damario Brown, 23, a resident of South Los Angeles, was sentenced to 36 months of probation and 9 days in jail after pleading guilty to writing anti-transgender hate speech on a Los Angeles LGBT Center. He was identified on surveillance video at the site and was arrested on March 9. On April 27 there will be a restitution hearing to determine how much he has to pay to the Center for cleaning up his mess. *Los Angeles Daily News*, Mar. 17.

DELAWARE – The Delaware Supreme Court has affirmed a ruling by the state's Chancery Court that last year

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rejected a constitutional challenge to a state law requiring that as a condition of parole or probate convicted sex offenders must wear a GPS device at all times so their movements can be tracked by state officials. *Doe v. Coupe*, 2017 WL 837689 (En Banc, March 1, 2017), holding that “the Court of Chancery should be affirmed for the reasons stated in its August 12, 2016,” opinion, which is published at 143 A.3d 1266. That court, in an opinion by Vice Chancellor Montgomery-Reeves, rejected the argument that the GPS requirement violated 4th Amendment rights to be free from unreasonable searches and seizures, and asserted that the Delaware Constitution provided no broader protection than that afforded by the federal constitution. The court also held that the application of this requirement to person convicted prior to its adoption did not violate the *ex post facto* clause, accepting the legal fiction (for such it is in reality) that this requirement is not a punishment. The purpose of the requirement, of course, is to monitor whether parolees and probationers are violating the geographical restrictions of the sex offender registration laws to which they are subject. That this is neither a restriction on “liberty” nor an unreasonable “search” is quite startling.

INDIANA – Isiah Benford of Terre Haute was ordered to serve 20 years in prison on a 30-year sentence in a plea agreement to resolve five pending charges of spreading HIV knowingly. There are seven alleged victims, and there were 27 criminal counts resolved through the plea deal. Judge Michael Lewis ordered Benford to serve 20 years in the Indiana state prison system, and 10 years on formal probation afterwards. He was arrested and charged in 2015 after investigators claimed he had sex with people without disclosing his status, knowing that he was HIV-positive. *Legal Monitor Worldwide*, March 20, 2017, 2017 WLNR 8599774.

OHIO – Virginia Davis, an HIV-positive woman, was charged with having sexual intercourse with two men without disclosing her HIV-status. Neither of the men have tested positive for HIV. She entered into a plea agreement to one count of felonious assault, which was amended to cover her relations with both men, other charges were dismissed, and then there was a sentencing hearing, at which the state agreed to seek a four year sentence unless Davis requested community control, in which event the state would seek a sentence of four to six years. Davis requested community control and was sentenced to seven years. On appeal, she claimed error by the court in allowing the prosecutor to state, “To me those two men have life sentences. They have to go every six months, get tested. They don’t know what’s in the future for them, okay. That’s why I feel that prison is necessary here.” The court rejected Davis’s argument that this was a basis for setting aside or reducing the sentence. “While the prosecutor may have engaged in some hyperbole,” wrote Judge Cheryl Waite, “it is reasonable to glean from the record that the victims have suffered harm. We also note that this statement was made to the judge in sentencing, and not to a jury or other layperson who may be more easily swayed by emotion. As the prosecutor’s comment is directly related to one of the seriousness factors of R.C. 2929.12, the comment was not plain error.” The court also rejected Davis’s attempt to pass herself off as a first offender, finding she had a prior disorderly conduct conviction in another county. “While the record reflects mitigating factors, Appellant’s pregnancy and mental health issues, the court was clearly aware of these,” wrote Judge Waite. “We have already determined that this record shows there was harm to the victims. There is nothing of record to demonstrate that this sentence is clearly contrary to law.” *State of Ohio v. Davis*, 2017 Ohio App. LEXIS 726, 2017 WL 823775 (Feb. 28, 2017).

OKLAHOMA – The *Daily Oklahoman* (March 15) reported on the sentencing of prison inmates who were using smuggled cellphones to extort money from gay men they met through dating services. Several inmates from Lawton Correctional Facility in Comanche County, Oklahoma, participated in the scam, in which one would establish contact with unsuspecting men through gay dating services, and the men would then receive calls from other individuals demanding money to keep their sexual orientations a secret. In a case involving a Connecticut victim, U.S. District Judge Robert N. Chatigny ordered restitution payment of nearly \$675,000 in a case where the victim later committed suicide. Darik Forsythe pled guilty in 2014 to conspiracy to commit wire fraud. On March 13, he was sentenced to 46 months in federal prison on top of his existing 20 year term on a robbery conviction. Another Lawton inmate, Sean Siwek, was ordered to pay \$125,000 in restitution to victims he and other inmates defrauded. According to the story, “After arranging to meet for sex, Siwek would then call the user, claim to be a law enforcement officer, and accuse the user of agreeing to have sex with a minor,” then shake them down for money to keep silent.

PRISONER LITIGATION NOTES

UNITED STATES COURT OF APPEALS – NINTH CIRCUIT – Sometimes, the Prisoner Litigation Reform Act, the rules for *in forma pauperis*, and the criteria for appointing counsel, designed to streamline use of judicial resources, instead exact a heavy toll. Two months ago, *Law Notes* reported in *Reberger v. Koehn*, 2017 U.S. Dist. LEXIS 8994 (D. Nev. January 23, 2017) (February 2-17 at page 79), that U.S. District Judge Miranda M. Du applied the “imminent danger” exception to the “three strikes” rule of the Prison Litigation Reform

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Act ["PLRA"] to permit *pro se* prisoner Lance Reberger to proceed with his civil rights lawsuit alleging deprivation of HIV medications. This was in case # 15-cv-0551. It turns out that Reberger had an earlier case, # 15-cv-0468, before the same judge, in which such permission was denied in 2015. The earlier case has now reached disposition before the Ninth Circuit in March of 2017, in *Reberger v. Koehn*, 2017 WL 1046180, 2017 U.S. App. LEXIS 4964 (9th Cir., March 20, 2017), which (without reference to the second case) reversed and remanded Judge Du's 2015 decision on the "three strikes" exception, based on the allegations that denial of HIV medication posed an "imminent danger." The Circuit's disposition illustrates two points: (1) that one hand does not know what the other one is doing in the *pro se* milieu, even when the same issues are before the same district judge; and (2) more importantly, that a Court of Appeals has now endorsed the "imminent danger" exception to the "three strikes" rule in PLRA cases involving HIV medication – even though the District Judge had already done so for the same inmate. The Circuit's decision is "not precedent" under Ninth Circuit Rule 36-3, but it may nonetheless be cited under F.R.A.P. 32.1. The Circuit relied on *Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (holding that decisions applying "three strikes" under 28 U.S.C. § 1915(g) are reviewed *de novo*). The opinion also notes that this *pro se* prisoner had already been before the Circuit previously on "three strikes" in appeals of two other cases in *Reberger v. Baker*, 657 F. App'x 681 (9th Cir. 2016). *William J. Rold*

ARKANSAS – In 2015, *Law Notes* reported that *pro se* gay inmate Lee Baker was permitted to proceed to discovery on what we characterized as a "verbal harassment – plus" protection from harm case, in *Baker v. Tallant*, 2015 WL 4716311 (W.D. Ark., August 7, 2015),

reported September 2015 at pages 408-9. Now, the same judge, U.S. District Judge Susan O. Hickey, has ruled against Baker after a bench trial of the jail officials for failure to protect him from sexual orientation harassment and sexual assault in *Baker v. Tallant*, 2017 U.S. Dist. LEXIS 41882, 2017 WL 1097204 (W.D. Ark., March 23, 2017). Baker had two stints of jail incarceration: once while awaiting trial (on charges of sexual indecency with a minor) before making bail; and again after conviction while awaiting transfer to state prison. Judge Hickey notes the theoretical difference between Fourteenth Amendment jurisprudence (applicable to pre-trial detainees) and Eighth Amendment law (involving convicted offenders), but finds the distinctions immaterial to the protection from harm claims here. Judge Hickey finds in favor of the jail officials on the claims of verbal harassment by other inmates, primarily because Baker appeared to them to be joining in the banter and laughter that ensued and because guards instructed the other inmates to stop it. She found no evidence of a policy or practice of failing to protect inmates who had unpopular charges/convictions or were sexual minorities – actually making a finding of fact that there was a policy of protection. Judge Hickey also found that, while Baker filed a number of grievances, he never complained about risk of sexual assault before the alleged incidents or asked that he be moved. The Court notes this ostensible failure to exhaust the claim under the Prison Litigation Reform Act, but the opinion applies the absence of complaints about the sexual harassment – while Baker complained about other things, including multiple complaints about lost property – to question Baker's credibility about the nature of the alleged sexual assaults and Baker's requests for protection. Baker did grieve the sexual assaults, but he did not "follow-up" on these grievances – appealing six grievances on other subjects after the assaults, without mentioning them.

Baker also said the assaults did not involve penetration (calling them "dry humping"). Judge Hickey found this sufficiently serious under the objectively "serious" prong of a protection from harm claim under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) – and specifically ruled that "dry humping" by other inmates (or even "pretended" sex) subjected Baker to "significant fear, ridicule and humiliation." Nevertheless, she ruled against Baker on the subjective component of the test – the jail defendants' deliberate indifference to the risk. Baker's failure to complain about the verbal harassment caused lack of any official notice of the need for protection, on which the defendants' subjective deliberately indifferent state of mind could be premised. As noted in the previous *Law Notes* (September 2015 at 209), Judge Hickey here continues to conflate Eighth Amendment cases involving *Farmer's* right to protection from inmate-on-inmate assault (the correct test) with cases involving assault or unreasonable force *by staff*, which involves a balancing of use of force with legitimate security needs to maintain order or quell disturbances. The extensive citation of Eighth Circuit law in the opinion should be read with this distinction in mind, even as the line of cases overlaps when dealing with supervisory liability. Reading the opinion as a whole, in this writer's view, Baker's behavior of seeming to "laugh off" the harassment (a survival tool in the highly charged atmosphere of a cell block – and explainable by an expert) was not fatal to his claim. Rather, Baker lost because he did not press his sexual assault claims sufficiently to the hierarchy of the jail, while he used the relatively calm administrative appeal process to address other matters. *William J. Rold*

CALIFORNIA – *Law Notes* has followed the saga of California transgender inmate Shiloh Heavenly Quine for three

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years. Settlement of her case led to state changes in policies for transgender inmates. See “California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery,” November 2015 at page 489. She had sex reassignment surgery recently, as the first female transgender inmate to have such a procedure; and she has been reassigned to the women’s institution at Chowchilla. Describing her circumstances to the Associated Press (reported March 22, 2017) as a “torture unit,” Quine (who has been incarcerated since 1981) says she has been forced to go through initial reception as if she were a new inmate. She has been denied a razor as part of “assessment,” and she now has a beard and mustache. Accordingly to the AP, California officials say that Quine is “being treated like other female inmates,” who “initially are denied privileges like razors . . . until officials are confident they won’t harm themselves or others” and that “it’s a process every inmate goes through.” Quine says she is “housed alone” in a cell but said she still has no privacy to perform required intimate post-operative procedures and is enduring a “restrictive isolation” that is pushing her toward anxiety, depression and sadness. She has returned to the judge overseeing her case—U.S. Magistrate Judge Nandor J. Vadas has enforcement over *Quine v. Beard*, 3:14-CV-02726 (N.D. Calif.) JST (NJV)—arguing “harassment” without “legitimate penological objective” for the restrictions that could last from 6 weeks to a year. In this writer’s view, while Quine’s incarceration poses some discrete problems, she does not need “initial reception” in the sense of psychological evaluation, programmatic assessment, and dangerousness classification, having serving decades in the system. She is more like a transfer inmate, whose behavior and needs are relatively known, particularly since they have been the subject of prolonged attention in litigation. *William J. Rold*

GEORGIA – In a very long opinion that can only be summarized here, United States District Judge J. Randal Hall grants summary judgment against transgender inmate Darius Ishun Green on her claims of deliberate indifference to her safety arising from extortion of sex and rape by another inmate in *Green v. Hooks*, 2017 U.S. Dist. LEXIS 40439, 2017 WL 1078646 (S.D. Ga., March 21, 2017). Green was previously granted systemic discovery by U.S. Magistrate Judge G. R. Smith in *Green v. Hooks*, 2015 U.S. Dist. LEXIS 93376 S.D. Ga., July 17, 2015). See “Georgia Federal Court Parses Discovery Requests in Transgender Protection from Harm Case,” reported in *Law Notes* (Summer 2015 at page 371) – in which Judge Smith characterized Green as having “begged” for protective custody after repeated sexual assaults from another inmate, Darryl Ricard, whereupon defendants placed Green “into protective custody with Ricard, who then raped him.” [Italics by the court.] After discovery and depositions, Judge Hall found no jury question presented by the evidence. Georgia DOC did not classify Ricard as a sexual aggressor (although he had a rape conviction against a minor), and it did not find Green to be a potential sexual victim (although she had breast enlargement and a feminine appearance). Green was classified to medium security and sent to dormitory housing, at a facility that also had two-inmate segregation cells. Ricard began extorting sex from Green in exchange for “protection” shortly after her arrival, and Green wrote her mother, who contacted the warden. The warden had Green brought to his office and questioned her; but she denied any problems, said she was not in fear, and did not ask to be moved. The warden telephoned Green’s mother and let Green speak with her, prior to returning Green to the dormitory under a pretext for the visit that “would not raise suspicion among the other inmates.” Later, Green was moved to protective

custody, ostensibly because other inmates wanted to “oust homosexuals” from the dorm. Ricard left the dorm with Green, who did not ask to be separated from Ricard. Eventually they were assigned to the same segregation double cell, where the rape occurred. After the rape, Green smuggled a note to officers who returned to find Ricard assaulting Green with a razor blade. Green then told investigators that Ricard had been sexually assaulting her for weeks and that she had made a prior written complaint, which was never found, about which Judge Hall wrote that Green “can offer no proof for this assertion beyond her own testimony.” Grand juries twice declined to indict Ricard for the assault. Ricard did not receive internal prison discipline, even for the possession of the shiv. After extensive discussion of Eleventh Circuit standards for summary judgment, Judge Hall applies the deliberate indifference to safety rules of *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994), finding that no jury could rule that Green was at “substantial risk of serious harm” or that defendants knew about it or were deliberately indifferent to it. Judge Hall said this ruling is “dictated” by *Goodman v. Kimbrough*, 718 F.3d 1325, 1331 (11th Cir. 2013). In *Goodman*, a man with dementia was arrested, and his wife went to the jail to plead for his safety out of fear that he would insult another inmate and be assaulted. That same night the husband was double-celled and severely beaten. The Circuit upheld summary judgment against the victim, because the plaintiff failed to show that the defendant officers either knew about or were deliberately indifferent to the risk. Here, however, the conduct occurred over weeks. Judge Hall also relies on Green’s failure to express fear or object to housing with Ricard. Like the plaintiff in *Farmer*, however – who did not object to housing in general population (511 U.S. at 830) – Green’s silence about her risk should not have been determinative if the risk were “obvious” – 511 U.S. at 836. Judge Hall

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found that Green presented no evidence that anyone “noticed her breasts or feminine appearance,” even after strip searches. [Give me a break!] In taking the case from the jury, the opinion never uses the notion that the risk was known because it was “obvious” – a word appearing 22 times in *Farmer* – 511 U.S. *passim*. The court also found that knowledge cannot be imputed to the warden from reports of sexual assaults in the institution, because Green did not establish that the warden read the reports and because “twenty-eight allegations of rape — not confirmed incidents — over the course of five years in a 1,500 person prison is not a substantial risk.” Judge Hall relies on Green’s insistence that she was not afraid and her failure to request protection when she was away from Ricard and alone with the warden or other officers. Hall finds: “Although [defendants] could have chosen to disbelieve Plaintiff in spite of her confidential assurances to the contrary, the Constitution does not require them to do so.” Even if Green is believed that she wrote a letter prior to the rape, the court cannot “subject every official to trial if a prisoner merely alleged that she wrote a letter claiming abuse Plaintiff’s claim that she sent a letter to Defendants, without more, does not create a genuine dispute of material fact.” The opinion ranges from dismissive (referring to prisoners as “these people”) to sarcastic (objecting that “judges are not like pigs, hunting for truffles buried in briefs” in deciding summary judgment). In this writer’s view, the opinion does not give *Farmer* its due. One can ask: If the warden were not subjectively aware of the risk, why did he feel the need to resort to a subterfuge to avoid danger upon returning Green to the dormitory?
William J. Rold

MARYLAND – U.S. District Judge Catherine C. Blake granted summary judgment against transgender *pro se* inmate Michael Jones, a/k/a Latrina

Marie Lopez, in *Jones v. Puffenbarger*, 2017 WL 1020819 (D. Md., March 15, 2017). This is the third decision reported in *Law Notes* involving Jones’ confinement in Maryland, and her third loss. See U.S. District Judge George Russell’s decisions in *Jones v. Does*, 2016 U.S. Dis. LEXIS 9908 (D. Md., January 28, 2016) (reported March 2016 at pages 112-3) (denying injunctive and damages relief in allegations of rapes by cellmates, but reserving issue of declaratory relief on protection from harm); and *Jones v. Doe*, 2016 U.S. Dis. LEXIS 69603 (D. Md., May 26, 2016) (reported June 2016 at pages 252-3) (denying all remaining relief). Prior decisions note the difficulty of even determining Jones’ sexual and/or gender identity because of lack of patient cooperation. Here, Jones sues individual corrections officers primarily for sexual assault, failure to protect (as Judge Blake frames it), and excessive force. Judge Blake recites Jones’ allegations in her complaint and “declaration” in detail, along with defendants’ affidavits and documentation in support of summary judgment. Jones did not reply in opposition. Judge Blake invokes the narrow exception to the rule that disputed facts require a trial, enunciated in *Scott v. Harris*, 550 U.S. 372, 380 (1970) (non-moving party’s version of facts “blatantly contradicted by the record, so that no reasonable jury could believe it”), citing *Smith v. Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009) (applying *Scott* where inmate’s excessive force case is contradicted by videotape). Judge Blake goes a step further and applies *Scott* to preclude a trial where employment records show that defendant officers were not at work when the incidents supposedly occurred and that medical records do not support the injuries claimed. Judge Blake noted that Jones’ records show a pattern of “gestures for secondary gain” – such as swallowing batteries, smearing feces, threatening staff and other inmates, refusing to eat – and that

Jones was “routinely followed by mental health.” Defendants presented proof that Jones’ allegations were investigated under the Prison Rape Elimination Act, 42 U.S.C. § 15601, *et seq.* [“PREA”], but Jones refused to be interviewed. The allegations were determined to be unfounded. Judge Blake found that Jones failed to exhaust administrative remedies under the Prisoner Litigation Reform Act, although the issue is muddled by some 44 grievances filed. After extensive discussion – including discussion of the exceptions to exhaustion in *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) – Judge Blake notes that exhaustion is not required by PREA and proceeds to the merits, finding allegations of sexual assault to be not credible. Jones sued certain officers for failing to prevent the rape by other officers. Judge Blake joins the virtually unanimous chorus of judges who have ruled that PREA does not create a private cause of action, but she does not cite the extensive discussion by the Fourth Circuit on “bystander” officer liability under the Eighth Amendment in *Randall v. Prince George’s County, Md.*, 302 F.3d 188, 203-4 (4th Cir. 2002), presumably because she did not credit the allegations that sexual assaults ever occurred. Because the allegations in this case involve assaults by staff (or the failure to stop them) and the excessive use of force, the failure to protect claims in this writer’s view collapse into misuse and excessive use of force claims under *Hudson v. McMillan*, 503 U.S. 1, 6-7 (1992) and *Whitley v. Albers*, 475 U.S. 312, 320-1 (1986), and their progeny, not protection from harm under *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (which involves safety from inmate-on-inmate assault). Nevertheless, applying *Farmer*, Judge Blake found that the defendants’ submissions were sufficient to take the protection from harm claims from a jury. Applying *Hudson* and *Whitley*, Judge Blake also grants defendants summary judgment on excessive use of force, based on the defendants’

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submissions, including video footage contradicting Jones. Finally, Judge Blake found that verbal abuse alone (“[n]o matter how reprehensible”) did not state an Eighth Amendment claim, comparing *Hudspeth v. Figgins*, 584 F.2d 1345, 1348 (4th Cir. 1978) (threats accompanied by actions designed to carry out a threat may be actionable). At this point, the trio of cases make it highly unlikely that Jones can prevail on claims in the Fourth Circuit while she remains *pro se*. *William J. Rold*

MINNESOTA – Accepting a recommendation from Magistrate Judge Katherine M. Menendez, U.S. District Judge Joan N. Ericksen dismissed all the claims against various prison personnel by inmate Benjamin Elliott except for his equal protection claim, asserting that several members of the staff violated his equal protection rights by “subjecting him to discipline for possession of photographs with homosexual content discovered on October 30, 2014.” Elliott had pointed out that inmates discovered to possess photographs with heterosexual content were not disciplined. *Elliott v. Wilson*, 2017 WL 1180422 (D. Minn., March 29, 2017). Elliott represents himself *pro se*.

MISSOURI – United States District Judge Carol E. Jackson allowed *pro se* inmate Dwayne Garrett to proceed *in forma pauperis* (charging an initial fee of \$1.00), and found Garrett’s initial pleading sufficient to state claims under the Eighth Amendment and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq. [“RLUIPA”], in *Garrett v. St. Louis County Justice Center*, 2017 WL 914264 (E.D. Mo., March 7, 2017). Judge Jackson described Garrett as “a homosexual,” receiving female hormone treatment and having “well developed breasts” – but she refers to Garrett with male pronouns throughout

the opinion. Despite requests for an accommodation for safety, Garrett was placed in general population and subjected to violent sexual assault. Garrett says officials denied treatment for injuries (“he was allowed to bleed constantly from his rectum for weeks”), and prevented reporting the rape to authorities. Garrett pleaded that reconstructive surgery is now required. Garrett also pleaded that officials denied Wicca religious materials because “devil worshipping” people are “weird.” Garrett seeks injunctive relief, in part, out of fear “because no one has reported the rape to the police.” Judge Jackson appointed counsel and observed that the court “does not wish to dismiss any of plaintiff’s claims at this time,” allowing counsel time to amend. Judge Jackson found potential claims of: (1) deliberate indifference to Garrett’s safety under *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); (2) deliberate indifference to serious medical needs in the allegations of lack of treatment and delays under *Albersson v. Norris*, 458 F.3d 762, 765-66 (8th Cir. 2006); and *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); and (3) substantial burden on religious exercise under RLUIPA, citing *LaPlante v. Massachusetts Dept. of Corrections*, 89 F.Supp.3d 235 (D. Mass. 2015) (rules regarding worship substantially burdened inmate’s religious exercise regarding Wiccan faith). Judge Jackson denied injunctive relief, without prejudice to “entertain such a request” from counsel. *William J. Rold*

NORTH CAROLINA – Last year, U.S. District Judge Louise W. Flanagan allowed *pro se* transgender prisoner Duane Leroy Fox, a/k/a Jennifer Ann Jasmine, to sue under her chosen name and to proceed against a prison physician for deliberate indifference to her serious medical needs in *Jasmine v. Magana*, 708 F.3d 520, 526 (4th Cir. 2013), in *Jasmine v. Futrelle*, 2017

WL 829290 (E.D. N.C., March 2, 2017), Judge Flanagan conducts a screening of the amended complaint under 28 U.S.C. § 1915 after Jasmine was ordered to file more particularized allegations as to the civil rights violations of each defendant. Judge Flanagan again found Jasmine’s claims “rambling and disjointed,” but her medical and religious allegations remain sufficient to state a claim. Per PACER, Jasmine’s 104-page complaint has specific medical claims, including denial of hormone therapy and mental health treatment, despite GID diagnosis, as well as denial of women’s undergarments and cosmetics. Her claims under the First Amendment and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, et seq. [“RLUIPA”], involve various aspects of observance of Wicca. These proceed under both the First Amendment and RLUIPA, citing *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). Jasmine’s safety claims under the Prison Rape Elimination Act, 42 U.S.C. § 15601, et seq. [“PREA”], and her claims about verbal harassment are both dismissed. PREA does not create a private cause of action, and verbal harassment without more is insufficient to state a claim under *Henslee v. Lewis*, 153 F. App’x. 178, 180 (4th Cir. 2005). Jasmine also claimed that a specific officer assaulted her by fondling her breast during a search. This “isolated incident” was found insufficient to state a constitutional violation under *Helling v. McKinney*, 509 U.S. 25, 32 (1993), as some “touching” is inherent in the context of prison searches. Judge Flanagan relied on the Second Circuit’s requirement of repeated sexual contact in *Boddie v. Schneider*, 105 F.3d 857, 861 (2d Cir. 1997), even though *Boddie* was effectively overruled two years ago in *Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015). Judge Flanagan dismissed the sexual contact claim without prejudice – perhaps as a warning shot across the bow. *William J. Rold*

PRISONER / LEGISLATIVE

VIRGINIA – U.S. District Judge Elizabeth K. Dillon granted prison defendants summary judgment against *pro se* inmate Tamar Devell Harvey in *Harvey v. Moreno*, 2017 U.S. Dist. LEXIS 38447 (W.D. Va., March 17, 2017). Harvey sued supervisory staff (including a physician, health services administrator, warden, and state medical director), alleging deliberate indifference to his serious health care needs in three areas: HIV, hypertension, and syphilis. The decision illustrates again that it is nearly impossible for a *pro se* prisoner plaintiff to take a medical case to trial without an expert. Judge Dillon found none of the defendants to be sufficiently involved personally; even the doctor had only two entries in Harvey’s chart. Nevertheless, the opinion tracks the allegations and rebuttal exhaustively. As to HIV, Harvey alleged interruption in daily dosage of Atripla. Judge Dillon found that Harvey was allowed KOP (“keep on person”), and he failed at times to present himself for renewal in a timely manner. He said the pharmacy ran out of the drug or gave supplies to other inmates – an allegation Judge Dillon found immaterial – because the total missed dosages were on only 12 occasions over the course of a year. Harvey had “undetectable” viral load, and a health t-cell count, so there was no evidence of harm. Judge Dillon found the hypertension question amounted to a difference of opinion as to drug of choice, which is not actionable under the Eighth Amendment. She also judicially noticed (questionable under Fed. R. Evid. 201, in this writer’s view) an on-line description of normal age-specific blood pressure from the Mayo Clinic; and she found that Harvey’s numbers, which were checked regularly, did not vary so widely from normal to show deliberate indifference. Finally, as to syphilis, Judge Dillon found that Harvey’s titers were checked quarterly and that he did not have a right to an ultrasound to check for organ damage merely to satisfy his fears. While there

is no breaking news here, the decision is replete with case law for practitioners in the Fourth Circuit. *William J. Rold*

VIRGINIA – United States District Judge Norman K. Moon denied a physician’s motion to dismiss a transgender inmate’s case on qualified immunity grounds in *Morris v. Fletcher*, 2017 WL 1161888 (W.D. Va., March 27, 2017). *Pro se* plaintiff, Terah C. Morris, claimed that Dr. Happy Smith [really] refused to evaluate her for physical or mental health treatment for “gender identity disorder [“GID”] or to provide hormones. According to the complaint Dr. Smith said “they don’t provide hormone shots or pills” and that Morris “look[ed] like a male to him.” Morris states that Dr. Smith “never tried to diagnose me or anything” and claimed that Smith was deliberately indifferent to her serious medical need by failing to diagnose her, preventing her from obtaining a “competent evaluation,” and by not treating her GID. Judge Moon found that the burden of establishing qualified immunity was on Smith, citing *Meyers v. Baltimore Cty., Md.*, 713 F.3d 723, 731 (4th Cir. 2013), and that Smith had not met that burden. Judge Moon ruled that “a reasonable officer would have known at that time that failing to provide an inmate adequate medical and mental health treatment, assessment, or medication for a serious medical need would be unlawful,” citing *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). Judge Moon did not cite *De’lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013), the leading Fourth Circuit case on transgender prisoners’ right to medical care. *William J. Rold*

WISCONSIN – Over the objections of transgender inmate Dominique Dewayne Gulley-Fernandez, U.S. District Judge William M. Conley ordered her case about medical care in the Wisconsin prison system to be transferred to the

Eastern District of Wisconsin, where she has other cases pending. Judge Conley’s refusal to accept a transgender inmate’s damages claims and his acceptance of a state-paid expert’s opinion as controlling has already been reported in *Law Notes*. See “Wisconsin Transgender Inmate Who Waited over a Year for Evaluation for Hormones Loses Summary Judgment on Failure to Treat Damages Claims,” discussing *Mitchell v. Kallas*, 2016 U.S. Dist. LEXIS 114603 (W.D. Wisc., August 26, 2016) (October 2016 at page 424). Gulley-Fernandez has long-standing federal litigation in the Eastern District, as reported in *Gulley-Fernandez v. Johnson*, 2016 WL 1169470 (E.D. Wisc., March 21, 2016), *Law Notes* (April 2016 at page 167). The current transfer of *Gulley-Fernandez v. Wall*, 2017 WL 933155 (W.D. Wisc., March 8, 2017), to the Eastern District is likely to result in consolidation with her other cases. Judge Conley ruled her claims for “alleged refusal to provide her with medication to treat her gender dysphoria and . . . failure to comply with her requests for sex reassignment surgery” should be heard in the same court. Meanwhile, Gulley-Fernandez – and other Wisconsin transgender inmates – remain *pro se*, in what is clearly a statewide class action waiting to happen. *William J. Rold*

LEGISLATIVE & ADMINISTRATIVE

TRUMP – On March 27, Donald J. Trump signed an Executive Order revoking President Obama’s Executive Orders 13673 (July 31, 2014) and 13738 (August 23, 2016), and section 3 of Executive Order 13683 (December 11, 2104). These Executive Orders were intended to enhance enforcement of other Executive Orders that required federal contracts to include non-discrimination provisions. They required the potential contractors to disclose to contracting agencies any

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rulings against the contractors under a list of federal statutes, including federal laws governing employment. The main Order revoked is 13673, which set up the disclosure requirement, an obligation for each contracting agency to appoint an official to monitor the status of contractors, establishment of a mechanism for interagency communication about the status of contractors, and a requirement that contractors' record of federal legal violations be considered in determining whether to grant or renew contracts. The other Orders revoked were revisions to the list of statutes in 13673. In a separate Obama Order, which Trump has not revoked, President Obama required that federal contracts include provisions against sexual orientation and gender identity discrimination. A consequence of the March 27 Order is that contractors will not be required to disclose proceedings in which they were found to have violated these non-discrimination requirements. In addition, of course, the statutes listed in the revoked Executive Order include several banning discrimination because of sex, which statutes had been interpreted by the Obama Administration to extend to claims of sexual orientation and gender identity discrimination. Thus, the March 27 Executive Order is calculated to weaken enforcement of those anti-discrimination requirements. It had been rumored that Trump was poised to revoke the Obama anti-discrimination Order as well, but was dissuaded from doing so by Jared Kushner and Ivanka Trump, so that Order has remained in effect. However, there are reports of a religious liberty draft order under consideration that would create an exemption from compliance with federal non-discrimination requirements for religious objectors. Some gay media reports about the March 27 Order, which was signed and posted to the White House website without any fanfare and thus flew under the radar of mainstream media reporting that was

preoccupied with other Trump tweets and peccadilloes, mistakenly asserted that the March 27 Order had "gutted" enforcement of the sexual orientation and gender identity order, or had even had revoked it. Such misinterpretation was understandable, in light of the deceptive way the Order was framed. It is titled "Revocation of Federal Contracting Executive Orders" and says nothing substantive about the Orders revoked, merely listing their numbers and dates. It would be impossible to understand the substance of what this Order was doing without looking up and reading the Orders that were revoked, and one could easily misinterpret it to have revoked *all* prior Executive Orders relating to federal contracting, including those issued during the last century establishing affirmative action requirements for federal contractors. Evidently Trump (and Bannon) haven't gotten around to those yet, but they probably will. . .

U.S. CUSTOMS OUTRAGES – There are reports that U.S. Customs agents on the Canadian border having been denying entry to gay men. In one example reported by *nationalpost.com* on March 29, Michael Potter, a Windsor resident, reported being denied entry after declaring to a primary inspection officer for the U.S. Customs and Border Patrol that he had purchased a bottle of vodka and a box of cigars at a duty-free shop in Windsor as a present for his husband Matthew Allsopp. Potter had regularly crossed the border in order to shop and enjoy the nightlife in Detroit. After being rudely treated by officers, held in isolation, subjected to humiliating body search, etc., he said he will no longer regularly visit the U.S. This is presumably part of the Trump Administration's new policy to discourage tourism to the United States in order to create more jobs? A spokesperson for the U.S. Customs and Border Protection, when questioned

about Potter's treatment, said he could not comment on an individual case, and said Potter could have asked to speak to a supervisor. A local member of Parliament to whom Potter complained, Brian Masse, said that there had been an increase recently of complaints by people in Windsor about their treatment by U.S. customs at the border in Detroit. He said they were hearing a couple of stories each week.

CONGRESS – Senator Jeanne Shaheen (D-N.H.) has introduced S. 635, to amend the U.S. Code "to prohibit the exclusion of individuals from service on a Federal jury on account of sexual orientation or gender identity." The measure, introduced on March 15 with four co-sponsors, was referred to the Judiciary Committee, where it will undoubtedly be ignored by the Republican majority.

ALABAMA – Distraught at the prospect that embattled probate judges are tasked with issuing marriage licenses to same-sex couples who outrage their religious sensibilities, the Alabama Senate voted on March 7 by 22-6 to approve a bill that would eliminate marriage licenses and instead task the probate judges with simply recording (i.e., accept for filing) notarized forms signed by the marital parties attesting that they meet the technical legal requirements to marry in the state (legal age, not already married, not related closely by blood or by adoption). No formal ceremony would have to be held to declare the parties married. Senator Phil Williams, a Republican, voted against the measure, stating that he was opposed to "the idea of reducing it to the idea of a contract between two parties," but the bill's sponsor, Greg Albritton, also a Republican, said that "the state does not make things sacred." *www.al.com/news*, March 7; *Montgomery Advertiser*, March 8. This is sort of a halfway house between the formal marriage license

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system and the informal common law system that is still in effect the District of Columbia and nine states. (Most other states will recognize common law marriages of couples who met the requirements of a state where they were present.) If the Alabama legislators truly want to protect their probate judges from any “complicity” with same-sex marriage, they would go “all the way” to make common-law marriages the only form of civil marriage in the state, providing that a marriage performed by clergy could be deemed a common law marriage. Perhaps this would be the best solution! Since Probate Judges in some Alabama counties are still refusing to issue any marriage licenses in order to avoid having to issue them to same-sex couples, this would seem the neatest solution, next to abolishing the position of Probate Judge.

ARKANSAS – On March 27 the Senate Judiciary Committee rejected a bill that would have conformed the state’s parental rights laws to the requirements of the *Obergefell* decision by replacing the word “husband” with “spouse” in the provision dealing with parental rights in relation to donor insemination and surrogacy. The state supreme court has ruled that a parental presumption will not apply to the same-sex spouses of women who give birth, following a strict interpretation of the gendered language in the statute. A cert petition is pending before the U.S. Supreme Court. *Arkansas Times*, March 30. * * * On March 29, Senator Linda Collins-Smith, a Republican, withdrew her proposal of a law prohibiting people from using bathrooms in government buildings that do not match their gender at birth. Tourism groups and Gov. Asa Hutchinson had expressed opposition to the bill, fearing a boycott of the state if it were to be enacted. Collins-Smith said the measure was necessary to protect the privacy of bathroom users who are not transgender. The conservative

Arkansas Family Council was a prime supporter of the measure. Collins-Smith said she will bring the measure back for consideration in a future session. *Associated Press*, March 29. * * * On February 28 the Senate approved by 19-9 a resolution calling for a federal constitutional convention to consider an amendment that would define marriage in the United States as only between a man and a woman, thus overruling the *Obergefell* decision. Why anyone would waste time on this effort when a majority of the public now tells pollsters that it supports the right of same-sex couples to marry is beyond explanation. *Associated Press*, March 1. * * * Rep. Stephen Meeks has withdrawn his bill designed to restrict marriage in Arkansas to heterosexual couples. H.B. 2098 was pulled shortly after being introduced. A local TV report questioned how Meeks expected his measure to be enforced if enacted in light of *Obergefell*. *KTHV*, March 14.

COLORADO – The Senate State, Veterans, and Military Affairs Committee voted to defeat H.B. 1122, the Birth Certificate Modernization Act, which would have liberalized the procedure for transgender people to obtain revised birth certificates consistent with their gender identity. This was the third year in a row that the bill was defeated, on a party-line vote by the Republican majority of the committee. *ColoradoPols.com*, March 27.

FLORIDA – Reacting to the *Debaun* case, Rep. Kionne McGhee introduced H.B. 165, which would add HIV to a law making it a crime to consciously spread sexually-transmitted disease. The bill would authorize the death penalty for people who knowingly spreads HIV more than once to multiple people. People who spread HIV unwittingly could be charged with a misdemeanor. *saintpetersblog.com*, March 20.

GEORGIA – The Senate Judiciary added an anti-LGBT amendment to H.B. 159, an adoption reform measure, and then passed the bill out of Committee. It had previously been approved (without the anti-LGBT language) in the House on February 27. The amendment would allow adoption agencies, including those receiving state funding, to discriminate against same-sex couples and to refuse to work with prospective LGBT parents. The measure was proposed by Sen. William Ligon (R-Brunswick). *thegavoice.com*, March 16.

INDIANA – Vanderburgh County’s Commission voted 2-1 to add age, sexual orientation and gender identity to the county’s anti-discrimination policy. Those experiencing discrimination can file charges with the county’s Human Relations Commission, which investigates and mediates claims. However, the measure does not authorize lawsuits. The measure was said to mirror an ordinance adopted previously within the county by the municipal government of Evansville. *Courier & Press*, Mar. 22.

KENTUCKY – The legislature has approved S.B. 17, a bill intended to allow student groups at colleges, universities and high schools in the state to discriminate against students based on the student groups’ religious freedom claims. The bill passed the House on an 81-8 vote early in March, after having passed the Senate in February. The bill is intended to override anti-discrimination measures implemented by many educational institutions in the state forbidding student organizations from discriminating against students because of their race, sex, religion, sexual orientation or gender identity. The measure is intended to counter the effect of the U.S. Supreme Court’s ruling in *Christian Legal Society v. Martinez* (2010), which allowed a University of California law school

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campus to deny official recognition to a Christian Legal Society chapter that insisted on following the national organization's requirement to impose a fundamentalist Christian religious morality test for membership. Governor Matt Begin (R) signed the measure into law on Mar. 20.

MICHIGAN – The state's Attorney Discipline Board ordered the disbarment of Andrew Shirvell on March 30. Shirvell is the former Michigan Assistant Attorney General who was fired after waging an anti-gay campaign against Christopher Armstrong, an openly gay man who had been elected student body president at the Ann Arbor campus of the University of Michigan. Shirvell's alma mater. Shirvell claimed that his activities were an exercise of free speech rights, but the discipline board said his motive in acting was "dishonest or selfish," according to an Associated Press report on March 30. A jury awarded Armstrong \$4.5 million in a civil suit he instituted against Shirvell.

MISSOURI – The State Senate voted down a bill that would have added sexual orientation and gender identity to the prohibited grounds of discrimination in employment, housing and public accommodations. The vote was 20-10. *AP State News*, March 1.

MONTANA – Rep. Carl Glimm introduced a bill calling for a voter referendum about whether transgender people should be barred from restrooms and locker rooms in schools and public buildings that don't match their gender identified at birth. Because this is what we want the public to be consumed with debating: where transgender people can relieve themselves in public buildings. Glimm's strategy to seek a referendum rather than proposing a "bathroom

bill" is to avoid a veto from Gov. Steve Bullock, a Democrat. A measure passed by the voters can't be vetoed by the governor. The bill defines sex as "a person's immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth." Glimm has not suggested he will bear the cost of genetic testing of all newborns to establish their "immutable biological sex" record, which all people will presumably have to carry around in case they are challenged when entering or using a public facility. The bill would authorize lawsuits against schools, universities and government agencies if people find themselves confronting transgender people in restrooms where they are not supposed to be. *AP Alerts*, March 17. The House Judiciary Committee voted 7-11 to table the bill on March 27. *Great Falls Tribune*, March 28.

NEVADA – The Assembly voted 27-14 on March 9 to advance the effort to replace the state's marriage amendment, which was rendered inoperative by the *Obergefell* decision. *Las Vegas Review-Journal*, March 10. The Senate Judiciary Committee approved a bill on March 2 that would allow transgender people to get a legal name change without publishing their new and original names in a newspaper. S.B. 110 changes the name change process for cases where the purpose is to conform with an individual's gender identity. *Law Vegas Review-Journal*, March 2.

NEW HAMPSHIRE – The House Health, Human Services and Elderly Affairs Committee voted 13-8 to shelve a bill to ban gay conversion therapy for minors, with Republican opponents arguing that it limited parental rights and counseling for youth "working through their sexuality." Earlier this year, the Republican-led House had rejected a

bill to expand the state's civil rights law to ban gender identity discrimination. The setback was a surprise, since the conversion therapy bill had been approved in the Republican-led Senate. *concordmonitor.com*, March 30.

NEW MEXICO – The House passed a bill March 15 prohibiting therapists and other licensed professionals from providing "conversion therapy" to minors. S.B. 121 was approved 44-23. It had previously passed the Senate, but was amended in the House, so a new Senate vote was necessary for it to go to Governor Susana Martinez. *Albuquerque Journal*, March 16.

NEW YORK – Assemblyman Daniel O'Donnell (D-Manhattan) introduced a bill that would mandate that single-occupancy restrooms be made gender neutral in various public accommodations and government buildings. The bill would not affect multiple-occupancy facilities. O'Donnell's office announced that Sen. Andrew Lanza (R-State Island) had agreed to sponsor a companion bill in the Senate. Such a law was enacted in New York City in 2016, and California was the first state to adopt such a measure. *Albany Times Union*, Mar. 14.

OHIO – The Columbus, Ohio, City Council voted on March 27 to ban conversion therapy performed in the city, according to a March 28 report by *Associated Press*. Other Ohio cities that have enacted similar ordinances include Cincinnati and Toledo.

OREGON – The House Healthcare Committee held hearings on H.B. 2673, which would create a new "streamlined" method for transgender residents to change their names and legal gender marker at the Oregon

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Health Authority, which is charged with keeping vital records. The current process requires, among other things, that legal name-change petitions be publicly posted in a county courthouse. Transgender advocates testified that this requirement creates safety fears of harassment and discrimination. The bill would eliminate this requirement. *Statesman Journal*, March 8. The bill passed the House on March 15 by a vote of 37-23, and was sent on to the Senate. *AP Alerts*, March 16.

PENNSYLVANIA – The Phoenixville Borough Council approved an anti-discrimination ordinance by a 6-1 vote that bans discrimination in employment, housing and public accommodations on a host of grounds, including sexual orientation and gender identity or expression. *Phoenixvillenews.com*, March 16.

SOUTH DAKOTA – Governor Daugaard signed into law S.B. 149 on March 10. The bill allows taxpayer funded agencies to refuse to provide services – including adoption and foster placement services – on the basis of an agency’s religious and moral convictions. The particular purpose of the measure, of course, is to allow agencies with religious affiliations to refuse to serve gay people and same-sex couples, and it was opposed by social service organizations that are devoted to protecting the rights of kids who need foster or adoptive homes. The proponents are legislators pandering to religious pressure groups and individuals who believe that they are protecting children from sexual predators and – fate worse than death – becoming gay.

TENNESSEE – The House Civil Justice Subcommittee voted on March 29 to stop consideration of Representative Mark Pody’s bill that would require

the attorney general to defend county or city clerks if they are sued for refusing to issue marriage licenses to same-sex couples. A prior version of the bill would have put Tennessee on record as declaring that marriage is between only one man and one woman. Pody, a Republican from Lebanon, TN, agreed to delay consideration until the next session while local lawsuits challenging implementation of the *Obergefell* ruling proceed. Such suits are undoubtedly brought by people ignorant about how the Supremacy Clause of the Constitution works. *Associated Press*, March 29. * * * The House of Representatives voted 70-23 to approve H.B. 1111, which would require the state to interpret and apply gendered words in statutes according to their “natural and ordinary meaning.” Thus statutes using words like “mother,” “father,” “husband,” and “wife” could not be given a neutral meaning as “parent” or “spouse” in construing statutes. This is an attempt to limit the rights of same-sex couples by denying them the benefits of recognition of their marriages under all laws containing such undefined status terms. *FreedomforallAmericans.com*, March 16.

TEXAS – On March 8, the Senate State Affairs Committee voted 7-1 to approve the proposed “bathroom bill,” which would require people to use public bathrooms consistent with the sex indicated on their birth certificates and would preempt municipalities from adopting contrary policies. The vote came at the end of a 21-hour hearing during which more than 400 people had signed up to give testimony. The measure was considered likely to pass the Senate but might be blocked in the House, where the Speaker is an opponent. Business groups in the state have campaigned against the measure. *AP State News*, March 8. Proponents state that they are trying to protect

women’s privacy in bathrooms, but everybody knows what they are doing is using transgender people as a means to exploit public fear, an immoral but all-too-frequently used political tactic. The full Senate approved the measure, euphemistically titled the Texas Privacy Act, on March 14 by a vote of 21-10, but House Speaker Joe Straus has stated repeated opposition to passing the measure. *Austin American-Statesman*, March 15.

TEXAS – USA Wrestling has adopted a new policy at an executive committee meeting on March 14, in response to the public discussions about the Mack Beggs case. Mack is a transgender boy who was required under existing rules to compete as a girl in the state’s high school wrestling championships. There were protests that Beggs, who has been receiving testosterone treatments as part of his transition, was unfairly advantaged in competing with girls, and some girls withdrew from competition to avoid wrestling with him. Under the new policy, Beggs will wrestle as a boy. The policy change came a month after Beggs won the girls state 6A wrestling title in the 110 lb. weight class. *wfaa.com*, March 23.

UTAH – The legislature has approved S.B. 196, which repeals a state law provision forbidding classroom discussion of anything that can be construed as “promotion” of homosexuality. The measure, adopted long ago, was under court challenge by LGBT rights advocates, including the state organization Equality Utah, and the state had asked the trial judge to delay proceedings to give the legislature a chance to repeal the offending statute. The result is a compromise bill that repeals the old law while providing that in sex education classes the teachers must not advocate sexual activity outside of marriage (regardless of

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sexual orientation). It seemed likely that passage of the bill would lead to a negotiated settlement of the lawsuit. *fox13now.com*, March 8. Governor Herbert signed the bill into law on March 20. *Deseret Morning News*, March 21.

VIRGINIA – The City of Norfolk’s Council voted 8-0 on February 28 to ban discrimination in city hiring or contracted based on sexual orientation or gender identity. The measure was to take effect immediately. *Virginian-Pilot*, March 1.

WISCONSIN – Now that same-sex couples can marry in Wisconsin as a result of *Baskin v. Bogan*, Governor Scott Walker is proposing the elimination of domestic partner benefits for the non-marital partners of state employees. The governor’s budget bill for the fiscal year starting January 1, 2018, proposes defunding the partner benefits program. The measure would require all state and local workers to marry their partners if they wanted them to continue receiving health insurance and other partner benefits. One problem was immediately raised; what about the non-marital partner widows and widowers of state employees who are receiving benefits based on that status, for whom there is no longer an option for them to marry their deceased partners in order to continue receiving benefits? A spokesperson for the governor indicated that the executive branch was “willing to work with the Legislature on a potential fix for this.” *Milwaukee Journal Sentinel*, March 8.

OSAGE NATION – The Native American tribe of the Osage Nation held a special election on whether to allow same-sex marriages, and the measure passed with 52 percent of the vote. Recognized Indian tribes are not

required to follow U.S. Supreme Court decisions, as they are deemed sovereign nations by treaty and custom. The Osage Tribe is one of several that have voted to recognize same-sex marriages, some well before the Supreme Court had ruled.

LAW & SOCIETY NOTES

MASSACHUSETTS – Some issues never seem quite put to bed. The South Boston Allied War Veterans Council, organizer of the annual St. Patrick’s Day/Evacuation Day parade, voted 9-4 on March 7 to deny an application by OutVets, a gay military veterans organization, to march as a unit in the parade scheduled for March 19. OutVets had marched in the previous two annual parades. There is a history of LGBT activism around the parade. A group of LGBT people of Irish descent that was specifically formed to march in the parade was able to do so by state court order until the U.S. Supreme Court ruled that the parade organizers had a 1st Amendment right to decide who was officially a part of their parade, which the Court deemed to be an “expressive activity.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995). Reacting to the March 7 vote, Mayor Walsh and other city officials announced that they might not march in the parade unless the LGBT group was included. *Boston Globe*, March 8.

INTERNATIONAL NOTES

AUSTRALIA – Queensland’s so-called “gay panic defense” for murder charges has been ended by Parliamentary vote, reported *AAP Newswire* on March 21. The plea had been used in criminal cases to reduce charges from homicide to manslaughter by claiming

an unprovoked homosexual advance had provoked a violent response.

CANADA – The City of Hamilton, Ontario, has passed the Protocol for Gender Identity and Gender Expression, developed to ensure all individuals the right to access gender segregated facilities in accord with their self-identified gender identity. *Canadian Government News*, March 9. * * * Alberta’s Education Minister, David Eggen, issued an order to two Baptist academies to allow the establishment of gay-straight alliances by students. His order was grounded in provisions of the School Act, after the Independent Baptist Christian Education Society sent the government a letter stating that such alliances were incompatible with their beliefs and mission in running the schools. *Canadian Press*, March 24.

GERMANY – With polls showing support from 83% of the public, the Social Democratic Party of Germany (SPD) announced that it would once again push for marriage equality in the Parliament, with support from the Green Party. The SPD is part of the centrist governing coalition with Prime Minister Angela Merkel’s Christian Democratic Union, which has traditionally opposed marriage equality proposals. As thirteen other European countries now have marriage equality, Germany has fallen far out of step with the European trend, raising hopes that the governing coalition will reach agreement and pass the measure. *International Business Times News*, March 6. The Cabinet approved a bill on March 22 that would annul convictions of thousands of gay men who were prosecuted under Paragraph 175, a notorious anti-gay 19th century criminal law that was toughened during the Nazi regime, and then retained by the post-World War II civilian government until homosexuality was decriminalized in 1969 and the measure

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was fully repealed in 1994. The measure requires parliamentary approval to go into effect. It would authorize monetary compensation for those convicted, including a bass amount an additional payments based on length of jail time served.

INDIA – A measure to assure treatment and protection against discrimination for people living with HIV passed one house of the parliament on March 21. Health Minister J. P. Nadda said that anybody testing positive for HIV would be treated, and the measure would ensure that nobody is denied treatment. The bill theoretically offers wide-ranging protection against discrimination. *United News of India*, March 21.

ITALY – The Court of Appeals in Trento ruled on March 2 that the names of both same-sex partners should be listed on their child’s birth certificate. The court found that even though the child was born through surrogacy, both men acting as parents create a familial unit and should have equal rights, even though only one is the child’s biological father, according to a report by *Legal Monitor Worldwide*, 2017 WLNR 6540835 (March 2).

JAPAN – Sapporo’s municipal government said on March 21 that it would officially recognize same-sex partnerships beginning in June 2017. Those eligible would be city residents at least 20 years old, and would receive a receipt and copy of their “partnership vow” upon registration. No special rights or obligations would be conferred, but such couples would gain life insurance benefits entitlement, and family discounts on some services. Some wards within cities have adopted similar measures, but Sapporo is the first major municipality to do so. *Kyodo News*, March 21. * * * Japan’s national anti-bullying policy is being updated

for the first time to protect sexual and gender minority students, according to a report by Human Rights Watch. *Plus Media Premium Official News*, Mar. 24.

PAKISTAN – A sessions court on March 8 sentenced two men to life imprisonment in a case involving the murder of a transgender person, reported *Express Tribune* on March 9.

PHILIPPINES – President Rodrigo Duterte, reversing a position he took during his 2016 election campaign, announced that the Philippines will not legalize same-sex marriage, stressing that the country was “Asia’s bastion of Roman Catholicism,” according to *The New York Times* on March 20.

RUSSIA – There were credible media reports of a government crackdown and roundup of gay men in the Russian Republic of Chechnya. It was reported that “hundreds” of many were entrapped through social media contacts, and some have fled as word was spreading. The government denied the news reports, with the usual weird assertions that this could not be happening because no such people lived in the country. The roundup may have been sparked by applications for permits to hold gay rights marches. Information was attributed to sources within the Chechen Interior Ministry. Chechen is a predominately Muslim republic. *BBC International Reports*, April 1.

SOUTH AFRICA – The Seshego Magistrate’s Court, ruling on case brought by the South African Human Rights Commission last fall, has ordered the Limpopo Department of Education substantial money for compensation to Nare Mphela, a transgender woman who suffered severe discrimination from her school

principal, and told students to “provoke and harass her in school toilets” and to grab her crotch “to find out what is there.” The principal was also charged with improperly using corporal punishment to discipline her. *Daily Maverick*, AllAfrica.com, March 24.

SPAIN – A Madrid judge has ordered that a bus chartered by an “ultra-Catholic” group to drive about with a “transphobic” slogan inscribed on it be kept off the road until the slogan is removed. The group claimed their effort was to oppose the promotion of gender diversity. The orange and white billboard attached to the bus states (in Spanish, of course): “Boys have penises, girls have vulvas. Don’t let them fool you. If you’re born a man, you’re a man. If you’re a woman, you will continue to be so.” The court was reacting to complaints from citizens who saw the vehicle operating on the streets. *Deutsche Welle World (blog)*, March 2.

UNITED KINGDOM – The Merchant Shipping (Homosexual Conduct) Bill, submitted by MP John Glen, would remove a reference to “homosexual acts” as grounds for dismissal from the crew of merchant ships. The anachronistic measure is not enforceable under existing law, so the proposed repeal, which was approved unanimously in the House of Commons, was largely symbolic. *Pink News*, March 24.

PROFESSIONAL NOTES

LAMBDA LEGAL LIBERTY AWARDS – Lambda Legal announced that its Liberty Award honorees this year will be Larry Kramer and Javier Munoz. Kramer will receive the Kevin Cathcart Community Legacy Award, named in honor of Lambda’s former Executive Director. Munoz is the openly gay, HIV-

positive actor who has taken the lead role of Alexander Hamilton as part of the second cast of the hit Broadway musical. Before starring in *Hamilton*, Munoz had the lead role in the Broadway hit “In the Heights.” The awards will be bestowed at Lambda Legal’s Liberty Awards Dinner in New York on May 1.

LAMBDA LEGAL STAFF ATTORNEY POSITION – Lambda Legal is accepting applications for a new Staff Attorney position for somebody to work in its new D.C. office with Sharon McGowan, the organization’s new Director of Strategy. The position calls for 4-7 years experience. Lambda also has two staff attorney positions to fill in its regional offices in Chicago and Los Angeles. The organization is now large enough that staff attorney openings occur at regular intervals, and those interested in doing public interest law practice on LGBT and HIV issues should be checking the lambdalegal.org website (under about-us/jobs) on a regular basis to learn about application opportunities.

PROFESSOR ARTHUR LEONARD – The longtime editor of this publication, Arthur S. Leonard, will be installed as the Robert F. Wagner Professor of Labor and Employment Law at a ceremony at New York Law School on April 26. At the ceremony, Professor Leonard will also offer a lecture entitled “A Battle Over Statutory Interpretation: Title VII and Claims of Sexual Orientation and Gender Identity Discrimination.”

WILLIAMS INSTITUTE – UCLA LAW SCHOOL – Announcing two new staff appointments: **CHRISTY MALLORY** will be the Institute’s State and Local Policy Director, after working at the Institute for over eight years. She also serves as director of the Annual Williams Institute Moot Court Competition. **ADAM P. ROMERO** will be the Legal Scholarship and Federal Policy Director, and continues as the Arnold D. Kassoy Scholar of Law. He has been busy authorizing *amicus* briefs in cutting edge cases on LGBT law.

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3. Antognini, Albertina, The Law of Nonmarriage, 58 B.C. L. Rev. 1 (January 2017).
4. Berall, Frank S., Estate Planning for Cohabiting Unmarried Couples, 44 EST. PLAN. 31 (April 2017).
5. Brady, Heidi, and Robin Fretwell Wilson, The Precarious Status of Domestic Partnerships for the Elderly in a Post-*Obergefell* World, 24 Elder L. J. No. 49 (2016).
6. Brady, Kathleen A., The Disappearance of Religion from Debates About Religious Accommodation, 20 Lewis & Clark L. Rev. 1093 (2017) (Symposium: Law and Religion in an Increasingly Polarized America).
7. Calabresi, Guido, and Eric S. Fish, Federalism and Moral Disagreement, 101 Minn. L. Rev. 1 (Nov. 2016) (interesting exploration of the problems encountered by judges who seek to follow a principled approach to federalism when presented with constitutional challenges to state legislation founded on moral beliefs).
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9. Cruz, David B., Log Cabin Republicans: International Experience with Military Inclusiveness and the End of Don’t Ask, Don’t Tell, 23 Sw. J. Int’l L. 159 (2017).
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13. Domague, Bradley, Gender Identity in a Binary System: Transgender Students in Public Schools, 54-FEB Hous. Law. 16 (Jan/Feb 2017).
14. Farrell, Ian P., Enlightened Originalism, 54 Hous. L. Rev. 569 (Winter 2017) (Explaining why *Obergefell* is an originalist decision, using the principle of “enlightened originalism”).
15. Finnemore, Melody, Recent Victories, Future Challenges for the Transgender Community, 77-MAR Or. St. B. Bull. 18 (Feb/March 2017).
16. Frank, Nathaniel, The Role of Research, Litigation and Comparative International Policy in Ending the U.S. Military’s “Don’t Ask, Don’t Tell” Policy, 23 Sw. J. Int’l L. 141 (2017).
17. Hammersmith, Rachel Johnson, Equality Trumps Religion: Why Indiana’s Religious Freedom Restoration Act is Inherently Promoting Discrimination Based on Sexual Orientation, 48 U. Tol. L. Rev. 109 (Fall 2016).
18. Handschu, Barbara, and Mary Kay Kisthardt, Representing the Nonbiological “Parent”, Nat’l L. J., March 17, 2017.
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SPECIALLY NOTED

HARVARD UNIVERSITY PRESS particular interest to *Law Notes* readers this spring. PROF. CARLOS A. BALL of Rutgers Law School has written *The First Amendment and LGBT Equality: A Contentious History*, a book that traces the role of the First Amendment in LGBT rights disputes through the courts from the 1950s to the present. This detailed, in-depth treatment is especially useful now as 1st Amendment issues, especially under the Free Exercise Clause, are looming as a major battle ground with the spread of marriage equality and protection against discrimination because of sexual orientation and gender identity. ISBN 9780674972193. * * * * NATHANIEL FRANK has written *Awakening: How Gays and Lesbians Brought Marriage Equality to America*, a detailed history of the struggle for marriage equality. ISBN 9780674737228.

EDITOR'S NOTES

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

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