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All Eyes Again on Justice Kennedy As Supreme Court Hears Arguments on Marriage Equality and Recognition
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Supreme Court Argument Leaves Marriage Equality Proponents Cautiously Optimistic for June 2015 Victory

The United States Supreme Court heard oral arguments in *Obergefell v. Hodges*, No. 14-556, on April 28, considering the questions of whether same-sex couples have a right to marry and to have their marriages recognized by states other than those in which they marry. The case consolidated appeals from the plaintiffs in four states – Ohio, Tennessee, Michigan and Kentucky – whose district court victories were reversed by the U.S. Court of Appeals for the 6th Circuit in *DeBoer v Snyder*, 772 F.3d 388 (6th Cir. Nov. 6, 2014).

Most commentators agreed that it was possible that the Court would reverse the 6th Circuit on one or more grounds, but during the argument the Court appeared closely divided, and the “swing Justice,” Anthony M. Kennedy, did not give any clear signal from his questioning and comments about which way he was leaning, sometimes appearing skeptical about the plaintiffs’ claims, at other times supportive.

The Petitioners (plaintiffs in the trial courts) and Respondents (the states, which were defending their victory in the Court of Appeals), had complied with the Court’s request to designate one advocate from each side on each question, with the addition of Solicitor General Donald B. Verrilli, Jr., arguing in support of Petitioners on behalf of the Obama Administration. Petitioners designated Mary Bonauto, Civil Rights Project Director at Gay & Lesbian Advocates & Defenders, the Boston-based public interest law firm, to argue the marriage question, and participated in the argument before the 6th Circuit, successfully defending Tennessee’s ban on recognition of same-sex marriages.

Bonauto led off the argument and it quickly became clear that the four Democratic appointees to the Court – Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan – were likely votes in favor of same-sex couples having the same fundamental right to marry as different sex couples. Chief Justice John Roberts quickly moved to dispel the speculations of some commentators that he was a potential vote for marriage equality, as he suggested that what the plaintiffs were seeking was not just “to join the institution, you’re seeking to change what the institution is.” Roberts characterized “the opposite-sex relationship” as “the fundamental core of the institution” of marriage, and he signaled opposition to the idea that judges rather than legislatures or the voters in referenda should decide whether to change that definition.

As expected, Justice Antonin Scalia weighed in with arguments familiar to anybody who read the 6th Circuit opinion by Judge Jeffrey Sutton, one of his “originalist” acolytes. Scalia asserted that the question before the Court was not “where there should be same-sex marriage,” but rather “who should decide the point,” and clearly signaled his view that it should be decided by the democratic process of voting and legislating, not by judges. None of Justice Samuel Alito’s questions or comments suggested any real sympathy for the plaintiffs’ position either, and of course Justice Clarence Thomas was true to form in refraining from questioning or offering comments.

So, as had been speculated from the beginning, the outcome will likely fall to Justice Kennedy, and his opening sally was not calculated to reassure those who were counting on him.
time between striking down sodomy laws and the present case on same-sex marriage. “And so there’s time for the scholars and the commentators – and the bar and the public – to engage in it,” he pointed out.

Kennedy came closer to tipping his hand in the other direction when John Bursch stood up to argue on behalf of the states defending their marriage bans. Kennedy pressed Bursch to explain how allowing same-sex couples to marry would harm “conventional marriage,” but he left it to the other justices, particularly Breyer and Kagan, to pursue the point as Bursch put forward the notion that the state has a particular interest in assuring bonds between children and their biological parents, with Kennedy only interjecting a question or two along the way, although he characterized as “just a wrong premise” the argument that “only opposite-sex couples can have a bonding with the child.”

Kennedy seemed particularly indignant when Bursch discounted the significance of the dignity that the state bestows on a couple by according them the right to marry. Bursch had suggested that the state has no particular interest in this, being primarily concerned with children, not with the relationship between the adults. This was not a good strategic move on his part, in light of Kennedy’s expressed concern in his DOMA opinion about the “dignity” states confer on married couples. “I don’t understand this not dignity-bestowing,” Kennedy commented. “I thought that was the whole purpose of marriage. It bestows dignity on both man and woman in a traditional marriage. It’s dignity bestowing, and these parties say they want to have that same ennoblement.” When Bursch insisted that “the State has no interesting in bestowing or taking away dignity from anyone, and certainly it’s not the State’s intent to take dignity away from same-sex couples or from anyone based on their sexual orientation,” Kennedy sharply responded, “Well, I think many states would be surprised, with reference to traditional marriages, they are not enhancing the dignity of both the parties.”

One absurd point arose when Scalia questioned Bonauto about whether a minister might be required to perform same-sex marriages against his or her religious belief. Bonauto responded that the First Amendment would shield a minister from any such obligation, but Scalia insisted that if there was a constitutional right to marriage, that might be held to overcome the minister’s free exercise of religion defense. Bonauto pointed out that no minister had been prosecuted for refusing to perform marriages in marriage equality states, and Justice Kagan jumped in with the example of rabbis who refuse to perform marriages between Jews and non-Jews. While listening to this part of the argument, I was waiting for somebody to raise the example of Catholic priests who condition their willingness to perform marriages between Catholics and non-Catholics upon the commitment of the non-Catholic parent that the children be raised as Catholics, but nobody suggested that. Of course, consistent with the Free Exercise Clause, no court would ever order a religious officiant to perform weddings that would violate their religious beliefs, so this was a silly line of questioning.

Solicitor General Donald Verrilli focused his argument entirely on equal protection, and he was pushed during the questioning on his failure to make the fundamental right to marry argument. It became clear from the questioning from the conservative justices that they saw the right to marry argument as a non-starter because of – at least in their view – the difficulty of accepting a fundamental right to marry and then having to confront arguments on behalf of a right to plural marriages. Alito posed a hypothetical about two men and two women seeking to marry as a foursome, which introduced a discordant note into the discussion, and Scalia also harped on this issue.

Verrilli closed his brief argument with a strong pitch for an equal protection decision, stating that “in a world in which gay and lesbian couples live openly as our neighbors, they raise their children side by side with the rest of us, they contribute fully as members of the community, that it is simply untenable, untenable, to suggest that they can be denied the right of equal participation in an institution of marriage, or that they can be required to wait until the majority decides that it is ready to treat gay and lesbian people as equals. Gay and lesbian people are equal. They deserve equal protection of the laws, and they deserve it now.”

Bonauto closed with a rebuttal argument that was so precise and well-focused that she was not interrupted for any questions as she highlighted the basic inconsistencies in Bursch’s arguments. One note of unexpected drama was introduced when a member of the audience stood after Bonauto had finished and burst into a diatribe about sin and abomination until escorted out by security officials. Chief Justice Roberts seemed ready to delay the Solicitor General’s argument, but Verrilli signified he was ready to press forward. Scalia made a cryptic remark that the outburst was “refreshing.” Perhaps he meant to suggest that the Court seriously consider religious objections to same-sex marriage.

After a brief recess, the Court turned to the second question, whether states are required by the 14th Amendment to recognize same-sex marriages contracted in other states. Douglas Hallward-Driemeier was quickly interrupted by Justice Alito. “I am somewhat surprised by the arguments you made in your brief,” he said, “because they are largely a repetition of the arguments that we just heard with respect to Question 1. I thought the point of Question 2 was whether there would be an obligation to recognize a same-sex marriage entered into in another State where that is lawful even if the State itself, constitutionally, does not recognize same-sex marriage. I thought that’s the question in Question 2. Am I wrong?”

This quickly clarified a mystery that had caused much speculation among legal commentators after the Court announced that it would review the 6th Circuit’s decision. Why the second question, since it seemed obvious that if same-sex couples have a right to marry the right to recognition of out-of-state
marriages would naturally follow? This question was posed so that if the Court ruled against the plaintiffs on the right to marry, it could then confront the question whether a state that refuses to allow same-sex marriages – and is constitutionally free to do so – may nonetheless be obliged to recognize out-of-state same-sex marriages. Justice Alito’s question thus framed the issue for the second hour of argument.

And Alito and Scalia energetically followed up with questions and hypotheticals about forcing states to recognize the validity of marriages that they wouldn’t allow to be formed within their own borders. Even Kennedy joined in briefly, pointing out that if the Court determined that states do have a sufficient justification for refusing to issue marriage licenses to same-sex couples, might not the same justification suffice to allow them to refuse to recognize such marriages from out-of-state? Justice Ginsburg did jump in to nail down the point that if the plaintiffs won the right to marry on Question 1, “then the argument is moot.” Hallward-Driemeier agreed with her, as Joseph Whalen also conceded during his part of the argument. Hallward-Driemeier emphasized the harms to same-sex couples who married and had children in other states and then might be moved by an employer – the starkest example was the military as an employer – to a state that didn’t recognize their marriage. This seemed well-calculated to appeal to Justice Kennedy, since he had articulated a concern for the welfare of children of same-sex couples in his DOMA opinion.

As soon as Whalen got up to defend the recognition bans, Scalia appeared to surprise him by raising the Full Faith and Credit Clause, Article IV of the Constitution, which has barely been mentioned over the past two years of marriage recognition litigation. In 1996, Congress adopted as part of the Defense of Marriage Act a provision stating that states were not required to accord full faith and credit to same-sex marriages from other states. That provision has not been declared unconstitutional, and in the DOMA decision Justice Kennedy observed that it was not being challenged in that case. Instead, lower federal courts have focused on the Equal Protection Clause and generally found that states had no rational basis for recognizing different-sex marriages from other states, but refusing to recognize same-sex marriages. Some scholars addressing this issue after passage of DOMA in 1996 observed that, traditionally, the Full Faith and Credit Clause had not been invoked in marriage recognition cases, since it was not really clear that the Clause even applied to marriages.

But Scalia pressed the point with Whalen. Always the textualist, Scalia said, “I’m so glad to be able to quote a portion of the Constitution that actually seems to be relevant. ‘Full faith and credit shall be given in each State to public acts, records, and judicial proceedings of every other State.’

Other justices were soon drawn in to what became a rather esoteric conversation about the interpretation and application of the Full Faith and Credit Clause, which one suspects was not fully anticipated by the advocates. There even seemed to be some indication, if perhaps just fleeting, that Chief Justice Roberts might see an application of the Full Faith and Credit Clause here, which could feed speculation that even if the Court were to rule adversely on Question 1, there might be a majority including some of the more conservative justices in favor of marriage recognition. But only fleeting...
to marriage is to link children with their biological parents. When that breaks down, then there’s adoption.” Sotomayor responded by asking whether a state can refuse to recognize a birth certificate issued by another state that identifies same-sex spouses as the parents of a child. “Do you think the word ‘records’ in the Constitution includes birth certificates,” referring again back to the Full Faith and Credit Clause. After Whalen’s affirmative response, Sotomayor continued, “So California without any reason, no suspicion of fraud, no anything, could it refuse to recognize another State’s birth certificate. Records to me has to have a meaning.”

“Record has a meaning,” Whalen responded. “It does, your Honor. The reason that I’m hesitant is that I know that there is disagreement in the cases about exactly what the impact of that is between whether that just means we have to acknowledge the existence of the record for evidentiary purposes, or whether the effect of the record has to be acknowledged.”

“But if a birth certificate were to be a record,” asked Sotomayor, “don’t you think a marriage certificate – it’s an official act of a State.” While Whalen acknowledged as much, he continued, “I think that the laws that allowed that marriage to occur, when they are different fundamentally with the laws of a State like Tennessee, preclude the application of that same principle from one State to the other.”

Hallward-Driemeier’s rebuttal, like Bonauto’s, was so tightly focused that none of the justices interrupted with questions. He concentrated on demonstrating the real harms suffered by same-sex couples exemplified by two of the plaintiff couples who had relocated and been denied recognition of their marriages, in one case in the context of emergency medical care for one of their children. This, of course, was well-calculated to invoke Justice Kennedy’s concern. For those looking to read the Kennedy tea leaves, there was little to work on in the Question 2 argument, since he barely spoke at all. Hallward-Driemeier ended with the stark evocation of Jim Obergefell’s struggle to be properly recorded as a surviving spouse on his husband’s death certificate.

Commentators and analysts are likely to pick over the transcript and audio recordings for the next few months trying to find hopeful signs about how the case will turn out, but they may be disappointed to find that the likely “swing” voter, Justice Kennedy, had much less to say than those justices whose positions are much more predictable pro and con. Chief Justice Roberts’ brief flirtation with treating this as a sex discrimination case seemed just that – a brief flirtation, unlikely to prevail over his concern about shutting off the political debate by rendering a constitutional ruling for marriage equality.

The most hopeful sign for marriage equality proponents springs not from these arguments, but more from the prior actions of the Court, denying review of the 4th, 7th and 10th Circuit pro-marriage equality rulings last October 6, which allowed same-sex marriage to go into effect eventually in all the states in those circuits, and denying stay petitions from several 9th Circuit states as well as Florida and Alabama, in cases that had not yet been reviewed by the 11th Circuit Court of Appeals (which had also refused to stay the marriage equality rulings from those states). These actions seemed to clearly indicate that a majority of the Court was on-board with marriage equality, since the stay denials contributed to facts on the ground spreading marriage equality to 37 states representing over 70% of the population, and making the prospect of an adverse ruling on Question 1 a daunting proposition liable to generate frenzied litigation over the status of thousands of marriages performed in those states. When viewed from that perspective, it seemed highly likely that Justice Kennedy would overcome any qualms he might have about suddenly abandoning “millennia” of different-sex marriage traditions in favor of avoiding the dignitary, financial, and other harms suffered by same-sex couples and their children denied the benefits of marriage.
Florida Courts Can Grant Divorces to Married Same-Sex Couples

The Florida 2nd District Court of Appeal ruled on April 24 in Brandon-Thomas v. Brandon-Thomas, 2015 Fla. App. LEXIS 6051, 2015 WL 1874457, that a same-sex couple that married in Massachusetts but resides in Florida could seek a divorce in a Florida court. The unanimous three-judge panel found that the state had no rational basis for treating such a marriage differently from other out-of-state marriages. The ruling reverses a 2013 decision by Lee County Circuit Judge John E. Duryea, Jr., who dismissed the divorce petition filed by Danielle Brandon Thomas.

Danielle and Krista Brandon Thomas married in Massachusetts in 2012 and subsequently relocated to Florida. They have a child, for whom Krista is the birth mother. According to the per curiam opinion issued by the Court of Appeal, “the marriage soured” after they relocated to Florida, and Danielle filed a divorce petition in October 2013. In her petition, Danielle asked the court to “determine parental responsibility and child support issues, as well as equitable distribution.”

Why would Krista oppose the divorce petition? In her motion to dismiss the petition, she “alleged that she was both the birth mother and genetic mother of the child and that Danielle therefore had no standing to request shared parental responsibility or child support.” It seems that Krista hoped, by defeating the divorce petition, to avoid a court ruling that Danielle was entitled to exercise parental rights to the child, or a court ruling requiring a division of assets.

The trial court based its dismissal on Florida’s Defense of Marriage Act and a state constitutional amendment that forbids recognition of same-sex marriages. At the time the trial court ruled, those provisions had yet to be declared unconstitutional. But after the U.S. Supreme Court’s June 2013 decision striking down part of the federal Defense of Marriage Act, several lawsuits were filed by same-sex couples in Florida seeking both the right to marry and the right to recognition of out-of-state marriages. Florida Attorney General Pam Bondi has energetically opposed these lawsuits and appealed adverse rulings. However, on December 19, 2014, the U.S. Supreme Court rejected her petition to stay a federal trial court ruling finding the Florida laws unconstitutional under the 14th Amendment, and same-sex couples began marrying in Florida early on January 6, 2015.

Instead of issuing a ruling that, of course, Florida courts can decide divorce cases for married same-sex couples because same-sex marriage is now legal in Florida, the court ruled as if the status of those Florida laws relied upon by Krista has not changed.

Surprisingly, the per curiam opinion by the court doesn’t mention any of this marriage litigation and doesn’t purport to base its ruling on the federal decisions, although they are mentioned in a concurring opinion by Judge Edward C. LaRose. Instead of issuing a ruling that, of course, Florida courts can decide divorce cases for married same-sex couples because same-sex marriage is now legal in Florida, the court ruled as if the status of those Florida laws relied upon by Krista has not changed.

Instead, the court based its decision on the Full Faith and Credit Clause of the U.S. Constitution, which provides: “Full Faith and Credit shall be given in each State to the public acts, Records, and judicial Proceedings of every other State.” After noting that Florida courts have not treated “sexual orientation” as a “suspect classification,” the court said that “the right of a same-sex couple to seek a dissolution of marriage in Florida, when they were validly married in another state but now live in Florida, is not a fundamental right for federal constitutional purposes. Thus, Florida bears the burden of presenting only a rational basis for its classification.”

The court found that neither Krista, in opposing the divorce petition, nor the state, which intervened to advance its view that Florida courts may not recognize out-of-state marriages, even for the purpose of dissolving them, had failed to present such a “rational basis” for the Florida laws forbidding recognition of same-sex marriages.

“Krista refers to ‘a societal inducement for opposite-sex couples to marry, thus decreasing the percentage of children accidentally conceived outside of a stable, long-term relationship,’” commented the court. “But this argument seems to ignore the biological fact that same-sex couples do not contribute to the problem of children ‘accidentally conceived’ outside of a stable, long-term relationship because, as a matter of pure biology, same-sex couples simply cannot ‘accidentally conceive’ children.” This comment seems ironic, since prior to the recent
surge of marriage equality decisions, several courts, including New York’s highest, had relied on the biological impossibility of same-sex couples accidentally conceiving children as a justification for the state providing marriage for different-sex couples but not same-sex couples. Now the tables are turned!

Attorney General Bondi argued that “Florida’s refusal to recognize same-sex marriage furthers Florida’s longstanding history of defining marriage as being between a man and a woman.” The court pointed out that refusing to give divorces to married same-sex couples living in Florida “seemingly contravenes Florida’s public policy.” “If the policy is to prevent, eliminate, discourage, or otherwise preclude same-sex marriage in Florida, permitting the courts to dissolve same-sex marriages that have been previously entered into in other states would arguably further that policy by reducing the number of same-sex married couples in Florida,” the court wrote, stating that the Attorney General had failed to identify a “public purpose” that is served by denying divorces to such couples.

The court was disturbed by the practical impact of the trial court’s order dismissing the case, which is to deprive Danielle and the child of a judicial forum for determining what custody and visitation and child-support arrangements should be. “The fact that a child is involved implicates Florida’s strong public policy to protect children by determining custody matters in accordance with the best interests of the child,” the court concluded.

In his concurring opinion, Judge Darryl C. Casanueva emphasized an alternative theory for finding jurisdiction: a right of access to the courts to determine the legal rights and responsibilities of parties upon the break-up of a marriage. Same-sex couples married out-of-state are similarly situated with different-sex couples married out of state and equally in need of access to Florida courts to dissolve their marriages. The judge pointed out that the U.S. Supreme Court had found a due process violation in the past when a state imposed significant fee barriers to couples seeking access to the courts for divorces, making them practically unavailable for poor people. Thus, the right of access for a divorce is encompassed within the liberty protected by the Due Process Clause of the 14th Amendment.

Furthermore, he argued, this case wasn’t about same-sex marriage. “A divorce proceeding does not involve recognition of a marriage as an ongoing relationship,” he wrote. “Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition is met, the laws regarding divorce apply. Laws regarding marriage play no role.” Judge Edward C. LaRose also concurred, emphasizing that the state’s statutory marriage recognition ban would have “minimal application to a case involving a divorce of a same-sex couple validly married in another state.” While mentioning the federal marriage equality developments in Florida, Judge LaRose did not rely on them to reach his conclusion. But in noting the practical impact of the trial court’s order, he pointed out that 37 states and the District of Columbia now have same-sex marriage. “Although divorce does not inevitably follow marriage,” he wrote, “we should anticipate that many married same-sex couples, unfortunately, will need to dissolve their unions. It is hard to fathom that the legislators who passed [Florida’s recognition ban] envisioned a scenario where assets remain unmarketable for lack of an equitable distribution. Nor could they have reasonably anticipated a system that disregards the best interests of a child raised and nurtured in a same-sex home. There can be no question but that Florida has a compelling interest in protecting children subject to its jurisdiction.”

Surprisingly, the court never mentioned the federal Defense of Marriage Act (DOMA) in its opinion. Although the Supreme Court declared part of DOMA unconstitutional in 2013, it left untouched Section 2, which provides that states are not required to give “full faith and credit” to same-sex marriages contracted in other states. Thus, in DOMA Congress gave Florida permission to withhold recognition from same-sex marriages such as that of Danielle and Krista. Although many commentators have suggested that Section 2 of DOMA is unconstitutional, most of the litigation about marriage recognition over the past two years has virtually ignored it, as did the Florida court in this case.

The second question certified for review by the Supreme Court when it decides the pending marriage equality cases, Obergefell v. Hodges, was whether states are constitutionally required to recognize same-sex marriages from other states. In Brandon-Thomas v. Brandon-Thomas, the Florida 2nd District Court of Appeal has answered this question in the affirmative.

Attorneys Luis E. Insignares and Brian J. Kruger of Fort Myers represent Danielle and Michael E. Chionopoulos of Fort Myers represents Krista. The case will be returned to the Lee County Circuit Court for a hearing on Danielle’s divorce petition.
EEOC Rules on Transgender Employee Restroom Rights

The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcement of federal bans on sex discrimination in employment, has ruled that a transgender woman employed in a civilian position by the U.S. Department of the Army is entitled to use restroom facilities consistent with her gender identity, despite the agency’s objection to providing such access before the individual has undergone sex-reassignment surgery. Lusardi v. McHugh, Appeal No. 0120133395 (EEOC). Although the EEOC had previously ruled that refusal to employ somebody because of their gender identity was a form of sex discrimination in violation of federal law, this was its first pronouncement on one of the great looming issues in transgender workplace rights: restroom access.

The complainant, Tamara Lusardi, was hired as a male-identified person in 2004 as a civilian employee with the U.S. Army Aviation and Missile Research Development and Engineering Center in Huntsville, Alabama. The case decided by the EEOC relates to events from October 2010 through August 2011, when she was assigned to the AMRDEC Software Engineering Directorate and was also doing work at the Project Management office, Aircraft Survivability Equipment, as a Software Quality Assurance Lead.

As early as 2007 Lusardi had begun to discuss her gender identity issues with the Division Chief, and she began the actual transitioning process in 2010, obtaining a legal name change from an Alabama court in April of that year from a male-identified first-name to her desired name of Tamara. She requested that her name be changed in Department records, which was effected on October 13, 2010. Two weeks later, at the request of the supervisor on the Aircraft Survivability Equipment job, she met with that supervisor and the Division Chief to discuss the process of transitioning to presenting herself in conformance with her gender identity, and the issue of how she would relate to co-workers came up, particularly regarding restroom use once she began presenting as a woman. An agreement of sorts was reached, and memorialized in writing, that she would use a single-user restroom, referred to as the “executive restroom,” until she had undergone sex reassignment surgery.

She generally adhered to that agreement, but there were a few occasions when that restroom was unavailable or out of order, so she used the restroom designated for women, which brought forth objections from the supervisor, and it turned into an issue. There was also a problem of harassment, derived from another supervisor’s apparent difficulty in accommodating to Lusardi’s gender identity. This supervisor persisted in referring to Lusardi with masculine pronouns or calling her “sir,” using her former first name, and “smirking” and “giggling” in front of others while stating “What is this, [Complainant’s former male name] or Tamara?”

Lusardi initially spoke with an Army EEO counselor about these issues in September 2011, and filed a formal complaint of disparate treatment and hostile environment with the Army’s EEO office on March 14, 2012. A final agency decision was issued on September 5, 2013, concluding that she had failed to show a violation of the applicable ban on sex discrimination. She appealed this ruling to the EEOC a few weeks later. She also filed a complaint with the Office of Special Counsel, which is charged with ruling on internal executive branch personnel matters. That office found that the restroom access denial was improper, in a report that ordered training for Army Department staffers but awarded no remedy to Lusardi.

Reversing the Army Department’s decision, the EEOC found that the disparate treatment in restroom access was a direct violation of the ban on sex discrimination. Following up on the logical implications of its prior decision, it held that a transgender woman who is presenting as a woman is entitled to be treated by her employer as a woman. This includes access to women’s facilities, regardless of whether the individual has had surgery. “This case represents well the peril of conditioning access to facilities on any medical procedure,” wrote the Commission. “Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals or anyone else). An agency may not condition access to facilities — or to other terms, conditions, or privileges of employment — on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.”

The EEOC also rejected the agency’s findings on the harassment claim, concluding that the insults to Lusardi were intentional, and ordered the agency to take concrete steps to educate its employees and supervisors on their non-discrimination obligations. The EEOC also ordered the agency to undertake a fact-finding investigation to determine compensatory damages for Lusardi in connection with the findings of sex discrimination and hostile environment. This is an important step forward on an issue that has divided courts presented with gender identity discrimination claims, even in jurisdictions whose laws expressly forbid gender identity discrimination or had been authoritatively construed to do so despite the lack of express gender identity language. It will be interesting to see whether it stands up when private plaintiffs or the EEOC pursue restroom access issues in the courts.
Federal District Court Finds that Transgender Employee Can Bring Only a Sex Stereotyping Claim under Title VII

On April 21, 2015, U.S. District Judge Sean F. Cox (E.D. Mich.) denied a motion to dismiss an employment discrimination action brought by the U.S. Equal Employment Opportunity Commission (EEOC) against a Detroit-based funeral home company that fired a transgender female funeral director and embalmer after she announced she was undergoing a transition. EEOC v. R.G. & G.R. Harris Funeral Homes, 2015 WL 1808308, 2015 U.S. Dist. LEXIS 53270. Judge Cox ignored a recent trend in the law, however, most notably the EEOC’s interpretation of Title VII of the Civil Rights Act of 1964 in Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), in which that agency found that gender identity discrimination is, as such, a form of sex discrimination. Cox ruled that the transgender employee may only bring a Price Waterhouse sex stereotyping claim “just like anyone else” under Title VII.

According to the agency’s complaint, R.G. & G.R. Harris Funeral Homes (Harris) had employed Amiee Stephens as a funeral director and embalmer since October 2007. In July 2013, she gave her employer and co-workers a letter explaining she was undergoing a gender transition from male to female, and would soon start to present as a woman in appropriate business attire at work. Two weeks later, Harris’s owner fired Stephens, telling her that what she was “proposing to do” was unacceptable.

The EEOC filed suit in September 2014, seeking both monetary and injunctive relief, after first trying to reach a pre-litigation settlement through its conciliation process. The agency asserted that the funeral home company’s decision to fire Stephens “was motivated by sex-based considerations . . . because Stephens is transgender,” because of her transition, and because she did not conform to her employer’s “sex- or gender-based preferences, expectations, or stereotypes.” Harris filed a motion to dismiss.

Cox, an appointee of President George W. Bush and the brother of former Michigan Attorney General Mike Cox, offers only a very short matter-of-fact analysis as to why transgender discrimination is not sex discrimination under Title VII, contrary to the EEOC’s conclusion in Macy. Judge Cox dismisses Harris’s remaining arguments as without merit, irrelevant, or improperly raised. Separately, the EEOC also asserted in the suit that Harris unlawfully engaged in another stereotyping gender-discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

With that in mind, Cox finds that Smith and another Sixth Circuit case “establish that a transgender person just like anyone else can bring a sex-stereotyping gender-discrimination claim under Title VII under a Price Waterhouse theory” and, therefore, “having alleged that Stephens’s failure to conform to sex stereotypes was the driving force behind the Funeral Home’s decision to fire Stephens, the EEOC has sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII.”

Cox dismisses Harris’s remaining arguments as without merit, irrelevant, or improperly raised. Separately, the EEOC also asserted in the suit that Harris unlawfully engaged in another Title VII violation by providing a clothing allowance only to its male employees. Harris did not challenge that claim in its motion to dismiss, so that sex discrimination claim remains in the case as well.

This is one of the first two federal district court lawsuits filed by the agency alleging sex discrimination against transgender individuals. The other, EEOC v. Lakeland Eye Clinic, was filed in the U.S. District Court for the Middle District of Florida (Case No. 8:14-cv-2421). They are part of the EEOC’s ongoing efforts to implement its December 2012 Strategic Enforcement Plan to cover lesbian, gay, bisexual, and transgender individuals under Title VII’s sex discrimination provisions as a top agency enforcement priority. – Matthew Skinner

Matthew Skinner is the Executive Director of LeGal.
His ruling distinguished the en banc decision of the First Circuit in Kosilek v. Spencer, which reversed an SRS injunction after trial for a Massachusetts inmate.

Norsworthy has received hormone therapy since 1996. She has become a “biological female,” who “walk[es] the yard ... as a woman.” In 2009, she was gang-raped by other inmates, contracting hepatitis-C.

Medically, Norsworthy is at risk from long-term dosages of hormones, including liver toxicity (exacerbated by hepatitis-C), age-related factors (she is 51), and allergy to spironolactone, the most common anti-androgen hormone. Her current “last resort” medications still create liver toxicity, and SRS would reduce her medical risks by removal of her testosterone-producing glands. Norsworthy’s treating psychologist determined that her condition “mandate[s] a sex change medical operation before normal mental health can be achieved.” She continues to experience “excruciating pain and frustration” as a result of her gender dysphoria and male genitalia.

Norsworthy formalized her requests for SRS after learning of Michelle Kosilek’s success in Massachusetts. Judge Tigar describes her odyssey through California’s prison grievance system. When her primary clinicians supported SRS, prison administration assigned new providers. At the final appeal, the reviewing physician (Dr. Raymond J. Coffin) was selected because he had “been through Dr. [Stephen] Levine’s training,” wherein participants were “clearly instructed” that SRS was “never an available treatment for incarcerated patients.” Although California regulations provided for

United States District Judge Jon S. Tigar issued a preliminary injunction directing sex reassignment surgery (“SRS”) “as promptly as possible” for transgender prisoner Jeffrey B. Norsworthy, a/k/a Michelle-Lael B. Norsworthy, in Norsworthy v. Beard, 2015 WL 1500971 (N.D. Cal., April 2, 2015). His ruling distinguished the en banc decision of the First Circuit in Kosilek v. Spencer, which reversed an SRS injunction after trial for a Massachusetts inmate. See 774 F.3d 63 (1st Cir. 2014), reported in Law Notes (January 2015), at pages 3-4. Judge Tigar’s lengthy opinion found that Norsworthy’s circumstances are different than Kosilek’s, and Norsworthy is sufficiently likely to prevail to warrant mandatory preliminary relief. He “expresses no view now as to whether Kosilek was otherwise correctly decided on its facts.” On April 27, he denied a motion by the state to stay his order pending appeal to the 9th Circuit, 2051 U.S. Dist.LEXIS 54909, 2015 WL 1907518, finding that the state had failed to meet the criteria for obtaining a stay, while Norsworthy’s need for the surgical procedure was urgent.

While fine distinctions are the grist of law, in this writer’s view, it is difficult to reconcile Norsworthy with Kosilek as an application of Eighth Amendment jurisprudence under Estelle v. Gamble, 429 U.S. 97, 104 (1976). A petition for certiorari was filed on March 16, 2015, in Kosilek, sub nom. Kosilek v. O’Brien, No. 14-1120. The case is set for conference on May 1, 2015. Even if certiorari is denied as expected in Kosilek, the two SRS cases seem destined to lead to a circuit split.

Norsworthy’s gender identity issues began before her life sentence for murder in 1987, but she has “openly identified as a transsexual woman” since the mid-1990’s.” Her current diagnosis is gender dysphoria under the DMS-V. Judge Tigar notes it “intensifies with age” and its management is subject to individualized treatment Standards by the World Professional Association for Transgender Health [“WPATH”]. The Standards specify that hormones and psychotherapy alone are “insufficient” for some patients, who require “medically necessary” SRS, which has “demonstrated” effectiveness and has not been considered “experimental” for over twenty years. While the Standards allow “reasonable accommodations” for institutional settings, they make clear: “Denial of needed changes in gender role or access to treatments, including sex reassignment surgery, on the basis of residence in an institution are not reasonable accommodations.”

Norsworthy has been gang-raped by other inmates, contracting hepatitis-C.

Medically, Norsworthy is at risk from long-term dosages of hormones, including liver toxicity (exacerbated by hepatitis-C), age-related factors (she is 51), and allergy to spironolactone, the most common anti-androgen hormone. Her current “last resort” medications still create liver toxicity, and SRS would reduce her medical risks by removal of her testosterone-producing glands. Norsworthy’s treating psychologist determined that her condition “mandate[s] a sex change medical operation before normal mental health can be achieved.” She continues to experience “excruciating pain and frustration” as a result of her gender dysphoria and male genitalia.

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have a male gender identity in one ‘community’ and a female gender identity in another.”

Physician R. Nick Gordon, who has treated hundreds of transgender patients, said that SRS was “medically necessary” (“urgent”) for Norsworthy and that it “should have been performed many years ago.” Its denial causes “significant and unnecessary pain.” Norsworthy’s current hormone therapy is “ineffective” and damaging.

Defendants relied on Dr. Stephen Levine, a defense expert in Kosilek. Norsworthy attempted to strike his testimony as “unreliable” under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Judge Tigar found it “shaky but admissible” under F. R. Evid. 702, which removed a possible appealable issue from the case.

Dr. Levine opined that legal advocates “exaggerate the suffering” from gender dysphoria; that SRS is “always” an “elective procedure”; and that, while Norsworthy’s gender identity is “consolidated as feminine,” her “existential distress does not constitute a necessity for immediate SRS.” He characterized her “transition” as an “adaptive response to long term incarceration.” Ultimately, Judge Tigar gave “very little weight” to these opinions.

California security concerns focused on post-SRS confinement, safety, and risk of future assault. Judge Tigar did not accept defendants’ proffered difficulties housing “one post-operative male-to-female transsexual individual.” He wrote that they were “hard to square” with the fact that California “already houses many women with a history of violence, including violence against their female partners.”

As to the standards for a mandatory preliminary injunction, Judge Tigar found it likely that Norsworthy would prove an Eighth Amendment violation in the denial of her SRS (finding it unnecessary to decide whether her right to Equal Protection was also violated). It was virtually undisputed that Norsworthy had a “serious medical need,” even under Kosilek, 774 F.3d at 86.

California prison officials tried to characterize the case as a dispute between types of treatment (not reachable under the Eighth Amendment), relying on Kosilek. Judge Tigar ruled that Norsworthy did not have to show “a complete failure to treat,” quoting De’onta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013) (which cited WPATH standards with approval); and he likewise rejected the Orwellian argument that Norsworthy’s “long-standing” need for SRS somehow made it “shaky but admissible” under Daubert.

Judge Tigar noted that Kosilek “is not binding” in the Ninth Circuit and that, in any event, the evidence in Norsworthy does not suggest that defendants made a bona fide decision between competing treatment modalities. Rather, they engaged in the very behavior Kosilek forbade: finding “a single practitioner willing to attest that some well-accepted treatment is not necessary.” 774 F.3d at 90 n. 12.

Judge Tigar found that Norsworthy would be irreparably injured without a mandatory injunction to stop the “continuation of this suffering... whether this is the first month she has suffered it or the hundredth.” He found that the balance of equities favored Norsworthy, even though ordering SRS as preliminary relief against defendants “potentially deprives them of appellate review.” He found that the public interest was served by an injunction to vindicate Norsworthy’s constitutional rights, citing Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012), and that there was “no interest in Norsworthy’s continued suffering during the pendency of this litigation.”

California Attorney General Kamala D. Harris moved for a stay, citing the scope of the order entered without a trial, claiming irreparable injury to the state if the SRS goes forward, confusing standards for handling similar requests from other transgender inmates, and the lack of controlling Ninth Circuit precedent. Judge Tigar denied the stay motion on April 27, and the state indicated it would renew its motion at the Court of Appeals, where this case is headed, whoever prevails.

Norsworthy is represented by Herman Joseph Hoying, Christopher J. Banks, Ian Thompson Long, and Megan Dy Lin, of Morgan Lewis & Bockius LLP, San Francisco; and by Ilona Margaret Turner, Jennifer Orthwein, and Shawn Thomas Meerkamper, Oakland. – 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.
United States District Judge Daniel R. Dominguez permitted a dozen prisoners to litigate claims for punitive damages after they were segregated in the Vega Alta women’s prison in Puerto Rico for “act[ing] like men,” in Lopez v. Ortiz, 2015 WL 1470566 (D.P.R., March 31, 2015). For five days in 2012, officers “herded” the plaintiffs into a visitation area openly called “bucholandia,” where they were surrounded by tactical officers, forced to sit and sleep on the floor, denied recreation and communal meals, threatened with pepper spray, and subjected to a “constant barrage of verbal abuse” and “all manner of homophobic insults on a daily basis.”

Seventeen inmates sued the officers and supervisors responsible, as well as their spouses. [Note: Under Puerto Rico law, married couples are a “conjugal partnership” for tort purposes, and spouses are proper defendants in civil rights cases, if marital assets may be affected by a judgment; moreover, the “conjugal partnership” itself is a “person” for purposes of 42 U.S.C. § 1983. See Mercado-Vega v. Martinez, 666 F. Supp 3, 5-7 (D.P.R. 1986).] Five plaintiffs’ claims were dismissed for failure to exhaust administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (“PLRA”).

Judge Dominguez first denied a motion to dismiss for lack of subject matter jurisdiction because the PLRA is an affirmative defense and does not deprive the court of subject matter jurisdiction, citing Jones v. Bock, 549 U.S. 199, 212 (2007). He then granted summary judgment against five plaintiffs, because defendants tendered evidence that they did not initiate any grievances. It is unclear from the opinion whether the remaining twelve were still incarcerated when the lawsuit was brought approximately a year after the events, but the PLRA would not apply if they started their lawsuit after they were released, even if the case is about former prison conditions. See Talamantes v. Leyva, 575 F.3d 1021, 1024 (9th Cir. 2007) (with string cite).

Judge Dominguez ruled that these remaining plaintiffs could not maintain an action for compensatory damages because they did not allege physical injury, as required under the PLRA, 42 U.S.C. § 1997e(e). Noting that the First Circuit has not addressed the issue, he nevertheless joined a majority of circuits that interpret § 1997e(e) to require physical injury as a condition precedent to recovery for mental or emotional injury – finding that insomnia and loss of appetite accompanying depression were emotional injuries “as a matter of law.” Compare Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 106-9 (D. Mass. 2005) (agreeing with “minority” view that constitutional torts are not included in § 1997e(e)).

On the other hand, the “majority” of circuits allow punitive and exemplary damages for constitutional torts notwithstanding the language of § 1997e(e), and Judge Dominguez adopted this view, citing dicta in Kuperman v. Wrenn, 645 F.3d 69, 73 (1st Cir. 2011). He also found it “odd” that the plaintiffs did not seek declaratory and injunctive relief, since it is not barred by § 1997e(e), and it is a long-standing remedy for unconstitutional conduct, citing Ex Parte Young, 209 U.S. 441 (1908). [Note: This may be an unstated standing issue: if plaintiffs avoided PLRA exhaustion by filing after release from custody, they could no longer seek an injunction against corrections.]

Judge Dominguez also found that the plaintiffs “retain” limited Equal Protection rights although incarcerated and that discrimination (here, segregation) founded on “sexual preference” and “non-stereotypical conforming physical appearance” states an Equal Protection claim. He then applied rational basis scrutiny (“reasonable relationship to legitimate penological interests”), with “deference” to security considerations under O’Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987): “friction” between inmates leading to violence. Nevertheless, he found that the plaintiffs’ pleading asserted “sufficient facts to plausibly state a claim” based on defendants’ conduct: “taking them to a room where they were surrounded by the Tactical Operations Unit all day”; subjecting them to daily homophobic insults and threats; and isolating them from the rest of the population for eating, sleeping and living – all without a “legitimate penological interest being served.”

Judge Dominguez also found that plaintiffs adequately plead an Eighth Amendment claim based on the same circumstances – “Plaintiffs were humiliated, harassed, isolated and abused by Defendants when they were herded and isolated to a separate unit, based on sexual-stereotyping,” thereby causing the “unnecessary and wanton infliction of pain,” which is “repugnant to the conscience of mankind” – citing (interestingly) the First Circuit en banc decision of Kosilek v. Spencer, 774 F.3d 63, 62 (1st Cir. 2014) (which denied an injunction for surgery for a transgender plaintiff). For pleading purposes, the conditions of plaintiffs’ segregation exceeded “routine discomfort” and met the “extreme” threshold of Eighth Amendment jurisprudence under Hudson v. McMillian, 503 U.S. 1, 9 (1992), even if they persisted for only five days. The complaint also alleged a “sufficiently culpable state of mind” by defendants who “conceived and coordinated” the segregation of “openly homosexual women” to satisfy the subjective component of Eighth Amendment liability under Farmer v. Brennan, 511 U.S. 825, 834 (1994).

The plaintiffs were represented by San Juan attorneys Steven P. Lausell–Recurt and Guillermo J. Ramos–Luina. – William J. Rold

Federal Judge Allows Punitive Damages Claim when Puerto Rico Women’s Prison Segregates “Butch” Inmates

A.H. and M.L. were in a committed relationship with one another and decided to have a child together. The couple created a document signed by A.H. and a sperm donor stating the donor relinquished his parental rights and that A.H. and M.L., the birth mother, intended to raise the child as their own. The child was named after members of A.H.’s family and given A.H.’s surname. A.H. hired legal counsel to pursue joint custody, and after W.R.L. filed a petition for step-parent adoption of the child, A.H. moved to intervene in the adoption proceeding and to have the adoption petition dismissed.

For a panel of the court, Chief Judge Glenn E. Acree stated that “in order to have standing in a case, a party must show that it has a judicially recognizable interest in the subject matter of the suit.” Relying on a 2010 Kentucky Supreme Court Case, A.H. argued that the Uniform Child Custody Jurisdiction and Enforcement Act would permit standing in a shared custody co-parenting situation; however, Judge Acree noted that the subject matter of the case here is not custody, but adoption, and that A.H.’s argument would “make an end-run around the requirements of the adoption statute” and cannot support standing for two reasons.

First, Judge Acree held that even a colorable claim to a right to seek custody will not confer the right to intervene in a separate adoption proceeding because A.H.’s interest in receiving custody in a different proceeding would not be a “present substantial interest” in the adoption but merely “an expectancy or contingent interest.” Second, Judge Acree found that A.H. lacked standing because she did not fit Kentucky’s definition of a “person acting as a parent,” because by statute such a person must have had physical custody of the child for a period of six consecutive months during the year immediately before the commencement of custody proceedings, and A.H. had not had physical custody of the child because M.L. was the sole parent named on the birth certificate of the child and A.H. had not lived with the child for more than four years prior to the proceedings being initiated.

Judge Acree further held that since A.H. cannot establish standing to pursue custody, A.H. could only intervene in the adoption proceeding if the court could “find some other basis to support a finding of standing,” stating that “standing to intervene in an adoption proceeding...is tantamount to standing to sue for adoption.” He noted that M.L. has not consented to A.H.’s adoption of her child and that without her consent, “the child is not available for adoption [because M.L.’s] parental rights have not been terminated.” Judge Acree stated that the court sees “nothing in these circumstances that would authorize A.H.’s intervention and interference with W.R.L.’s adoption of the child,” and reversed the Kenton Circuit Court’s decision and remanded the case with instructions to reinstate the adoption petition.

In a concurring opinion Judge Debra Lambert wrote to “acknowledge the difficult truth underlying the outcome of [the] case” and to state that the ruling is “a harsh result compelled by the law.” In fact, it is only in Judge Lambert’s concurrence that the gender of the parties was revealed, that one can determine that A.H. and M.L. were in a same-sex relationship, and that M.L. later married W.R.L., a man, as Chief Judge Acree’s majority opinion never discusses the gender of anybody involved. Judge Lambert ended her concurrence by stating: “Notwithstanding this opinion, or the opinion of any court, the greater power to do right by this child – and any child – resides in the hearts of the adults who love her.” – Bryan Johnson
Second Federal Judge Dismisses Constitutional Claim by a Transgender Inmate Who Was Forced to Strip by Corrections Officers as “Sport”

In a second decision in as many months, a federal judge has found no constitutional violation when corrections officials gratuitously forced a transgender inmate to strip in public for officers’ amusement. Last month, United States District Judge Edward J. Lodge dismissed a male-to-female inmate’s claim that her rights were violated when she was ordered to display her breasts to settle a “bet,” because the incident was not “severe” enough to violate the Eighth Amendment, in Stover v. Corr. Corp. of Am., 24373 (D. Idaho, February 27, 2015), reported in Law Notes (April 2015), at pages 145-6. Now, Oklahoma District Judge David L. Russell dismisses a civil rights case by a female-to-male inmate forced to display his genitalia in front of officers and inmates in Flurry v. Whetsel, 2015 U.S. Dist. LEXIS 45184 (W.D. Okla., April 7, 2015).

Flurry had been charged with drunk driving following an automobile accident. He had already been medically assessed at a hospital, searched at the jail, and issued detention clothing before officers forced him publicly to exhibit his vagina to “prove his gender.” Flurry plead that he was “mocked, harassed and humiliated by detention officers and placed in grave risk of danger.” He was not physically assaulted, but he was isolated and denied various privileges. He sued the county, the sheriff, and unknown “Doe” defendants after his release from custody. [Note: The Prison Litigation Reform Act (PLRA) – and all of its procedural hurdles – does not apply to inmates who bring suit after their release from prison, even if they are suing about events that occurred during incarceration. Thus, there is no discussion of the PLRA in this case.]

Judge Russell analyzed the case primarily as a substantive due process claim under the Fourteenth Amendment. He found that claims against the county and the sheriff in his official capacity were legally indistinguishable and failed because Flurry did not adequately plead an unconstitutional “policy” underlying the incident under Monell v. Dep’t of Social Servs., 436 U.S. 658, 690 (1978). He wrote that: (1) Flurry’s “assertions are strictly based on his limited personal experience” on the day of his arrest; (2) he offers “no facts to support” any “plausible” custom, practice, pattern or failure constituting “policy”; and (3) he fails to show how any policy was the “moving force” behind a violation of his rights. He rejected as too “broad” the argument in the jail by a group of officers, who forced an inmate to undress for public ridicule to “prove” his gender, even though he had already been medically examined, searched, and issued prison clothing. Judge Russell did not analyze the conduct of the “Doe” defendants (or even have them identified), but he used “no underlying constitutional violation by any of its officers,” as an additional reason to absolve the county and the sheriff, citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

Neither Judge Russell nor Judge Lodge addressed these cases as presenting unreasonable searches.
Transgender Student Loses Fight over Expulsion from University of Pittsburgh over Restroom Issues

The U.S. District Court for the Western District of Pennsylvania rejected a discrimination lawsuit by a transgender man who was expelled from the University of Pittsburgh at Johnstown in January 2012 for insisting on using men’s restroom and locker room facilities. *Johnston v. University of Pittsburgh*, 2015 WL 1497753, 2015 U.S. Dist. LEXIS 41823 (W.D. Pa., March 31, 2015). Just one day before the federal Equal Employment Opportunity Commission ruled that the Army had unlawfully discriminated against a transgender woman by denying her the right to use women’s facilities (see above), U.S. District Judge Kim R. Gibson reached an opposite conclusion in his March 31 decision, finding that transgender legal precedents under Title VII of the Civil Rights Act did not apply to this lawsuit.

When he applied to the University of Pittsburgh at Johnstown (UPJ) in March 2009, he listed “female” on his application form, as he had not yet been formally diagnosed as transgender or begun hormone treatments. He attended UPJ as an undergraduate for five semesters until his expulsion. Although he had applied as “female,” upon arrival for his first semester in August 2009, he “consistently lived as a male,” he alleged in his lawsuit. In August 2011, after his sophomore year, he asked the school to change the gender marker in his school records. This request was not acted upon because he could not meet the school’s requirement that he present a birth certificate in his legal name identifying him as male. The court’s opinion does not specify why he was born, but it seems likely that it was in a jurisdiction that won’t issue a new birth certificate that, however, he would have to get either a court order or a changed birth certificate.

Johnston consistently used the men’s restrooms on campus. Because he was living as a man, to do otherwise would be to risk a possible disorderly conduct arrest. What he didn’t anticipate, however, was that he would be arrested for using the men’s restrooms, as he was dressing and grooming as male. What seems to have triggered this development was his enrollment in a men’s weight training class, attended only by men, and his use of the men’s locker room throughout the spring 2011 semester. This came to the attention of the administration, and he was summoned to a meeting on September 19, 2011, after he enrolled in the class again for the fall semester. He was told he could no longer use the men’s locker room. He agreed to use a unisex locker room in the Sports Center, and was told that he could resume using the men’s locker room if his student records were “updated from female to male.” For that, however, he would have to get either a court order or a changed birth certificate.

Johnston filed a complaint with UPJ’s president, whose response was the same: get a court order or a new birth certificate. Doing neither, Johnston resumed using the men’s restroom and was arrested by campus police. He was barred from the Sports Center and disciplinary charges were brought against him. But he persisted in using men’s restrooms on campus, and was ultimately barred from the campus, suspended, and expelled in a proceeding culminating in a hearing before a student disciplinary panel. A University Appeals Board ruled against him. He lost his scholarship, and the Campus Police pressed criminal charges, leading to a guilty plea on trespass and disorderly conduct charges. After he was expelled, he claims the University retaliated against him by giving his name to the FBI in connection with an investigation of a bombing threat received by the University.

He filed a federal lawsuit alleging violations of the Equal Protection Clause of the 14th Amendment and Title IX of the Higher Education Act as well as various state laws. Pennsylvania state law does not prohibit discrimination because of gender identity, so his state law claims asserted sex discrimination. The Equal Protection Clause has been interpreted by the 11th Circuit Court.

U.S. District Judge Kim R. Gibson found that transgender legal precedents under Title VII of the Civil Rights Act did not apply to this lawsuit.
of Appeals to prohibit gender identity discrimination by a public employer. Title IX bans sex discrimination by colleges and universities that receive federal funding.

Johnston sought to build on a growing body of court and administrative decisions in other parts of the country recognizing gender identity discrimination as a form of sex discrimination. Most of those decisions are relatively recent, and as noted above, an important recent breakthrough decision by the EEOC on the restroom access issue was issued the day after Judge Gibson ruled against Johnston in this case.

Unfortunately for Johnston, the Supreme Court has yet to rule on a gender identity discrimination claim, and neither has the U.S. Court of Appeals for the 3rd Circuit, whose rulings bind the federal courts in Pennsylvania. Thus, Judge Gibson was facing a question of first impression in terms of binding precedent, and he resolved the question against Johnston, rejecting persuasive precedents from other jurisdictions.

“At the outset,” wrote Gibson, “the Court notes that society’s view of gender, gender identity, sex, and sexual orientation has significantly evolved in recent years. Likewise, the Court is mindful that the legal landscape is transforming as it relates to gender identity, sexual orientation, and similar issues, especially in the context of providing expanded legal rights. Within the context of these expanding rights and protections arise the profound question of self-identity, as exemplified by this case. But, while this case arises out of a climate of changing legal and social perceptions related to sex and gender, the question presented is relatively narrow and the applicable legal principles are well-settled.”

Finding that the University had a legitimate interest in protecting the privacy of other students who did not want to share sex-segregated restroom and locker room facilities with persons of the other sex, Gibson concluded that, whether ruling under the Equal Protection Clause or Title IX, the University had a sufficient justification for excluding Johnston from facilities reserved for men. His conclusion was bolstered by 3rd Circuit rulings from early in the history of Title IX upholding sex-segregated educational facilities, and he emphasized Johnston’s failure to allege that he had completed sex-reassignment surgery or obtained a new birth certificate indicating his sex as male. Clearly, the University had stated that it would allow Johnston to use male facilities if he met the University’s requirement of a completed surgical gender transition with such documentation.

While acknowledging the growing body of lower federal court rulings in employment discrimination cases brought by transgender plaintiffs, Gibson insisted that employment rights were different from the issues raised in this case of access to educational facilities, where the University could be concerned about the safety and privacy interests of other students. UPI allowed Johnston to attend classes and use campus facilities for more than two years presenting himself as male, even though he applied as female. It was when Johnston pushed things forward by enrolling in the men’s weight training class and using the men’s locker room that alarm bells went off about the privacy interests of other students, and he was not barred from participating in that class during the Fall 2011 semester, just from using men’s restroom and locker room facilities, with the compromise offer of a gender-neutral restroom that was usually used by referees.

Having decided there was no federal claim Judge Gibson exercised his discretion to refuse to entertain Johnston’s state law claims. The retaliation claim failed upon Gibson’s conclusion that Johnston’s sex discrimination claims were not viable.

Gibson’s reasoning and conclusions were contradicted the next day by the EEOC’s ruling in Tamara Lusardi’s case against the Army. The EEOC concluded that under Title VII, a person identified as male at birth who was diagnosed with gender identity disorder, undertook transitional treatment (hormones), and was presenting as a woman with a legal name change, was entitled to be treated as a woman with access to women’s facilities, regardless whether she submitted to surgical procedures. The EEOC said that it was not up to the employer to impose its own surgical requirement in order to recognize a person’s desired gender identity. While Judge Gibson emphasized the privacy interests of students and the University’s overriding concern with the well-being of students, one could advance similar arguments in an employment setting. In fact, the Army argued in Lusardi’s case that restricting her from using the women’s restroom was largely motivated by concern over the privacy interests of female co-workers.

In both cases, the defendant had offered a gender-neutral restroom facility for the plaintiff’s use. The EEOC said the Army’s insistence on this was unlawful sex discrimination, but Judge Gibson concluded the opposite. This tension in the interpretation of laws or constitutional provisions dealing with sex discrimination in gender identity cases awaits resolution at a higher level, either by the Supreme Court or by enactment of a broad non-discrimination law by Congress that includes gender identity. Neither resolution seems imminent, as the state of Georgia did not seek Supreme Court review of the 11th Circuit case, and there seems little interest in Congress in amending federal sex discrimination laws to encompass gender identity. Passage of the Employment Non-Discrimination Act would solidify Lusardi’s victory at the EEOC, but would do nothing to affect Johnston’s case, which would require an amendment to Title IX. The EEOC has undertaken a litigation effort to establish appellate precedents in more circuits finding that gender identity discrimination is sex discrimination, perhaps culminating in a Supreme Court ruling, but a final resolution along those lines is probably years off.

Johnston is represented by Howard H. Stahl of Fried, Frank, Harris, Shriver & Jacobson LLP (D.C. office), Ilona M. Turner and Sasha Jean Buchert of the Transgender Law Center, Oakland, California, and Jesse R. Loffer and Mark Siegmund of Fried Frank’s New York office. Perhaps this is the case that will finally break through to bring the issue of gender identity discrimination to the Supreme Court.
Federal Court Suggests Title IX May Ban Sexual Orientation Discrimination by Educational Institutions

In Videckis v. Pepperdine University, 2015 U.S. Dist. LEXIS 51140, 2015 WL 1735191 (C.D. Cal. Apr. 16, 2015), U.S. District Judge Dean D. Pregerson found that the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is “blurry, at best,” and thus a claim that the plaintiffs, a lesbian couple, were discriminated against on the basis of their relationship and sexual orientation may fall within the bounds of Title IX, which protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.

Plaintiffs, a lesbian couple, Haley Videckis and Layana White, were former members of the Pepperdine University women’s basketball team, coached by Ryan Weisenberg (Coach Ryan). They allege that in the Spring of 2014, Coach Ryan and other staff members deduced that plaintiffs were lesbians and dating, which was a “cause of concern” for the team. Plaintiffs allege that beginning in February 2014, Adi, the athletic academic coordinator, would hold meetings with each of them in order to determine their sexual orientation and relationship status.

In September, Videckis was relieved from activities having to do with the basketball team. In November, Videckis was relieved from activities having to do with the basketball team. In November, Videckis received a letter from the Title IX coordinator stating that there was insufficient evidence to conclude that harassment or sexual orientation discrimination had occurred, and that the team doctor, Dr. Green, claim to have not received the documentation to medically assess her fitness.

A plaintiff alleging a claim for invasion of privacy under the California constitution must establish three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. Plaintiffs alleged that the medical record requests were motivated by the desire to harass them and force them to quit the basketball team. The court held that although plaintiffs had a reasonable expectation of privacy as to their sexual orientation and the right to be free from questions relating to or to determine to make a decision as to whether she wanted to remain on the team. The school began an investigation. Until it was completed, Videckis was relieved from activities having to do with the basketball team. In November, Videckis received a letter from the Title IX coordinator stating that there was insufficient evidence to conclude that harassment or sexual orientation discrimination had occurred, and further that the team doctor, Dr. Green, claim to have not received the documentation to medically assess her fitness.

Plaintiffs’ First Amended Complaint alleged three causes of action: (1) violation of the right of privacy under the California constitution; (2) violation of California Educational Code §§ 220, 66251, and 66270; and (3) violation of Title IX. Pepperdine moved to dismiss all claims.

A plaintiff alleging a claim for invasion of privacy under the California constitution must establish three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. Plaintiffs alleged that the medical record requests were motivated by the desire to harass them and force them to quit the basketball team. The court held that although plaintiffs had a reasonable expectation of privacy with respect to gynecological medical records, the complaint only alleged specific facts regarding demands for records of Videckis’ tailbone injury, which was permissible because it was related to her ability to play basketball.

Plaintiffs next argued that they had a reasonable expectation of privacy as to their sexual orientation and the right to be free from questions relating to or to determine
that questioning with regard to their relationship was persistent and aggressive, must provide, like a federal cause of action under Title IX, that (1) he or she suffered severe, pervasive and offensive harassment, that effectively deprived plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had actual knowledge of that harassment; and (3) the school district acted with deliberate indifference in the face of such knowledge. Pepperdine’s argument went to the strength of the plaintiffs’ allegations, not whether they had a plausible claim, arguing that plaintiffs failed to state a cause of action under Title IX because it only bans discrimination based on gender, not sexual orientation. In light of this, Plaintiffs requested leave to amend, arguing that they can state a claim on the basis of “stereotyped gender roles.”

The court noted that recent case law from the Supreme Court and from the Ninth Circuit indicated that the bounds of Title IX may not be so narrow as to not cover sexual orientation under Title IX. See, e.g., United States v. Windsor, 133 S. Ct. 2675, 2696, 186 L. Ed. 2d 808 (2013) (striking down the federal Defense of Marriage Act because no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity); SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (interpreting Windsor to apply heightened scrutiny to classifications based on sexual orientation discrimination); Latta v. Otter, 771 F.3d 456, 479-495 (9th Cir. 2014) (reasoning that Idaho and Nevada’s same-sex marriage proscriptions are unconstitutional not only because they discriminate on the basis of sexual orientation, but also because they discriminate on the basis of sex since: (1) they facially classify on the basis of gender, and (2) they are based in gender stereotypes) (Berzon, J., concurring).

Judge Pregerson wrote: “The law is rapidly developing and far from settled insofar as determining where sexual orientation discrimination lies within the framework of gender-based discrimination. Recent Ninth Circuit cases suggest that the distinction between sexual orientation discrimination and sexual orientation discrimination is illusory. Furthermore, discrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination even if such discrimination were not based explicitly on gender stereotypes.”

The court further explained that a policy that holds that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender, because their chosen partner was female. The court then noted that if this occurred on a men’s basketball team, the unequal classification would still hold, so the court was disinclined to give weight to older out-of-circuit cases that made categorical distinctions between gender-based discrimination and sexual orientation discrimination. The court dismissed the plaintiffs’ Title IX claim with leave to amend, despite Pepperdine’s protest that plaintiffs have already had multiple chances to amend. The court stated that “the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best, and thus a claim that Plaintiffs were discriminated against on the basis of their relationship and their sexual orientation may fall within the bounds of Title IX.”

The court dismissed the plaintiffs’ invasion of privacy claim only insofar as it is based on the medical records, dismissed the Title IX claim with leave to amend, and denied Pepperdine’s motion otherwise. – Anthony Sears

Anthony Sears studies at New York Law School ('16).
Georgia Allows Individualized Treatment of Transgender Inmates after Department of Justice Files “Statement of Interest”

The Civil Rights Division of the United States Department of Justice (“DOJ”) filed a “Statement of Interest” in the ongoing civil rights lawsuits of Georgia transgender prisoner Ashley Alton Diamond, stating: “Failure to provide individualized and appropriate medical care for inmates suffering from gender dysphoria violates the Eighth Amendment’s prohibition on cruel and unusual punishment,” citing Estelle v. Gamble, 429 U.S. 97, 104 (1976); Kothmann v. Rosario, 558 F. App’x 907, 910 (11th Cir. 2014); and Fields v. Smith, 653 F.3d 550, 554-55 (7th Cir. 2011). The Statement, filed under 28 U.S.C § 517, invoked the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, which authorizes the DOJ to address “egregious or flagrant conditions” that abridge constitutional rights.

Prior to the recent change, Georgia adopted a “freeze-frame” policy that refused to allow diagnostic assessment or treatment for transgender inmates when treatment had not been initiated prior to incarceration. The DOJ Statement argued that the “freeze-frame” approach impermissibly prohibits individualized medical determinations and is facially unconstitutional. To this writer’s knowledge, this is the first time DOJ has entered the fray regarding transgender rights in prison, although it has supported transgender rights in education, housing, and employment. The Statement endorsed individualized treatment standards promulgated by the World Professional Association for Transgender Health (WPATH).

Diamond’s multiple pro se cases had previously resulted in published opinions regarding her health care – see Diamond v. Silver, 2013 U.S. Dist. LEXIS 176049 (M.D. Ga., December 16, 2013), reported in Law Notes (January 2014) at page 38 – and her safety – see Diamond v. Allen, 2014 WL 6461730 (M. D. Ga., Nov. 17, 2014), reported in Law Notes (December 2014), at page 512-13. She is now represented by attorneys at the Southern Poverty Law Center, Montgomery.

Less than a week after the DOJ Statement, Georgia changed its policy, according to the New York Times, “Georgia Says Now Will Allow Hormones for Transgender Inmates” April 9, 2015) at P. A-16, which quotes Federal District Judge Marc D. Treadwell as calling the change a “tectonic shift.” He later heard from Diamond herself, when she sought a transfer to a lower security institution. Judge Treadwell denied the request – “Judge Denies Transgender Inmate’s Request for Transfer,” New York Times (April 21, 2015) at page A-12. He found that, although Diamond had a history of being assaulted and was still afraid, she was now housed in a special needs unit with only eleven other inmates – a “positive” change leading Judge Treadwell to find insufficient present evidence of deliberate indifference by the prison to her safety to warrant an injunction.

According to the New York Times, a prison psychologist who was supposed to testify for Diamond at the latest hearing was “taken suddenly ill.” Diamond testified that he told her that he was afraid of losing his job if he testified “truthfully,” causing Judge Treadwell “lingering concerns.”

And the beat goes on.... To paraphrase “The Imitation Game”: improbable things can happen in improbable places. – William J. Rold

2nd Circuit Reverses Jury Verdict in New York “Implied-In-Fact” Employment Contract Case

On April 3, 2015, the U.S. Court of Appeals for the Second Circuit reversed the judgment of the N.Y. Eastern District court in Saeed v. Kreutz. A district court jury had ruled in favor of plaintiff Shomari Saeed on his common law claim for breach of an implied-in-fact contract and had awarded him $200,000 in damages. Saeed v. Kreutz, 2015 U.S. App. LEXIS 5368. The defendants in this case are Sergeant Joseph Kreutz, Sergeant Thomas Saitta, Investigator Darryl Henderson, Captain Peter Dudek, Deputy Undersheriff Linda LaGreca, the Nassau County Sheriff’s Department (the “Department”), and the County of Nassau (the “County”).

This case concerns Saeed’s time as an employee of the Department. As a person who is black, Muslim, and gay, Saeed claims that he experienced harassment, discrimination, and retaliation from members of the Department because of his race, color, religion, and sexual orientation. He bases his claims on federal and New York anti-discrimination statutes as well as New York common law. The jury in the district court sided with the defendants on every claim except a common law claim for breach of an implied-in-fact contract.

In their appeal, defendants assert that they were entitled to summary judgment and that the implied contract claim should have been treated as a matter of law. At its heart, the implied contract claim rests on the theory that the Department and the County were bound contractually to the terms of the County’s Equal Employment Opportunity Policy.
MARRIAGE EQUALITY

SUPREME COURT – The Supreme Court denied a petition for a writ of certiorari in National Organization for Marriage v. Geiger on April 20, 2015 WL 849786. NOM was seeking review of the district court’s refusal to allow it to intervene to defend the Oregon ban on same-sex marriage, which was declared unconstitutional in Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Ore May 19, 2014). The 9th Circuit had rejected NOM’s petition to stay the decision, which went into effect promptly because the state government declined to appeal it. * * * The 9th Circuit informed attorneys for the parties the day after the Supreme Court before proceeding further. Plaintiffs’ attorney Josh Newville issued a press release bemoaning the expenses incurred by his clients in making hotel and airplane reservation to fly from the Dakotas to hear his oral argument. The Court of Appeals issued no explanation for its change of mind on holding the hearing, but it seems likely that in light of the Supreme Court arguments, they expect a pro-marriage equality ruling and see no reason to take the heat for a merits ruling of their own. If the Supreme Court reverses the 6th Circuit on the merits, the 8th Circuit could just affirm rulings by the district courts of the circuit without any need to hold hearings or to write anything substantive on the merits.

EIGHTH CIRCUIT COURT OF APPEALS – Despite having repeatedly rejected motions to delay its scheduling of May 12 oral argument on state appeals of marriage equality rulings, the 8th Circuit informed attorneys for the parties that they should confer within 14 days after the Supreme Court issues its decision to come up with a proposed schedule for “further proceedings.” Presumably, if the Supreme Court reverses the 6th Circuit and issues a marriage equality ruling, the parties will agree that the 1st Circuit can reverse and remand without oral argument. If the Supreme Court’s does not decide on the merits, an appeal will likely go forward in the 1st Circuit.

FIRST CIRCUIT COURT OF APPEALS – The 1st Circuit announced on April 14 that it is “premature” for it to schedule an oral argument in Conde-Vidal v. Rius-Armendariz, the Puerto Rico marriage equality appeal, in light of the cases pending before the Supreme Court. The court’s clerk notified the parties that they should confer within 14 days after the Supreme Court issues its decision to come up with a proposed schedule for “further proceedings.” Presumably, if the Supreme Court reverses the 6th Circuit and issues a marriage equality ruling, the parties will agree that the 1st Circuit can reverse and remand without oral argument. If the Supreme Court’s does not decide on the merits, an appeal will likely go forward in the 1st Circuit.

ALABAMA – Although she hadn’t ruled on plaintiffs’ motion to expand the pending Alabama marriage case into a class action by the end of April, District Judge Callie Granade (S.D. Alabama) issued two opinions on April 23, rejecting motions to dismiss the case filed by Attorney General Luther Strange and by the defendant probate judges. Strawser v. Strange, 2015 WL 1880605 (probate judges), 2015 WL 1880615 (Strange).

ARIZONA – Governor Doug Ducey countermanded a policy that had been adopted by the Department of Child Safety, which was refusing to certify legally married same-sex couples for adoption or to serve jointly as foster parents. Same-sex couples have been able to marry in Arizona since the state decided last October not to appeal a federal district court marriage equality ruling, but the Department stopped recognizing those marriages when the term of the attorney general who decided not to appeal the marriage ruling, Tom Horne, expired, and Mark Brnovich took office as attorney general. Department Director Charles Flanagan had reversed a total of $257,938.40 in fees and $458.40 in costs. Defendants contested the claimed fees, pointing out that the case proceeded relatively quickly from the filing through the grant of summary judgment, and that because the same questions were being litigated around the country and in several other states in the 9th Circuit, the kind of novelty factor that might otherwise attach to cutting-edge litigation was missing here and there was a reasonably clear path for plaintiffs to follow in terms of their legal theories and arguments. Judge Burgess was critical of the plaintiffs’ failure to offer affidavits concerning fees charged by comparable attorneys not connected with the case, noting that every fee affidavit filed in support of the plaintiff’s fee motion was made by an attorney having some connection to the case. Lacking more objective data, the judge fell back on comparisons to other fee awards in marriage equality cases and in other civil cases in Alaska, and ended up cutting down the fee request substantially, to $127,262.50. The defendants did not contest the amount of costs, resulting in a total award of $127,720.90. Plaintiffs’ counsel included Allison E. Mendel, Caitlin Shortell, and Heather Leigh Gardner, all of Anchorage, Alaska.
the policy in February after Brnovich’s office advised that allowing gays to marry did not affect any other Arizona laws, including the adoption statute that provides that only a husband and wife may jointly adopt children. Governor Ducey announced the change back to recognition, stating, “I have made it abundantly clear since day one that my administration is unambiguously and unapologetically pro-adoption. With 17,000 children under the state’s care, we need more adoption in Arizona, not less.” He ordered the Department of Child Safety to immediately ensure that all legally married couples in Arizona are able to jointly serve as foster parents and adopt.” Arizona Daily Star, April 23.

Although the Scottsdale City Council decided last year to sign on to a gay-rights pledge, the Council decided on March 31 not to take the next step and enact an ordinance, with several members stating that this would add unnecessary government regulation and divide the community. The mayor asserted that the LGBT community was well-represented in business, government leadership, and business associations, and had no need of specific legal protections. This drew fearful opposition from Councilwoman Virginia Korte, who related how her same-sex partner had been fired from her job because of her sexual orientation. Supporters of enacting an ordinance pointed to the examples of Tempe and Phoenix, but others cautioned that such an enactment could provoke a backlash and repeal efforts. Arizona Republic, April 13.

ARKANSAS – Still dragging their feet in Arkansas! As a federal ruling holding the state’s ban on same-sex marriage unconstitutional languishes in the 8th Circuit, where the state’s appeal has been put on hold pending a U.S. Supreme Court ruling in June, eyes turned to the Arkansas Supreme Court, which heard oral argument last year in the state’s appeal of trial judge Chris Piazza’s ruling striking down the marriage ban under the state constitution. The problem is that the court had not issued a decision by the end of 2014, at which point the terms of several justices expired and a question arose whether the case would have to be reargued, since the remaining justices appeared reluctant to decide it and several justices had recused themselves from the case. ArkansasOnline reported on April 14 that Governor Asa Hutchinson had appointed three individuals to serve in place of the recused judges, but there remained questions about the status of several judges with respect to the case, leading to an unholy mess. By all appearances, the Arkansas justices want to duck this bullet and let things be resolved by the U.S. Supreme Court’s forthcoming decision.

DISTRICT OF COLUMBIA – Although the District of Columbia has a form of home-rule, Congress has retained the authority to override legislation by the D.C. City Council. The council recently enacted a bill that bans discrimination against students because of sexual orientation or gender identity by religious schools in the District. The measure may well be unconstitutional. Rep. Vicky Hartzler, a Missouri Republican, introduced a disapproval resolution on April 14, asserting that the D.C. measure infringes the 1st Amendment rights of religious schools. However, the House Oversight and Government Reform Committee decided that it would not consider the resolution. Texas Senator Ted Cruz, also a Republican, introduced a similar disapproval resolution in the Senate, but it has not received any action on the Senate floor. Washington Blade, April 19.

FLORIDA – The House of Representatives approved a bill that would allow private adoption and foster-care agencies to turn away same-sex couples on moral or religious grounds, according to an April 10 report in the Washington Post. The measure includes a “conscience clause” that protects discriminators if serving particular clients would “violate agency’s written religious or moral convictions or policies.” The article reported that Florida has 82 private adoption agencies, many of which are run by churches. Religiously-inspired discrimination is generally considered to be sacrosanct by most Republican state legislators, who have a very weak understanding of the 1st Amendment religion clauses in the federal Bill of Rights.

GUAM – Kathleen M. Aguero and Loretta M. Pangelinan, a lesbian couple denied a marriage license in Guam, a U.S. possession within the jurisdiction of the 9th Circuit Court of Appeals, filed suit on April 13 in the District Court of Guam, seeking an order compelling the Governor and Registrar of Vital Statistics to comply with the 9th Circuit’s determination that bans on same-sex marriage are unconstitutional. Aguero v. Calvo, Civ. Case No. 15-00009 (D. Guam). The plaintiffs are represented by Mitchell F. Thompson and R. Todd Thompson of Thompson Gutierrez & Alcantara, P.C., and William D. Pesch of Guam Family Law Office. Although Guam’s attorney general opined that the clerk should have issued the license, the governor punted, refusing to concede the point even though any decision by the Guam District Court would be subject to appeal to the 9th Circuit, and residents of Guam are entitled to the same due process and equal protection rights under the U.S. Constitution as residents of any other state. One suspects this will be sorted out after the Supreme Court rules in Obergefell v. Hodges.

HAWAII – A legislative conference committee hammered out differences between House and Senate bills that
would make it easier for transgender Hawaiians to obtain birth certificates showing their correct gender identity. *Honolulu Civil Beat (May 1)* reports that the bill approved in committee on April 30 will be sent to both houses for final floor votes, and that Governor David Ige is expected to sign the measure into law. This would bring Hawaii in line with six other states and the District of Columbia that have liberalized their birth certificate laws to dispense with sex reassignment requirements as prerequisite for such changes.

**INDIANA** – The Hammond City Council voted unanimously on April 13 to enact an ordinance prohibiting discrimination because of sexual orientation or gender identity. At the same time, the mayor and several council members “lambasted the state’s Religious Freedom Restoration Act,” according to the *Munster Times*, April 14. The Hammond ordinance covers employment, housing and public accommodations. Licensed businesses found in violation could have their licenses revoked. Other communities that have added such provisions include Muncie, Whitestown, and Martinsville (by mayor proclamation). Some Indiana communities are rushing to counter the negative image the state acquired in the recent dust-up about its Religious Freedom Restoration Act, which was widely condemned as authorizing discrimination against gay people by businesses. **Republican leaders** have required public school students to use bathrooms and locker rooms corresponding to their “biological sex,” and would require schools to provide separate facilities for transgender students. It was not clear from press reports whether this was planned to impose an unfunded mandate on local school districts, or whether the

**KENTUCKY** – Just weeks before the Supreme Court heard oral arguments that involved, inter alia, Kentucky’s ban on same-sex marriage, Franklin County Circuit Judge Thomas Wingate ruled on April 16 that the ban on issuing marriage licenses to same-sex couples violates the 14th Amendment. Two gay couples – David Hardee and Marshall Robertson, and Lindsey Bain and Daniel Rogers – had sued Governor Steve Beshear and Fayette County Clerk Don Blevins. Wingate granted the plaintiffs’ motion for summary judgment, but put a stay on his ruling pending the Supreme Court’s decision in *Obergefell v. Hodges*, expected by the end of June. *kentucky.com*, April 17.

**MAINE** – Senator David Burns, a Whiting Republican, has withdrawn his proposed Religious Freedom Restoration Act, saying that the anticipated backlash to its consideration made it impossible to get a fair hearing in the legislature at this time. He issued a written statement: “Opponents of this bill and some in the media have poisoned the well of public discussion. They have been guided by an unwillingness to discuss factual information and inaccurate comparisons to the events in Indiana. The issues surrounding this bill should not be about the sponsor or the faith preferences of individual legislators. Yet it has become increasingly portrayed as such.” *pressherald.com*, April 15.

**MARYLAND** – Both houses of the legislature have approved bills that would allow transgender people born in the state to obtain new birth certificates correctly identifying their gender identity without the next for reassignment surgery, provided a licensed medical practitioner certifies that they have undergone appropriate treatment for gender dysphoria, which could include hormone treatments. The votes were strongly affirmative in both houses, enough if the majorities hold together to override a veto by the Republican governor, Larry Hogan, who has not announced a position on the issue. *MetroWeekly*, April 15.

**MISSOURI** – Voters in Springfield gave 51.4% of their vote to a ballot measure repealing an ordinance that bans sexual orientation and gender identity discrimination. The City Council passed the measure last October, but opponents successfully petitioned to put the measure on hold pending a public vote. Most opponents argued that the measure violates their religious freedom, and would allow sexual predators to insinuate themselves into women’s restrooms to commit sexual assaults, pointing to the epidemic of such assaults that have occurred in jurisdictions that have outlawed gender identity discrimination in public accommodations – not! *Associated Press*, April 7.

**NEVADA** – The Assembly defeated A.B. 375 on a mainly party-line vote of 22-20 on April 21. The measure would have required public school students to use bathrooms and locker rooms corresponding to their “biological sex,” and would require schools to provide separate facilities for transgender students. It was not clear from press reports whether this was planned to impose an unfunded mandate on local school districts, or whether the

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state would be required to pay for the physical renovations necessary to create such separate transgender restrooms, locker rooms, and showers. seattlepi. com, April 21.

NEW YORK – The State Assembly has approved measures that would add gender identity to the state’s Human Rights Law and to ban conversion therapy for minors, but enactment through the Senate remains a question mark. Governor Andrew Cuomo announced at the end of April a new state strategy for combating the HIV/AIDS epidemic, but it was uncertain whether the legislature would come through with necessary adjustments to state laws and sufficient funding to implement the plan, which would require a ramping up of testing and of benefits programs to ensure proper treatment for New Yorkers living with HIV.

NORTH DAKOTA – Governor Jack Dalrymple’s chief of staff sent a letter to all agency directors appointed by the governor on April 6, telling them that discrimination against anyone is unacceptable. Two hours later, all of the Democrats in the state legislature sent the governor a letter urging him to issue an executive order prohibiting discrimination based on sexual orientation in the state government. The governor’s staff responded by stating an executive order was unnecessary, because the governor had already reaffirmed a 1981 executive order that mandates that all state employees be provided “fair, equitable, and uniform treatment.” Senate Democratic Leader Mac Schneider said this was insufficiently specific. The North Dakota House voted on April 7 to defeat a law that would have added sexual orientation to the state’s anti-discrimination law. The measure had been approved by the Senate in February.

TEXAS – Anticipating the advent of marriage equality, either at the hands of the 5th Circuit or the Supreme Court or both, Texas legislators have gone wild introducing bills intended to nullify the impact of such decisions in their state. One measure would dock the pay of any state employee who issues a marriage license or records a marriage of a same-sex couple, and prevent the state from spending any money to implement such a court order. This is one of about twenty bills introduced in the legislature to fight the “gay agenda.” Perhaps the most dangerous, at present, is one patterned on a recent enacted Arkansas law that prohibits local governments from banning forms of discrimination that are not covered by state law. Several of the large cities in Texas have ordinances banning sexual orientation and gender identity discrimination, whose enforcement could be voided if the state proposal is passed. None of these anti-gay bills have been approved yet, but they’ve been getting lots of play in the press, seem to have potential support from the governor, and are widely co-sponsored in the Republican-dominated legislature. It did seem likely that a measure allowing religious organizations and clergy to refuse to provide services to same-sex couples if to do so would violate a “sincerely held religious belief” was likely to pass in May before the end of the legislative session. Such a measure would be purely symbolic, of course, because the 1st Amendment already protects the right of religious organizations to decline to provide services inconsistent with the tenets of their religion.

WASHINGTON – Differences between the House and the Senate about the scope of proposals to ban certain therapies led to a deadlock, according to the Spokesman Review (April 22). The Senate had given unanimous approval to a bill banning “aversion therapy,” a largely obsolete procedure of using electric shock or ice baths to try to change the sexual orientation of youths. The House wanted to add talk therapy – “sexual orientation change efforts” or SOCE – to this list, as California, D.C. and New Jersey have done, but the Senate was not inclined to go along, so legislators declared the effort dead for this session.

CIVIL LITIGATION NOTES

3RD CIRCUIT COURT OF APPEALS – A 3rd Circuit panel affirmed a decision by the Board of Immigration Appeals that a man from Guyana was not entitled to protection under the Convention against Torture (CAT) based on his allegation that he might be subjected to torture there because of his homosexuality. Baboolall v. Attorney General, 2015 WL 1639606 (April 14, 2015). The Petitioner, who was brought to the U.S. from Guyana as an 18-month-old infant and was granted lawful permanent resident status, was convicted in New York of attempted sale of a controlled substance in the third degree, provoking a move by the
Department of Homeland Security to deport him back to Guyana. The contention was that his conviction was for a “particularly serious crime,” thus precluding his ability to seek asylum or withholding of removal. The Immigration Judge, the BIA, and the 3rd Circuit rejected his challenge to this conclusion, finding that heroin was involved and the analogous federal criminal statute would make his conduct a felony. Thus, his only chance to avoid deportation would be to convince the immigration authorities that he would be subjected to torture on account of his sexual orientation if returned to Guyana. “Baboolall claimed to be bisexual and homosexual, despite being engaged to a woman and fathering three children with another woman,” wrote Circuit Judge Thomas Vanaskie. “He testified he was concerned that he would be subject to persecution, ridicule, and abuse if he were forced to return to Guyana because Guyanese laws criminalize homosexuality,” and he submitted reports and Guyanese statutes to support this claim. The Immigration Judge rejected this contention as “speculative,” and was affirmed by the BIA. While commenting that “a conclusion as to what will happen to him upon his return to Guyana is a finding of fact and, thus, outside our jurisdiction,” the court nonetheless said it retained jurisdiction “to resolve whether the undisputed factual record supports the BIA’s legal conclusions concerning CAT treatment.” As to that, wrote Vanaskie, “the evidence established that attitudes toward homosexuals in Guyana are mixed, laws against homosexual activity go largely unenforced, and the occasional police harassment of homosexuals is not condoned, propagated, or supported by the Guyanese government. Accordingly, the BIA had ample grounds for finding that Baboolall failed to demonstrate it was more likely than not he would be tortured.”

3RD CIRCUIT COURT OF APPEALS
– Enough, already? Give up, guys! On April 13, a unanimous panel of the U.S. Court of Appeals for the 3rd Circuit rejected another challenge to New Jersey’s A.B. 3371, a statute banning the provision of “sexual orientation change efforts” (SOCE) by licensed health care professionals to minors. Doe v. Governor of the State of New Jersey, 2015 WL 1610198. At the outset of her opinion for the court, Circuit Judge Dolores Sloviter cited the court’s prior decision on this issue, King v. Governor of the State of New Jersey, 767 F.3d 216 (3rd Cir. 2014), and wrote, “As in King, and for the reasons that follow, we reject the present challenge and will affirm the decision of the District Court dismissing Appellants’ complaint.” In the prior case, plaintiffs were SOCE practitioners. In this case, plaintiffs are a minor and his parents, alleging that the minor experienced unwelcome same-sex attractions that he and his parents consider “wrong” and “sinful” under their sincerely-held religious beliefs, and that the minor benefited from SOCE counseling beginning in May 2011, “which he believes has helped him in that he has stopped trying to be feminine, has reduced his same-sex attractions, has an improved relationship with his father, and has rid himself of his feelings of hopelessness or thoughts of suicide.” Plaintiffs wished to continue SOCE therapy, which is now prohibited in New Jersey. They claimed that the statute violates the minor’s 1st Amendment right to receive information and the parents’ due process right to provide medical treatment to their son. In the prior case, the 3rd Circuit rejected the district court’s finding that the practice of SOCE was conduct rather than speech and that consequently the statute did not raise any 1st Amendment concerns. Instead, the 3rd Circuit characterized it as “professional speech” which, like “commercial speech,” could be restricted if the restriction “directly advances the State’s substantial interest in protecting clients from ineffective or harmful professional services, and is not more extensive than necessary to serve that interest.” The 3rd Circuit held in King that the record supported the conclusion that this test was met and the state’s ban did not violate the 1st Amendment. In Doe, the court holds that an individual’s rights as a consumer of speech are analyzed the same way as an individual’s rights as a speaker. That is to say, when “professional speech” is at issue, the consumer’s right is no greater than the speaker’s right. As to the parental rights claim, the court found Supreme Court precedents indicating that although “parents have decision-making authority with regard to the provision of medical care for their children, the case law does not support the extension of this right to a right of parents to demand that the State make available a particular form of treatment.” The court stated agreement with the 9th Circuit’s reasoning in Pickup v. Brown, 728 F.3d 1042 (9th Cir., August 29, 2013), revised opinion on denial of rehearing en banc, 740 F.3d 1208, cert. denied, 134 S. Ct. 2871 (2014), dealing with an identical California statute, and quoted language from that decision supporting this point: “the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.” The Supreme Court denied review in Pickup last year. Plaintiffs in this case are represented by the same legal team affiliated with Liberty Counsel, Lynchburg, Virginia, that represented the plaintiffs in King. They will seek further review, because it ain’t over ‘til it’s over, and they undoubtedly raise lots of money from their credulous donors as they continue to wage their campaigns against the gay agenda on multiple fronts.
4TH CIRCUIT COURT OF APPEALS

The 4th Circuit Court of Appeals affirmed a decision by U.S. District Judge Alexander Williams, Jr., granting summary judgment in favor of a school board charged with violating Title IX by failing to protect a male elementary school student from sexual harassment by a fellow male student who was about a year older. Doe v. Board of Education, 2015 U.S. App. LEXIS 5557 (April 7, 2015). The per curiam decision agreed with Judge Williams that the plaintiffs failed to show that the school authorities displayed deliberate indifference to the situation, as they responded to each complaint brought to their attention by the student or his parents and, in the view of the court, acted reasonably under the circumstance. The court rejected the parents’ allegation that the school had violated its obligations under Title IX by failing to investigate adequately to uncover a pattern of mounting harassment over time and respond in a way that would effectively end it. From the court’s extensive description of the factual allegations of the parties during litigation of the summary judgment motion, it appears that the plaintiff student was not always particularly forthcoming in reporting incidents to his teacher or other authorities, and there is some indication of consensual sexual activity between the two students, as found by law enforcement authorities investigating a claim of sexual assault. Ultimately, the factual recitation was a bit confusing to read because of the description of inconsistent responses by the student to the unwanted attentions of his classmate.

9TH CIRCUIT COURT OF APPEALS

The advance of gay rights in Mexico has apparently gone too far for a gay asylum applicant from that country to suggest a reasonable fear of persecution if forcibly returned home, or so is the logical inference to draw from the brief opinion issued by a 9th Circuit panel in Unzueta v. Holder, 2015 U.S. App. LEXIS 6247, 2015 WL 1728798 (April 16, 2015). “The [Board of Immigration Appeals] held that Petitioner established past persecution and therefore was entitled to a presumption of future persecution,” wrote the court. “The BIA next held that the government had met its burden of rebutting that presumption. Although we might not have reached the same result, the record does not ‘compel a conclusion’ that the BIA erred. The BIA permissibly relied on general changes in Mexico – substantive changes in Mexico regarding the rights of homosexuals and increased protection against homophobic harassment – as well as facts specific to Petitioner – his ‘repeated voluntary trips to Mexico subsequent to the persecutory incidents.’ Accordingly, the BIA conducted the necessary ‘individualized analysis of how changed conditions will affect the specific petitioner’s situation.’”

The court held that similar evidence justified the denial of relief under the Convention Against Torture. The opinion, as usual in such cases, contained no specific facts about the nature of past persecution that the Petitioner had proven, and did not relate how long ago that persecution took place. However, the court noted that this was a case where the Petitioner was convicted of what the government characterized as a “particularly serious crime” in the United States, which was the prime motivation for deporting him back to Mexico. The opinion contains no description of the crime.

11TH CIRCUIT COURT OF APPEALS

Affirming the Board of Immigration Appeals ruling that the pro se appellant, a Colombian woman, was removable, the 11th Circuit found that due process had not been violated when she was confronted for the first time at a hearing with an affidavit by her ex-husband revealing that he was gay, the boyfriend of her brother, and had married her to give her a basis for staying in the United States. (This affidavit contradicted her sworn testimony that her ex-husband was not gay and that it was not a marriage of convenience entered for the purpose of providing her with a legal basis to stay in the U.S.) As usual with such court of appeals rulings, there is not much factual detail in the per curiam opinion in Hincapie v. United States Attorney General, 2015 U.S. App. LEXIS 5126 (March 31, 2015).

CALIFORNIA – A lesbian employee of the Pasadena Fire Department who failed to pass probation sued alleging discrimination because of sexual orientation, gender and disability. The Department contended that her failure to pass a mandatory written examination was the reason for her termination. The trial court granted the City’s motion for summary judgment on each cause of action except gender discrimination, and submitted that claim to a jury, which found in a special verdict that the plaintiff’s gender was not a “substantial motivating factor” in the termination decision. The California 2nd District Court of Appeal affirmed the trial court’s judgment in Leafblad v. City of Pasadena Fire Department, 2015 WL 1736328 (April 15, 2015) (not officially published). Leafblad argued that she was the only woman in her probationary class and in a nearly all-male Fire Department workforce and male-oriented culture, as a result of which she suffered less favorable treatment and work assignments during her probationary period and was subjected to rumors about her relationship with a fellow female Pasadena firefighter. She also contended that her score of 75 on the exam (for which the Department’s written policy required an 80 to pass) should have entitled her to a retake. The court concluded that “the evidence viewed in favor of Leafblad would not allow a reasonable juror to find that her test score was used as a pretext for sexual orientation discrimination.”
It also concluded that there was no evidence that Leafblad was regarded as having a disability based on her time off from work for a few months due to an abdominal injury. Robin Leafblad was represented by attorneys Steven H. Haney and J. Adrian Zamora of Haney & Young.

COLORADO – The Colorado Department of Regulatory Agencies ruled on April 3 that a Denver bakery that refused to bake a cake with an anti-gay slogan on it had not violated the public accommodations law. Bill Jack had walked into Azucar Bakery in Denver and ordered a cake that was to show two groomsmen with a red X over them and a Biblical verse condemning homosexuality – sort of an anti-gay wedding cake. The shop refused and he filed a religious discrimination complaint. The Colorado Civil Rights Division ruled that the shop had a right to refuse to make a cake with derogatory messages on it. The Division found that the baker did not discriminate based on religion, but rather because of the hateful nature of the images, reported Examiner.com on April 4. Jack can appeal this ruling to the Colorado Civil Rights Commission or file a discrimination lawsuit in the state district court.

CONNECUT – In Adams v. City of New Haven, 2015 U.S. Dist. LEXIS 46061, 2015 WL 1566177 (D. Conn., April 8, 2015), U.S. District Judge Jeffrey Aker Meyer granted a motion by the City and its Police Chief to dismiss a claim by the plaintiff that it these defendants should be held liable for violation of his constitutional rights by police officers who mistakenly detained and abused him while searching for a fugitive murderer. Joseph Adams was in his apartment enjoying a quiet evening when loud noise outside led him to open his door; when he say two gun barrels he fled back into his apartment. The gun barrels were those of police officers searching for a murder suspect reportedly in the neighborhood. His action attracted their attention and they shouted for him to come back out. He did, and the “officers threw plaintiff to the ground in a violent manner, and they zip-tied his hands behind his back. In the meantime, the officers threw flash grenades into plaintiff’s home, causing extensive damage to the property. Plaintiff was interrogated at gun point with the officers continually asking: ‘Where the fuck is he?’ Defendant said there was no one else in his apartment. The officers threw furniture around while searching his apartment. Eventually, the officers realized that they had entered the wrong unit of the multi-family home in which plaintiff resides. After detaining plaintiff about two and a half hours, the officers removed plaintiff’s restraints and released him. At the end of the encounter, one officer mocked the plaintiff on the basis of his perceived sexual orientation.” At oral argument on the City’s motion to dismiss, it came out that the officers eventually arrested the suspected murderer, recovering a weapon in the apartment next door. Adams sought to hold the City liable for the misconduct of its officers, but Judge Meyer wasn’t having it. “Although plaintiff alleges detailed facts about his mistreatment by police officers,” he wrote, “he alleges no facts at all about any policy, practice, or custom of the City of New Haven that led to this mistreatment. Instead, he insists that the Court should infer from the fact that he was mistreated that this mistreatment was the product of an unconstitutional policy, practice or custom of the City of New Haven. I reject this claim as contrary to the requirements for municipal liability under Monell [v. Dep’t of Soc. Servs. Of City of New York, 436 U.S. 658 (1978)] and contrary to the requirement that a complaint set forth facts – apart from conclusory allegations or legal conclusions – that establish a plausible ground for relief.” The motion to dismiss by the City and its Chief of Police was granted, and several counts were dismissed in their entirety. Adams had not named the police officers who mistreated him in his complaint, suing “Unnamed New Haven Police Officers,” but presumably would be able to maintain an action against the officers once they are identified, since this ruling only involved the municipal defendants. The court also provided that if Adams wants to re-plead any claims against the City and the Police Chief, he could “file a motion showing what facts – not mere legal conclusions – will be sufficiently alleged and why those facts could not have been alleged at an earlier time.” Adams is represented by Max L. Rosenberg and William J. Whewell, of Rosenberg and Press LLC, of Stratford.

FLORIDA – The Equal Employment Opportunity Commission announced a settlement of a case it had filed against Lakeland Eye Clinic of Florida on behalf of Brandi Branson. Branson was hired by the clinic as a male and began transitioning to female after six months on the job. According to the lawsuit, doctors at the clinic virtually stopped referring patients to her and her position was eliminated in a “reduction in force” for lack of work. (The clinic reportedly hired a new person to fill the position just two months later.) The EEOC was using this case as one of its vehicles to establish judicial precedents consistent with its position that gender identity discrimination violates Title VII’s ban on sex discrimination in the workplace. As part of the settlement, the clinic will make two payments of $75,000 to Branson and will adopt a policy against discrimination because of gender identity or gender stereotyping. The clinic will undertake training of management and staff on the subject.
**KENTUCKY** – A male same-sex harassment claim plaintiff asserting a sex discrimination claim under Title VII survived the employer’s motion to dismiss in *Halcomb v. Black Mountain Resources LLC*, 2015 WL 1757919 (E.D. Ky., April 17, 2015). Billy J. Halcomb, a coal miner, alleged that he was subjected to “a constant, pervasive pattern of abusive and demeaning sexual conduct . . . direct at him,” which included “the rough and unwanted sexual grabbing of [his] genitals” and “crude, vulgar sexual language.” He alleged that both supervisors and co-workers engaged in this conduct directed at him. U.S. District Judge David L. Bunning rejected the employer’s contention that these allegations were insufficient to state a sex discrimination claim under Title VII, finding that the employer’s arguments would be more suitable for a motion for summary judgment after discovery. Based on these factual allegations, he held, “It is plausible that the harassment was based on Halcomb being a male,” given the focus on his genitals and the vulgar sexual language. Furthermore, it is plausible that the employer can be held liable for this misconduct, since some of it was allegedly engage in by supervisors and Halcomb alleged that the company made only a “superficial” investigation in response to his complaints and did not take effective steps to stop the harassment. Bunning also found that Halcomb’s allegations were sufficient to create a plausible claim of sufficient severity and pervasiveness to meet the hostile environment test. However, Bunning dismissed supplementary state law claims of assault, battery and intentional infliction of emotional distress. It seems that Kentucky takes a restricted view of vicarious employer liability for intentional torts committed by workers against their co-workers. Vicarious liability attaches to the employer only when an employee’s tortious conduct “was intended to further the business” of the employer. “If Halcomb’s coworkers did engage in this behavior, they were motivated purely by personal reasons, and therefore [the employer is] not vicariously liable for their actions.” Having disposed of the tort claims on these grounds, the court did not have to address the additional argument that the Workers’ Compensation Act would provide the only remedy for Halcomb’s tort claims.

**KENTUCKY** – Fayette County Circuit Judge James Ishmael reversed a decision by the Louisville Human Rights Commission and held that a shop that refused a gay pride festival t-shirt order was privileged to refuse the business despite the city’s law banning sexual orientation discrimination by businesses. Hands on Originals indicated that it has refused particular print jobs in the past due to the Christian beliefs of the owners. According to an Associated Press report published on April 27, the judge said that the refusal to print the shirts was not due to the sexual orientation of the Gay and Lesbian Services Organization, which had placed the order, but rather because of the “message advocating sexual activity outside of a marriage between one man and one woman.” The judge said that the business never asked about the sexual orientation of the representatives from GLSO, and treat all groups the same, reserving the right to reject print jobs based on the content of the messages. The shirts were intended for use during the 2012 Lexington Pride Festival. The Human Rights Commission had ruled against the printer in 2014, leading to an appeal to the court by attorneys associated with Alliance Defending Freedom, an anti-gay litigation group.

**MICHIGAN** – In a lengthy opinion filed on March 31, U.S. District Judge Robert H. Cleland dealt with cross-motions in *John Does # 1-5 and Mary Doe v. Snyder*, 2015 WL 1497852 (E.D. Mich.), a challenge to various provisions of Michigan’s sex offender registration laws. Such laws have become progressively broader and more restrictive on the liberty of individuals convicted of offenses that subject them to registration requirements, especially in recent years as new federal requirements have led states to expand the scope of the laws and apply them retroactively to people whose offenses occurred long ago and who have long since served any sentences originally imposed. Judge Cleland found that certain provisions of Michigan’s law were subject to legitimate criticism as being too vague to provide fair notice to people about the geographical limits of their activity, and imposed particular burdens in that regard on parents of young children, where the restrictions could interfere with their ability to undertake normal parent-child activities, especially in connection with schools, since the Michigan law, in common with virtually all others, places restrictions on registrants’ activities within “school safety zones.” As to some of the plaintiffs’ objections, the court concluded that more factual development is necessary, and as to others, that a narrowing construction of the statute could save it from constitutional flaws. However, certain restrictions were declared unconstitutional and their operation enjoined, although the court indicated that clarifying amendments by the legislature might eliminate the constitutional objections by removing the problem that registrants would have to guess at what they had to do to avoid being held in violation of the law. This is one of many such lawsuits proceeding in numerous jurisdictions. The court’s description of the plaintiffs’ allegations suggest that these laws are broadly applied to many people who probably present little or no risk of harm to children, which is ostensibly the justification for the restrictions they place on those required to register.
MONTANA – A somewhat coy opinion by Chief Justice Mike McGrath of the Montana Supreme Court in Glueckert v. Glueckert, 2015 MT 107, 2015 WL 1788704 (April 17, 2015), a grandparent child visitation dispute, seems to skirt the issue of homosexuality in the case by alluding to it without explaining its significance, leaving the reader to go “between the lines” to try to figure out what is going on. Thayer and Kristin Glueckert married and had a son together, M.T. Thayer was serving on active duty in the military and was stationed outside Montana. Thayer and Kristin had separated but the divorce was not completed, and no final parenting plan was in place. M.T. has lived with Kristin since his birth in April 2013. Thayer’s only contact with the child comes when he is home on leave. Thayer’s parents, George and Laura Jeanne, sought regular visitation with their grandson. Kristin allowed occasional visits at her residence with her present, but was not amenable to their request for unsupervised visits with M.T., so their only opportunities to see him without Kristin present have arisen when Thayer is on leave. The Glueckerts petitioned the Lewis and Clark County District Court for four three-hour unsupervised visits per week with M.T., and additional unsupervised visits on special occasions. Kristin objected to unsupervised visitation. Wrote McGrath, “Kristin does not agree with the Glueckerts on subjects that are important to her, such as corporal punishment, views on homosexuality and the way they treat other family members. She and the Glueckerts do not have a good relationship, and the relationship is more strained because of the dispute over visitation.” Among other things, Kristin cited “George’s expressed belief that all homosexuals would go to hell,” and expressed concern that “the Glueckerts would disparage her and her family to M.T. if they were alone with him.” At the time District Judge Kathy Seeley made her decision rejecting the Glueckert’s petition, Kristin was planning to move with M.T. to Idaho to complete training in radiography, and had signified her willingness to allow the Glueckerts to come to Idaho to visit M.T. in supervised situations, but not to have him visit with them in her absence. Judge Seeley applied the statutory presumption that a fit parent can control access to the child, and noted that Kristin was not denying access, merely placing conditions on it. Furthermore, of course, during Thayer’s leaves the Glueckerts would be able to visit with M.T. without Kristin being present. Affirming Seeley’s ruling, McGrath observed, “There is a presumption in Montana law that Kristin’s wishes, as a fit parent, should be respected.” Responding to the Glueckert’s objection that Seeley had not performed a “best interest of the child analysis,” McGrath pointed out that “before the Glueckerts would be entitled to extended contact under the statute, they were required to show that contact would be in the best interest of the child and that the presumption in favor of Kristin’s wishes was overcome by clear and convincing evidence.” Seeley’s conclusion that this standard had not been met was not “clearly erroneous,” wrote McGrath, as “the Glueckerts did not show, by clear and convincing evidence, that their goal of maintaining a bond between M.T. and their side of the family with more unsupervised visits will materially suffer without the greatly expanded visitation they desire.” Dissenting in part, Justice Jim Rice found that Kristin’s testimony virtually conceded that the restrictions she was imposing on visitation might not be in M.T.’s best interests, so the presumption in her favor was “overcome by the totality of the evidence.” Although Rice conceded that the amount of unsupervised visitation the Glueckerts were requesting “may well be overreaching,” he thought they were entitled to “have the visitation issue subjected to a best interest determination by the District Court that would set an appropriate schedule.” Which leaves us with the lingering question: Why did Kristin mention the Glueckerts’ attitude toward homosexuality in objecting to their unsupervised visitation? Does this have anything to do with her own sexual orientation or that of her other family members, when she expressed concern about the Glueckerts disparaging her or them when alone with M.T.? The court doesn’t go there in the opinion, but one can imagine that battle will be joined again when Thayer completes his military service and the time comes for finalizing a divorce and child custody and visitation plan.

NEW YORK – A gay former Senior Assistant County Attorney in Rockland County struck out a second time in his constructive discharge/discrimination lawsuit, as U.S. District Judge Kenneth M. Karas granted defendants’ motion to dismiss John L. Weslowski’s amended complaint in Weslowski v. Zugibe, 2015 WL 1455857 (S.D.N.Y., March 31, 2014). Weslowski, representing himself pro se, alleges that he was told to resign or be fired after he apparently stirred up political trouble for the County Attorney by opposing awarding federal grant money to a politically connected potential county contractor. When he first raised objections, he alleges, his superiors instituted a secret surveillance of his office computer use, turning up evidence that he was using it to access gay-related sexually oriented materials. The superiors had reassigned the contracting matter to another attorney in the office, who revised the proposed contract leading to its execution with the proposed contractor. Subsequently, Weslowski alleges, he was called in and told that “he would not be invited to be ‘part of the team’” and that the only question was whether he would be fired or resign. He says he was encouraged to resign so he would not forfeit various benefits that he would lose if fired, so he resigned. Then he stewed over
the situation (including their failure to pay him all the accrued leave time he thought he was owed) for several years before filing suit. The court granted defendants’ motion to dismiss his first complaint largely on statute of limitation grounds, and found that nothing in the new complaint changed the conclusion that his claims are time-barred. However, the court addressed allegations in the amended complaint that raise new claims. Weslowski claimed that the office’s failure to enforce its computer use policy, combined with the Supreme Court’s Lawrence v. Texas decision respecting sexual autonomy for gay people, meant in effect that he had a right to use his office computer to access gay-related material without suffering any adverse personnel consequences. He alleged that many employees in the office accessed materials on-line that violated the office’s published policies but suffered no adverse consequences. He alleged that restrictions on “game playing/gambling” and “wasteful use of network resources” were listed in the policy, and were widely violated. Commented Judge Karas, “The Court finds it hard to fathom that employers might view a game of solitaire as more serious than viewing pornography in the workplace,” and observed that “Plaintiff fails to allege that Zagibe or Fortunato [the County Attorney and her Deputy] were aware of the violations such that the other offending employees could have been disciplined.” (Well, that’s exactly the point of Weslowski’s claim: that they responded to his objections to the grant by conducting surveillance of his computer use, but did not apparently routinely monitor all the employees to uncover similar violations of office rules, thus singling him out.) But, ultimately, Judge Karas found his legal theory unconvincing: “The Court finds that Lawrence does not create a right, distinct from Plaintiff’s First Amendment rights that the Court has already considered, to access sexually explicit material while at work. To be blunt, Plaintiff has cited no authority to support his claimed right to download or watch pornography in the workplace. Lawrence likewise does not stand for the proposition that failure to rigorously enforce a policy restricting access to sexually explicit material establishes a right to access this material, such that the dismissal of an employee engaging in such actions would implicate his personal liberty. Plaintiff cites no other case law . . . in support of his novel theory.”

NEW YORK – A 1993 decision by New York City Civil Court Judge Sabrina B. Kraus that a surviving same-sex partner’s occupation as a male escort did not disqualify him from tenant succession rights was affirmed in a unanimous ruling by the Appellate Term for the 1st Department in Infinity Corp. v. Danco, No. 13-432 (March 9, 2015), affirming 2013 N.Y. Slip Op. 52339(U), 46 Misc.3d 1229(A) (unreported disposition). The court wrote that “the record shows that respondent and tenant enjoyed a family-type relationship dating back to 1996 and lived together in the subject apartment for more than two years prior to the tenant’s death. The two engaged in social and recreational activities together, spent weekends together in Fire Island, and during the final months of his life, tenant was entirely dependent on respondent’s care. The tenant financially supported the household while respondent performed household duties. They also shared a joint bank account and respondent was a beneficiary of a substantial portion of tenant’s estate.” The court found that “the evidence adduced at trial established that the requisite emotional and financial commitment and interdependence existed entitled respondent to succession,” noting the trial court’s conclusion that “this was a relationship that went beyond that of roommates or a caregiver, [tenant] and respondent were each other’s family and shared their lives for a period of approximately fifteen years.” The court rejected the landlord’s attempt to make an issue out of the “respondent’s apparent involvement in the sex industry as a ‘male escort.’” The court said that this “was clearly not fatal to respondent’s otherwise meritorious succession claim. As the trial court recognized, such illicit employment activity was not shown, on this record, to have any material relevance to the nature of the relationship between respondent and [tenant].” LeGaL member Stephen Rosen represented respondent Aliston Philip.

NEW YORK – Another pro se employment discrimination complaint crashes and burns in Kane v. 24/7 Real Media, 2015 WL 1623832 (S.D.N.Y., April 7, 2015). Plaintiff Nickie Kane, who describes herself as a transgender woman who identifies her race as “Asian”, her color as “tan, brown,” and her national origin as “Guyanese,” claims that she was subjected to unlawful termination from employment, unequal terms and conditions of employment, and retaliation, also asserting “disparate impact” and hostile work environment claims. She filed a charge with the New York City Commission on Human Rights, which was dismissed. Then she filed suit in federal district court, alleging violations of federal, state and city civil rights laws. The defendant moved to dismiss for failure to state a claim, arguing that Kane’s failure to file a charge with the EEOC or the New York State Division of Human Rights barred her from suit in federal court for failure to exhaust administrative remedies. District Judge Analisa Torres agreed with the defendant and dismissed the case. It seems that the charge form Kane filed with the City Commission did not include any allegation of a Title VII violation and did not expressly authorize the City Commission to accept Kane’s complaint on behalf of the EEOC.
the ALJ had concluded that the plaintiff could work even though “the record contains no medical source opinion or findings of fact regarding the extent to which plaintiff’s shingles or HIV status limited his physical or mental ability to do basic work activities for twelve consecutive months at any time during the claimed periods of disability for SSDI or SSI purposes, leaving an evidentiary gap in the record with respect to the showing required by the regulations cited above governing the Commissioner’s determination of severity.”

NEW YORK – New York County Supreme Court Justice Peter Moulton rejected a retired schoolteacher’s contention that the NYC Department of Education had acted arbitrarily and capriciously in awarding her an “unsatisfactory” rating for the 2010-11 school. Hicks v. Department of Education, 101065/2013, NYLJ 1202723152644 (N.Y. Sup. Ct., N.Y. Co., decided April 2, 2015) (published April 13, 2015). The allegations that led to the rating of this special education teacher included inappropriate hugging of a 19 year old male student, inappropriate kissing of an 18 year old female student, and referring to a transgender student as “it” on more than one occasion. The teacher argued that the investigator was biased against her and that she had not made the “it” statement. Wrote Justice Moulton: “Exhibit F to petitioner’s affidavit includes minutes of an April 13, 2015 meeting concerning the offensive comment. At the meeting, petitioner denied making the comment overhead by a staff member and arising from the transgender student’s use of the women’s bathroom. However, the minutes reflect that petitioner conceded that she confronted the student with the comment ‘Show me the pass that allows you to use the women’s bathroom.’ The court will not disturb the credibility findings of the agency. Even if petitioner demonstrated that she never called the student ‘it’ and that staff was lying, the U Rating is sustainable based on petitioner’s admission that she confronted the student, demanding to see a pass for the women’s bathroom. The email dated October 29, 2010 (attached as exhibit G to petitioner’s affidavit) lends some support to petitioner’s denial that she called the student ‘it.’ The email reflects petitioner’s concern that the student was bullied by other students, should be referred to as ‘she’ and not ‘it’ and reflects petitioner’s concern that ‘[w]e have to have kids honor gender differences.’ However, the court cannot consider evidence that was not submitted to the Chancellor’s Review Committee. Even if the email was submitted, the evidence indicates the comment was overheard. Even if the email was considered, the agency could have concluded that petitioner was an advocate for the student until the student used the women’s bathroom, which petitioner clearly thought was inappropriate given her demand to see the bathroom pass. If student gender differences are truly honored, then the student had every right to use the women’s bathroom, and petitioner clearly failed to heed her own words.”

NORTH CAROLINA – U.S. Bankruptcy Judge David M. Warren granted a motion by the U.S. Bankruptcy Administrator to dismiss a Chapter 7 personal bankruptcy petition filed by a gay man whose finances were apparently overwhelmed by legal costs incurred in trying to keep his non-U.S. citizen domestic partner in the country, subsequently helping out with the partner’s expenses in Honduras, and providing housing, tuition support and a car to his new, much younger partner, a student. In re Garrett, 2015 Bankr. LEXIS 993 (E.D.N.C., March 31, 2015). Danny Arthur Garrett, 69, is incurring the housing expenses for a separate apartment for his 21-year-old boyfriend, justifying the expense on the ground
that the boyfriend’s younger sibling is living with him. Mr. Garrett has no legally-recognized relationship with the former partner or the current boyfriend, and has significant outstanding debts because he has a relatively low-paying job, supplemented by Social Security, but has purchased several automobiles before or after his bankruptcy filing and has a mortgage debt on his house. Judge Warren found that Garrett’s payment of large legal fees in the attempt to keep his partner in the country definitely set him back, but “the Debtor’s failure to impose upon himself the belt-tightening that could have prevented his subsequent financial deterioration” resulted in the court giving greater weight to the position of the Administrator, who was contending that the Chapter 7 petition should be dismissed as an abuse of the bankruptcy system, filed primarily to avoid paying consumer debt. “The Debtor does not necessarily have the type of consumer debt that this court often sees, accumulated by a debtor that [sic] purchases consumer goods for himself beyond his budget. In this case, the Debtor’s ongoing consumer purchases are not primarily for his benefit but are instead primarily for Mr. Barefoot’s benefit,” referring to the boyfriend. “This distinction does not change the fact that the Debtor’s consumer purchases were in excess of his ability to repay creditors. The Debtor has been leasing the Laurel Springs property for Mr. Barefoot to his creditors’ detriment. Money that could have been used to pay his mortgage, utilities and credit card bills has instead been used to support Mr. Barefoot in a separate residence.” Judge Warren signaled awareness that “many single debtors include in the budget expenses that support a significant other whom they are not legally bound to support, and those expenses are not always allowed by the court. Filing a bankruptcy petition subjects debtors to the court’s discretion as to whether certain expenditures are reasonable.” The court found the explanation for a separate residence for Barefoot was “insufficient” to justify the expenditure. Indeed, wrote the judge, “It is unreasonable and outrageous for the Debtor to expend $690.00 each month, not including utilities, to pay for a separate residence for Mr. Barefoot.”

The court also thought it was not appropriate to include the money Garrett was sending each month to his former partner in his monthly budget, since if he routed this money to his creditors he could reduce his unsecured debt by 22%. “The Debtor’s decision to ignore his responsibilities to his creditors—obligations that should be included in the Debtor’s budget—renders his proposed budget unreasonable.” The judge concluded that the Chapter 7 petition should be dismissed and the option of conversion to a Chapter 13 bankruptcy “is not a viable option” since “Debtor has demonstrated he is oblivious to the financial responsibilities of a bankruptcy debtor.”

### Ohio

A gay man discharged from a teaching position in Cleveland filed a discrimination complaint with the EEOC, then filed suit pro se in the U.S. District Court there, naming as defendants the school district and its chief executive officer, chief legal counsel, regional superintendent, human resources director, and the principal and human resources director of Collinwood High School. Brian Currie alleged that he was subjected to harassment by the Regional Superintendent because of his sexual orientation, that “expletives and threats concerning plaintiff’s sexual orientation were used against plaintiff in his classroom,” and that his attempts to complain about this brought about retaliation and ultimately his discharge. From U.S. District Judge Patricia A. Gaughan’s description of Currie’s complaint, it sounds like he made elementary mistakes that one might expect of a pro se litigant, including failing to understand that Title VII and the Americans With Disabilities Act, even if they might apply to his case, would not provide a cause of action against individual defendants, only against the corporate employer, in this case the school district. All of the individual defendants filed a motion to dismiss, which the court granted in this opinion. “The Sixth Circuit has clearly recognized that there is no individual liability under either of these statutes,” wrote the judge. “Therefore, because plaintiff cannot assert claims against the individual defendants in their personal capacity, these defendants are dismissed. The Court need not reach defendants’ alternative grounds for dismissal.” Presumably, the court will need to confront those alternative grounds once the school district files its own pretrial motion. One suspects they will argue that sexual orientation discrimination is not actionable under Title VII, and that Currie does not qualify as an individual with a disability under the ADA. As usual, it is puzzling why a litigant would sue for sexual orientation discrimination in a federal court when there is a local ordinance forbidding such discrimination. Does Cleveland’s ordinance not apply to employment practices in the public schools? The report of the case indicates that Currie now lives in Sharon, Pennsylvania, but he asserted federal claims, so this does not seem to have been initiated as a diversity case seeking to apply the local law. Puzzlement. Currie v. Cleveland Metropolitan School District, 2015 U.S. Dist. LEXIS 48916, 2015 WL 1787642Unzuweta (N.D. Ohio, April 14, 2015).

### Oregon

Independent Online (April 27) reported that the Oregon Bureau of Labor and Industries has assessed a fine of $135,000 against Sweet Cakes by Melissa, a bakery that refused to prepare a wedding cake for a lesbian couple. A spokesperson for the agency told Reuters, “The law provides an
exemption for religious organizations and schools, but does not allow private businesses to discriminate based on sexual orientation, just as they cannot legally deny service based on race, sex, age, disability or religion.” The decision is subject to review by State Labor Commissioner Brad Avakian, who has the power to lower, raise or confirm the damage amount. Supporters of the bakery started a GoFundMe internet page seeking donations to pay the fine, but site administrators took down the page after it had attracted more than $100,000 in pledges, stating that they had a policy against “raising money for illegal purposes.” It is difficult to understand how the Bureau came up with a figure of $135,000 for the refusal to bake a wedding cake.

PENNSYLVANIA — In Berrios v. City of Philadelphia, 2015 U.S. Dist. LEXIS 41266 (E.D. Pa., March 31, 2015), U.S. District Judge C. Darnell Jones, II, sorted through defendants’ motion for summary judgment as to some of the counts of a multicount complaint filed by Luis A. Berrios, III, against various Philadelphia police officers and the City of Philadelphia concerning incidents arising out of a domestic dispute between Berrios and his boyfriend Jason Mendez. On December 28, 2010, Berrios went to his neighbor and “told him that he and his boyfriend were having a disagreement, and if he did not return in five minutes to call the police.” The neighbor subsequently called the police, and ultimately several units arrived. Police officers discovered evidence of a domestic dispute and became embroiled with Berrios and Mendez, ultimately arresting Berrios after a bit of a melee as to which some observers reported that police officers were beating the two men. Berrios filed charges of violations of his 4th and 14th amendment rights, as well as claims of false arrest, false imprisonment and malicious prosecution, and an allegation that the City should be liable for failure to train and supervise its police officers adequately to deal with domestic disputes in the LGBT community. While acknowledging that there were significant factual disputes concerning almost every aspect of this incident, Judge Jones found that the claims against certain police officers for false arrest, false imprisonment and malicious prosecution had to be dismissed because, whichever version of the facts was believed, it appeared that the officers did have probable cause to arrest Berrios, drive him away handcuffed in a police vehicle, and charge him with criminal offenses. Rejecting Berrios’ equal protection claim, he found that allegations of selective enforcement against the police officers were not backed up by any showing that the police had treated Berrios differently from other suspects in domestic dispute situations because of his sexual orientation. However, the judge refused to dismiss charges of “bystander liability” against certain of the police officials who allegedly stood by and failed to intervene as other officers allegedly were beating up Berrios and his boyfriend. Judge Jones devoted substantial discussion to his decision to dismiss the allegation that the City failed to train its officers to deal with domestic disputes in the LGBT community. Berrios alleged that the city did not offer police officers “any training regarding respect and tolerance for the LGBT community,” and that “this failure to train caused the Police Defendants to use excessive force, as both perpetrators and bystanders, on the night in question.” Johnson noted that there was “substantial dispute” about whether the police used homophobic slurs during the encounter or whether excessive force was sparked by the officers’ discovery that Berrios and Mendez were boyfriends, or as to “whether such a coincidence of timing would in fact show a causation of homophobic animus leading to the use of excessive force.” Jones noted that a few years later there were community meetings addressing these sorts of concerns and that a task force made recommendations for such training in a report to the city government. However, he wrote: ‘Plaintiff does not offer any evidence to support a finding that there was an obvious need for sexual orientation training to prevent the use of excessive force against members of the LGBT community, or that not providing such training would likely result in a violation of constitutional rights. First, the report was released years after the incident in this case. Second, while the report does note that the LGBT community is a ‘sizeable portion of the Philadelphia citizenry,’ a point obvious to the City, it does not demonstrate that the fact of this ‘sizeable’ population necessarily demanded sexual orientation diversity training to prevent the use of excessive force specifically against the LGBT community. The report does not concern excessive force specifically. The report does not show that it was, or should have been, patently obvious to the City of Philadelphia that due to the ‘sizeable’ LGBT community, there was a strong likelihood that officers would illegally, and in violation of the Constitution, use excessive force against members of the LGBT community. The report does not cite any statistics, or quote any qualitative data, showing that the City was receiving complaints related to the use of excessive force against members of the LGBT community. The report does not state that the purpose of the recommended sexual orientation/diversity training would be to prevent the use of excessive force.” Since plaintiff would have to show that the City exhibited deliberate indifference to a known problem of police use of excessive force against LGBT community members in order to impose liability for the use of such force in a particular case alleging failure to train and supervise, these claims were dismissed as well. However,
the principal claims of actual use of excessive force, not the subject of this motion to dismiss, remain in play in the litigation as well as the bystander liability claims. Rania Major Trunfio is lead counsel for Berrios.

**RHODE ISLAND** – The Rhode Island Supreme Court ruled in *Sherman v. Ejnes*, 2015 WL 1500101 (April 1, 2015), that Kent County Superior Court Judge Stephen P. Nugent erred in refusing to schedule a special hearing to determine the viability of the plaintiff’s claim for punitive damages in connection with a suit for breach of HIV confidentiality against his doctor. Thomas Sherman filed suit against Dr. Yul Ejnes and his employer, Coastal Medical Center, alleging that they had “willfully, knowingly, intentionally, recklessly, and negligently failed to protect the confidentiality of Plaintiff’s HIV test results” in violation of Rhode Island confidentiality statutes, and sought compensatory and punitive damages, alleging “substantial harm, including the destruction of his marriage and extreme mental anguish.” Sherman sought through interrogatories to compel Dr. Ejnes to disclose “personal financial information,” to which the doctor objected, responding to Sherman’s motion to compel with a motion to strike the claim for punitive damages. At a hearing on the motion to strike, the parties asked the court to conduct a hearing on the viability of the punitive damages claims, consistent with a procedure established by the Rhode Island Supreme Court in *Palmisano v. Toth*, 624 A.2d 314 (R.I. 1993), but the trial judge refused to do so, instead granting the motion to strike the discovery request and staying all discovery relating to the punitive damages claim until a determination on liability had been made. The Supreme Court held that this was an erroneous application of its precedents. After reviewing the record, wrote Justice Flaherty, “it is pellucid that it is on all fours with *Palmisano* and that the trial justice was obligated to conduct an evidentiary hearing. This is so because, during the course of pretrial discovery, the plaintiff sought the disclosure of information related to the personal finances of Dr. Ejnes. Doctor Ejnes objected to the requests and eventually filed a motion to strike the plaintiff’s claim for exemplary damages. Because he did so, in accordance with our holding in *Palmisano*, the hearing justice should have conducted an evidentiary hearing, at which the parties would be afforded the opportunity to present evidence, examine witnesses, and to otherwise determine the viability of the plaintiff’s claim for exemplary damages.” If such viability was established, of course, it would then be appropriate to allow the plaintiff to conduct discovery concerning the defendant’s finances in order to be able to properly shape his damage claim.

**SOUTH CAROLINA** – The Transgender Legal Defense and Education Fund announced settlement of a lawsuit it had filed on behalf of Chase Culpepper, a transgender teen, against the South Carolina Department of Motor Vehicles, which had refused to allow Culpepper to pose for her driver’s license photo presenting as female. Officials at a DMV office in Anderson, S.C., told her that an agency policy “prohibited photos when a person intentionally altered his or her appearance in a way that would misrepresent the person’s identity,” according to an April 23 report by the *Anderson Independent Mail*. Culpepper removed her makeup and obtained the license, but filed suit in September 2014, alleging a violation of her constitutional rights of free speech and expression. Under the settlement announced on April 22, applicants can be photographed the way they appear regularly, regardless whether that matches gender expectations of their legal gender as recorded on their birth certificate. Under the settlement, the Department undertakes to train its employees on the policy and on how to treat transgender and gender-nonconforming people. The issue is not trivial; a person stopped by law enforcement or asked to show a driver’s license for identification purposes would run into problems if the photo on their license depicts a man when they are presenting physically as a woman, and the Department’s original requirement would in effect require somebody in the position of Culpepper to “out” themselves as transgender every time they are required to produced their driver’s license.

**TEXAS** – U.S. District Judge Ron Clark followed the recommendation of Magistrate Judge Keith F. Giblin to dismiss a Title VII sex discrimination claim asserted by a gay man (proceeding pro se) on the ground that sexual orientation discrimination is not forbidden by federal law. *Walters v. BG Foods, Inc.*, 2015 U.S. Dist. LEXIS 54385, 2015 WL 1926224 (E.D. Tex., April 27, 2105). Clark noted that in Huey Walters’ objections to the magistrate’s report, he contends that his claim is not limited to sexual orientation discrimination, but also involved discrimination based on sex and a hostile work environment. “He goes on to describe a handful of incidents in which co-workers acted disrespectfully to him and used slurs related to sexual orientation,” wrote Judge Clark. “He also complains that he and another male were the only male managers while there were six female managers at his workplace.” (Walters formerly worked as a manager for a McDonald’s franchise restaurant operated by the defendant corporation.) Clark found that even if these allegations were true, they would not “undermine” the magistrate’s analysis, which was premised on the lack of Fifth Circuit
precedent embracing a broader view of sex discrimination under Title VII that would encompass sexual orientation discrimination claims. Furthermore, the court found that Walters’ allegations did not meet the requirement of “severity or pervasiveness” necessary to establish a hostile work environment, and that Walters had not addressed the employer’s “legitimate, non-discriminatory reason for terminating” him. “The personal beliefs and unverified anecdotal evidence presented in plaintiff’s objections do not persuade the Court that the magistrate judge’s findings and conclusions of law should be altered,” wrote Clark.

TEXAS – Texas District Judge Robert Schaffer ruled that opponents of Houston’s non-discrimination ordinance had failed to gather sufficient valid signatures to force a repeal referendum on April 17, but the opponents vowed to file an appeal. Houston Chronicle, April 17. The ordinance forbids discrimination because of an individual’s sexual orientation or gender identity, characteristics that are not covered under the state’s anti-discrimination law. On April 30, the opponents filed an appeal with the Court of Appeals in Houston. Their attorney, Andy Taylor, said he would continue to press an earlier appeal he had filed with the Texas Supreme Court, which has not yet announced whether it will hear the case. Houston Chronicle, May 1.

VIRGINIA – Beware, the turkey baster baby! Joyce Bruce, a single woman, wanted to have a kid without the complication of a husband, a boyfriend, or sex. She talked a longtime friend, Robert Boardwine, into coming to her house, going into another room to ejaculate into a plastic container, and then giving her the results and leaving. She used a turkey baster to attempt to inseminate herself. After a few unsuccessful attempts, she consulted a doctor and tried to become pregnant through inseminations from unknown donors, but that didn’t work, so she called up Boardwine for another try. Using the same procedure with the turkey baster several times, she finally became pregnant. She and Boardwine never made any sort of agreement, written or otherwise, about his status. She expected him to remain just an interested friend. He claims that he expected to be a father. As her pregnancy progressed, they fell out over this difference of opinion and she stopped communicating with him. He learned through friends that the baby had been born and visited in the hospital. She allowed some visitation when she brought the baby home, but things were “strained” and she told him to “stop coming by.” Boardwine filed suit in Roanoke City Juvenile and Domestic Relations Court, seeking to establish parental rights including joint custody and visitation. Bruce moved to throw out the case, claiming that Boardwine was just a “sperm donor” with no parental rights. She invoked Virginia’s assisted conception statute, under which sperm donors do not have parental rights. But the court found that Boardwine was not a “sperm donor” within the meaning of that statute, which the court found was intended to deal with reproductive technology used by a physician to assist a married couple to have a child with the help of donated sperm. The trial court found that as DNA testing had established Boardwine’s parenthood, he should be awarded joint legal and physical custody and visitation. The court of appeals affirmed on April 21. “There is no serious dispute that Boardwine established that he is the biological father of J.E.,” wrote Judge McCullough. “Boardwine relied on Code sec. 20-49.1(B)(1), which provides that ‘the parent and child relationship between a child and a man may be established by scientifically reliable genetic tests, including blood tests, which affirm at least a ninety-eight percent probability of paternity.’ Boardwine’s test established his paternity by a probability of greater than 99.999%. The path to fatherhood may have been unconventional, but as the father of J.E., Boardwine was entitled to seek (and as the trial court found, receive), visitation with his son.” Bruce v. Boardwine, 2015 WL 1781242 (Va. Ct. App., April 21, 2015).

WASHINGTON – Granting defendant’s motion to dismiss a sexual orientation employment discrimination claim in Wurts v. City of Lakewood, 2015 U.S. Dist. LEXIS 56337 (W.D. Wash., April 29, 2015), U.S. District Judge Benjamin D. Settle found that the plaintiff had failed to allege facts sufficient to make out a prima facie case of sexual orientation discrimination, much less to put the employer on notice of the nature of the claim, merely citing the Washington Law Against Discrimination in his initial claim filed with the City, without specify that he was asserting a claim of sexual orientation discrimination. Thus, the court found plaintiff fell short of the procedural prerequisites for presenting this claim as part of his lawsuit. The case involves a variety of federal and state claims other than the sexual orientation discrimination claim, and the court granted in part and denied in part the overall cross-motions for summary judgment.

CRIMINAL LITIGATION NOTES

U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS – We might question the harm in receiving oral sex while inebriated, but evidently this is a battery in the Marines. In United States v. Escamilla, 2015 CCA LEXIS 157, 2015 WL 1880391 (April 23, 2015) (not reported in M.J.), the court affirmed the court martial conviction of an openly gay Marine who performed
oral sex on a straight fellow Marine after a night of off-base socializing and drinking, despite the “victim’s” woozy objection. The defendant was sentenced to a reduction in pay grade, 235 days in the brig, and a bad-conduct discharge. Appealing his sentence, Escamilla argued that the evidence was insufficient to prove beyond a reasonable doubt that the victim neither consented to the alleged “assault” nor that Escamilla honestly and reasonably believed that he had received consent to his action. The victim testified that after he said “Nah” to Escamilla’s question whether he could perform oral sex, Escamilla went ahead anyway and the victim “put a pillow over his own face ‘like when you want to scream’ and ‘hoped that it would just stop.’” Escamilla stopped when he heard somebody else coming into the hotel room; the victim jumped up and took a shower before going to bed. The matter came to command attention when another Marine, who had some dispute with Escamilla, questioned the victim, learned what happened and reported it. The court of appeals found that the court martial was properly instructed on consent, and rejected Escamilla’s claim that “it is simply unreasonable for the finder-of-fact to see the sexual encounter between me and LCpl MH as anything other than an awkward, but consensual, homosexual encounter.” Although the testimony about precisely what happened conflicted, it was up to the court martial members to make their finding of fact. “In fact,” wrote the court, “members are free to believe one witness and disbelieve another.” The court didn’t bother to address explicitly Escamilla’s argument that he was prejudiced by the military judge mentioning to the court martial the “punitive measures that could have been taken” against Escamilla under the former “don’t ask, don’t tell” policy. Was this a simple misunderstanding, or did Escamilla aggressively take things too far? This case really explodes the gay porn trope that any male Marine, regardless of his sexual orientation, would be happy to get a blow job from a buddy given the right amount of liquor and dim lights. . . Another commonly-shared fantasy exploded!

CALIFORNIA – U.S. District Judge Margaret M. Morrow accepted a recommendation from Magistrate Judge Louise A. La Mothe to reject a petition for a writ of habeas corpus from Carlos G. Astacio, who was convicted by a jury of first-degree murder in the death of Thomas Priest, a gay man who met Astacio and another man in a gay bar while on vacation in Long Beach, went with them to Priest’s hotel room, and was found murdered in his bed by hotel staff the following morning. The prosecution’s theory was that the men planned to rob Priest, who was murdered after making sexual advances. There were no witnesses to the murder, so the conviction was based on circumstantial and forensic evidence and a confession. Astacio was sentenced to 25 years to life, and his conviction was upheld on appeal to the California Supreme Court. The California Supreme Court denied a petition for review. The magistrate judge found no merit to Astacio’s claim that his clearly-established federal constitutional rights were violated on grounds of insufficient evidence of his guilt, errant jury instructions, voluntariness of his confession, or admission of hearsay statements. Astacio v. Hedgpeth, 2015 WL 1524563 (C.D. Calif., March 31, 2015).

CALIFORNIA – In a ruling that seems bizarre on its face, a panel of the California 5th District Court of Appeal (Fresno) relied on expert testimony from a 1990 case involving a criminal defendant charged with biting a police officer to support an HIV testing order imposed on a man who pled “no contest” to a charge of attempting to French kiss his young niece. People v. Jimenez, 2015 WL 15769512 (April 7, 2015). While conceding that one of the crimes with which he was charged is on the list of those for which HIV testing is authorized under California criminal statutes, “lewd and lascivious conduct with a child,” Rafael Jimenez argued that he should not be subjected to HIV testing because the record contains no evidence that “any fluid capable of transmitting HIV was transferred from Jimenez to any victim.” This is a defense to such testing orders that has been approved by other courts in other case, so such a finding is ordinarily a prerequisite to order such testing of a criminal defendant under recent California case law. In this case, wrote the court per curiam, “The court could reasonably find that Jimenez transferred saliva to victim S.M. during the incidents of molestation when Jimenez put his tongue in her mouth while kissing her.” Then the court cited Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255 (1990), where the court reasoned based on testimony about the state of medical knowledge at that time that there was a “theoretical possibility” that a defendant who bit a sheriff’s deputy during an arrest resulting in a “deep puncture type bite” might, if infected with HIV, have transmitted it to the deputy. “We consider the court’s discussion in Johnetta J. to be apropos here and find the evidence that defendant kissed one of the victims sufficient to support a finding of probable cause for the order for AIDS testing.” The court then string-cited three cases from other jurisdictions on the point, none more recent than 1995, without mentioning the factual context of any of them. The court went on to say, “There was no need for the prosecutor to present evidence showing that saliva can transmit HIV because prior case law has established that it can, albeit the possibility that it will actually infect a victim is remote.” This is crazy. “Facts” established in 1990 about an issue as to
CALIFORNIA – In a long and complicated opinion, the California 2nd District Court of Appeal ruled that prior litigation between a gay couple and health insurance companies in Missouri would not bar the surviving member of the couple from asserting a wrongful death claim against Pacificare in California, premised on the argument that its wrongful failure to cover legitimate claims by the decedent contributed to his death, subsequently harming the plaintiff with loss of consortium. *R.S. v. Pacificare Life & Health Ins. Co.*, 2015 Cal. App. Unpub. LEXIS 2999, 2015 WL 1887184 (April 27, 2015) (not officially published). A full discussion of the facts in this case would run to several pages in this newsletter, so we will avoid trying readers’ patience unduly. Suffice to say that R.S. and R.C., then registered California domestic partners, applied for health insurance in 2004 disclosing that they were HIV positive and that R.C. had been diagnosed with AIDS. Their policies and premium payments were accepted, but there were subsequent disputes about payment of their claims for treatment expenses. The men maintained residences in both California and Missouri, and had also purchased insurance from a Missouri insurer, some of the disputes extending to that insurer as well. There was litigation in the Missouri courts, at first instigated by the insurers claiming that the men had made fraudulent statements concerning their place of domicile, and ultimately various claims and counterclaims were litigated there. After R.C. died, R.S. sued Pacificare in California on wrongful death and survivor benefit claims. Ultimately the court of appeals held that the survivor claims stemmed from the same issues already litigated in the Missouri court and thus could not be maintained in this litigation, but that the wrongful death claims were not barred, having been asserted after R.C.’s death and thus not subsumed under the Missouri litigation concerning the denial of claims during R.C.’s life. Anyone concerned with ongoing health insurance litigation issues surrounding HIV/AIDS would probably do well to take a look at the opinion. We found some of it incomprehensible, but we are not insurance law experts.

OHIO – The 8th District Court of Appeals of Ohio affirmed a ruling by the Cuyahoga County Court of Common Pleas against Joanne Clayton, who sued her former employer on claims of wrongful discharge in violation of her employment contract and HIV-related disability discrimination. *Clayton v. Cleveland Clinic Foundation*, 2015 WL 1851517 (April 23, 2015). Clayton was employed as a housekeeper by the Clinic beginning in 2003, and was terminated in 2011 “for making derogatory comments about her supervisor that were sexual in nature and for misusing the Family and Medical Leave Act (FMLA),” wrote Judge Patricia Ann Blackmon for the court of appeals. Clayton received numerous positive job evaluations during her tenure, but also numerous reprimands for work rule violations. She alleges that her discharge violated her employment contract, premising her claim on an employee handbook that includes anti-harassment and anti-discrimination policies and on group sessions at the beginning of each workday during which supervisors made statements she construed as promises of job security. The court found that the handbook also had a clear disclaimer concerning contractual obligations and designated those employees not represented by a union (such as Clayton) as at-will employees. As to her HIV-discrimination claim, Clayton alleged that she was reassigned to a less desirable cleaning assignment after telling a supervisor that she was HIV-positive, but the court found that the reassignment could be seen as an accommodation, since Clayton had asked that her vulnerability to infection be taken into account in assigning tasks to her and the reassignment took her away from exposure to Clinic patients’ infectious conditions. Furthermore, during her deposition Clayton testified that her HIV infection did not limit her in any of her activities of daily life, and her doctor had certified to the clinic that Clayton was not physically impaired by her HIV infection. There was no evidence that the clinic regarded Clayton as impaired, and the court found there was no evidence that her HIV status had anything to do with her discharge. “She claimed her termination was without cause; therefore, it must have been based on her HIV positive status,” wrote the court. “However, her termination occurred eight years after she informed the Clinic that she was HIV positive. The Clinic also gave

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legitimate reasons for terminating Clayton’s employment. . . Clayton argues that the reasons for termination were pretextual because the Ohio Department of Job and Family Services found she was terminated without cause when it awarded her unemployment compensation. However, ‘just cause for purposes of the agency’s determination regarding a discharged employee’s eligibility to receive unemployment compensation benefits is distinct from, and has no collateral-estoppel effect upon, a subsequent civil suit concerning the employee’s discharge’ under Ohio precedents. Clayton effectively sunk her case by responding “no” to the following question at her deposition: “Can you, Ms. Clayton, give me an example of different treatment that was given to any white or non-handicapped employee at the same time you feel that you were discriminated against?” Clayton was represented on appeal by Joseph F. Salzgeber of Brunswick, Ohio.

VIRGINIA – Time for the courts and legislatures to catch up with changes in the law? The Court of Appeals of Virginia, clinging to what is clearly an obsolete concept of “cohabitation,” rejected an ex-husband’s attempt to reduce his spousal support payments when he learned his ex-wife was cohabiting with (and intending to marry) a woman. Luttrell v. Cucco, 2015 WL 1782065 (April 21, 2015) (unpublished opinion). When Michael Luttrell and Samantha Cucco divorced, they executed a property settlement agreement (PSA) on November 6, 2008, that provided he would pay spousal support each month but that the payments would terminate after November 1, 2016, “if not earlier terminated as a result of the death of either party, the remarriage of the wife, or as a result of action by the Court taken pursuant to Sec. 20-109 relative to cohabitation.” Early in 2014 the federal district court in Virginia ruled that the state’s ban on same-sex marriage was unconstitutional, but the opinion was stayed pending the state’s appeal to the 4th Circuit and thence to the Supreme Court. Meanwhile, on July 10, 2014, Luttrell filed a motion to adjust spousal support, alleging he recently discovered his wife was cohabiting with and engaged to marry a woman since at least November 24, 2012. He sought to terminate his support obligation and recoup payments made back to that date. Luttrell represented himself pro se, and Cucco’s attorney seized the initiative at the hearing, virtually presenting Luttrell’s motion to Circuit Judge Charles Maxfield and arguing that it was not meritorious because the cohabitation law applied only to different-sex couples living together due to its reference to a relationship “analogous” to marriage. Luttrell then argued that cohabiting same-sex couples could be seen as “analogous to marriage.” “The really important point,” he argued, “is the one that you made which is that the Federal Courts ruled this Commonwealth of Virginia statute against same-sex marriage is invalid, as have a slew of Federal Courts across the United States. I find [wife’s counsel’s] reasoning stretching the imagination.” Luttrell also claimed that when he signed the PSA he thought it applied to same-sex relationships because “it was really my understanding and my belief for much of our marriage that this very situation would arise.” Cucco’s attorney objected, citing the parol evidence rule (which restricts some kinds of evidence seeking to contradict a written contract). Judge Maxfield never ruled explicitly on the parol evidence objection, but just concluded, based on prior case law construing the cohabitation statute, that it applied only to mixed-sex couples, and rejected Luttrell’s motion. On his appeal, the Court of Appeals rejected Luttrell’s contention that the aggressive role taken by his ex-wife’s attorney during the hearing denied Luttrell due process of law, and concluded that the trial court had correctly ruled that under Sec. 20-109 of the Virginia Code, which was expressly referenced in the PSA, “same-sex couples cannot cohabit” as a matter of law. Thus, the trial court was correct to deny Luttrell’s motion, and had appropriately awarded attorney’s fees to Cucco pursuant to the fee provision of the PSA, which permitted an award of fees to a party “in the successful defense to any enforcement action” brought under the PSA. Annesha M. Grant represented Luttrell on appeal. Apparently confident of prevailing, Cucco did not bother to submit a brief or have anybody provide oral argument in opposition to Luttrell’s appeal. And, since the stay on the marriage ruling was lifted after the Supreme Court denied review on October 6, 2014, one speculates that if Cucco has married her girlfriend, Luttrell could renew his motion to suspend spousal support, at least back to the date of the marriage. Perhaps it would be appropriate for Virginia to repeal or revise its cohabitation statute (which, if it imposes any criminal penalties would certainly be deemed unconstitutional in any event). One expects, now that same-sex marriage is legal in Virginia, that parties executing spousal support agreements in future will be more explicit about the circumstances under which such obligations may terminate.

WISCONSIN – Another Craigslist case here. Micah D. Stern was sentenced to ten years imprisonment followed by 15 years of extended probation after a jury convicted him on one count of use of a computer to facilitate a child sex crime. He sought a writ of habeas corpus, challenging the constitutionality of his conviction, in Stern v. Dittmann, 2015 WL 1781931 (E.D. Wis., April 20, 2015). In December 2009, Stern posted an ad in the “Men seeking Men” section of Craigslist, headlined “Coach seeking Boy.” He received an email reply from somebody calling himself “Peter,” actually an undercover police officer
posing as a 14-year-old boy. During several email exchanges, “Peter” told Stern several times that he was “underage,” but Stern arranged to meet with “Peter” at a local McDonald’s and he was arrested shortly after arriving there. A police search of his car turned up a box of unopened condoms and some lubricant. Stern’s defense at trial was that he knew all along that “Peter” was “really another adult (“Chris” or “Wauk319”)” with whom he had also exchanged email in response to his advertisement, and that this was whom he was going to meet at McDonald’s. “Regarding ‘Peter,’ Stern pointed out, among other things, that the chat language seemed ‘contrived’ and that the photographs ‘Peter’ provided looked dated.” He also offered an “expert” who testified that the ad’s “Coach seeking Boy” language just reflected gay role-play involving dominant and submissive roles, and not necessarily a solicitation for sex with an underage male. Nonetheless, the jury convicted Stern. Stern argued that the jury instruction in the case allowed the jury to convict him without finding that he actually believed he had set up a meeting with a minor, as it provided for conviction if the jury found that Stern “has reason to believe” that “Peter” was underage, which could be premised on the email exchanges. He criticized the Wisconsin statute as vague, and said it “stifles his right to consensual adult sexual privacy.” The Wisconsin appeals court affirmed his conviction, finding the statute plain on its face and that Stern’s proffered interpretation would “require reading ‘has reason to believe’ out of the statute.” That court also found that in light of the email communications, Stern could not “credibly maintain that he could not tell that his conduct at least approached the proscriptions of the statute.” Magistrate Judge Nancy Joseph found no constitutional fault with the state appeals court’s ruling, and rejected Stern’s argument that the statute was faulty in not requiring a finding that the defendant actually knew his intended sex partner was underage. Turning to his privacy argument, based on Lawrence v. Texas, Judge Joseph said that “the jury, as was its right, rejected Stern’s defense” that he didn’t believe “Peter” was a minor. Stern’s conviction, however, does not mean that the statute authorizes prosecution or conviction of an adult communicating with another adult whom he actually believes to be an adult or plainly adult role-playing,” continued Joseph. “It simply means that on the evidence presented at trial in Stern’s particular case, the jury rejected the defense’s version of events. Stern has therefore failed to show that the court of appeals’ rejection of his right to sexual privacy argument was contrary to or unreasonable application of federal law.” Stern is represented on his habeas petition by Robert R. Henak of Milwaukee.

PRISONER LITIGATION NOTES

UNITED STATES COURT OF APPEALS – TENTH CIRCUIT – Last Fall, Law Notes reported Chief United States District Judge Vicki Miles-LaGrange’s adoption of a “gratuitously transphobic” recommendation of United States Magistrate Judge Charles B. Goodwin that a pro se transgender inmate’s lawsuit seeking medical care be dismissed, in Darnell v. Jones, 2014 WL 4792144 (W.D. Okla., Sept. 24, 2014), Law Notes (November 2014), at page 464. While that decision dismissed for failure to exhaust administrative remedies under the Prison Litigation Reform Act [PLRA], 42 U.S.C. § 1997e(a), it also addressed the merits of the case, writing that Darnell failed to show “physical injury” from denial of medical care and that “the relief requested was not consistent with the public interest.” Circuit Judges Carlos F. Lucero, Timothy M. Tymkovich, and Gregory A. Phillips affirmed on PLRA exhaustion grounds in Darnell v. Jones, 2015 U.S. App. LEXIS 6203, 2015 WL 1727666 (10th Cir., April 16, 2015). Although Darnell had sought hormone and other treatment for six years in the Oklahoma prison system, she mailed her third-tier administrative appeal to the wrong official, thereby failing to exhaust fully under Woodford v. Ngo, 548 U.S. 81, 90 (2006). Darnell’s arguments – that officials should have forwarded the appeal to the correct party; that the appeal in fact reached that official by fax; and that she had grievances the misrouting – were unavailing because Darnell did not re-mail the appeal herself through the U.S. Postal Service. Prison officials had no duty to cooperate with Darnell’s grievances so long as she was not “prohibited from mailing her appeal… though [sic: “through”] threats or intimidation.” The Circuit panel did not discuss the District Court’s transphobic dicta about Darnell’s lawsuit, writing: “we do not reach the merits of her claims.” The opinion is “not precedent,” but it may be cited under Fed. R. App. P. 32.1. William J. Rold

ALABAMA – An HIV+ inmate’s lawsuit claiming he is segregated because of his HIV status, denied programs and privileges and forced to wear an armband proclaiming his HIV status is allowed to proceed against current defendants in C.S. v. Thomas, 2015 WL 1513928 (N.D. Ala., March 9, 2015). United States Chief Magistrate Judge John E. Ott’s Report and Recommendation [R & R] dismisses claims against former officials who no longer hold office based on Alabama’s analogous two-year residual limitations period, which is incorporated in actions under the Americans with Disabilities Act and the Rehabilitation Act. The pro se plaintiff, allowed to proceed as “C.S.,” alleges that he is “housed in a segregated dorm for HIV-positive inmates in Limestone”; locked down in a particular dorm and
denied access to general population; not allowed to leave the unit for medical care or meals; and required to wear an armband identifying himself as HIV+ “at all times.” The R & R found that, for screening purposes under the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915A, the “plaintiff has alleged sufficient facts to require a response from [the current] defendants.” There is no discussion of the HIV civil rights class action in Alabama – see Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991) – or its settlement under the ADA and the Rehabilitation Act in Henderson v. Thomas, 2013 U.S. Dist. LEXIS 140098 (M.D. Ala., Sept. 30, 2013), reported in Law Notes (November 2013) at page 355. William J. Rold

ILLINOIS – United States District Judge Staci Michelle Yandle found that two claims of federal transgender inmate Anthony Johnson survived initial screening under 28 U.S.C. § 1915A(b) and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in Johnson v. Robinson, 2015 WL 1726965 (S.D. Ill., April 2015) at pages 176-77. United States Magistrate Judge Paul Papak found that Poole’s claim is barred stating them as to a particular plaintiff. Seaton v. Mayberg, 610 F.3d 530, 534–35 (9th Cir.2010). Seaton makes no such sweeping pronouncement. Rather, it balances prisoner medical privacy with articulated penological interests. While deferring to such interests, it does not sanction a court, as a “preliminary matter,” to dispense with defendants’ stating them as to a particular plaintiff. As to the nurse’s informing other inmates about Poole’s HIV status, Judge Papak finds that Poole’s claim is barred by the Prison Litigation Reform Act’s requirement of “physical injury” as a

Judge Yandle ruled that allegations that defendants “repeatedly attempted to house Plaintiff with inmates prone to harm her due to her transgender status, and then attempted to disrupt safer housing arrangements, combined with the allegations that Robinson was openly hostile to Plaintiff because she is transgender or perceived as being homosexual,” arguably fall with the ambit of the Eighth Amendment under Farmer v. Brennan, 511 U.S. 825, 847 (1994). Next, relying on “class of one” theory under Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), Judge Yandle ruled that allegations that “because Plaintiff is transgender and/or perceived as homosexual, [defendants] treated Plaintiff differently from other inmates in making housing decisions (impacting Plaintiff’s safety), states a colorable equal protection claim—at least at this early stage in the proceedings.” Judge Yandle found that allegations about due process denials and conspiracy to retaliate for filing grievances were insufficiently pleaded, and she dismissed them without prejudice, providing general guidance as to what elements of the causes of action were missing. As to HIPAA, Judge Yandle ruled (as have all judges addressing the issue) that no private cause of action exists under the statute, without discussing any constitutional right to medical privacy. Judge Yandle issued various housekeeping orders for service and further proceedings, including pre-trial referral to United States Magistrate Judge Philip M. Frazier. Judge Frazier is also supervising pre-trial proceedings in lawsuits by Illinois state transgender prisoner Dameon Cole, a/k/a Divine Desire Cole, reported most recently in Law Notes (March 2015), at pages 120-21. See also Brown v. Godinez, 528 U.S. 562, 564 (2000), Judge Yandle’s procedural handling of Johnson’s claims (including sua sponte dividing them into “Counts”) and the housekeeping orders are similar to orders by Judge Gilbert and together they create a model for handling pro se transgender prison cases in the Southern District of Illinois. Judge Yandle is openly gay, and she is the first African American federal judge in that court. William J. Rold

OREGON – United States District Judge Michael H. Simon adopted the unopposed Recommendation of United States Magistrate Judge Paul Papak that pro se prisoner Christopher James Poole’s complaint alleging violation of his right to medical privacy be dismissed in Poole v. ODOC, 2015 WL 1526527 (D. Ore., April 3, 2015). Judge Papak found that the “core” of Poole’s complaints involved allegations that his constitutionally protected right to privacy was violated when a nurse announced his HIV status within hearing of other inmates, a mental health unit employee discussed his case with security staff, and an officer “sat in” on his medical appointments. Judge Papak recommended as a “preliminary matter” that Poole’s claims about the discussion of his mental health with security and the officer’s presence at medical appointments be dismissed as outside a “constitutionally protected expectation of privacy,” citing Seaton v. Mayberg, 610 F.3d 530, 534–35 (9th Cir.2010). Seaton makes no such sweeping pronouncement. Rather, it balances prisoner medical privacy with articulated penological interests. While deferring to such interests, it does not sanction a court, as a “preliminary matter,” to dispense with defendants’ stating them as to a particular plaintiff. As to the nurse’s informing other inmates about Poole’s HIV status, Judge Papak finds that Poole’s claim is barred by the Prison Litigation Reform Act’s requirement of “physical injury” as a
Although the court found that some motions to dismiss their complaints were theoretically entitled to punitive damages, he does not have a “plausible” claim for them here because the nurse apologized and addressed privacy for the future in response to his grievance. Judge Papak recommended denial of appointment of counsel despite Poole’s mental illness (finding it “apparent from Poole’s most recent submissions to the Court that he has deteriorat[ed] mentally and currently is not grounded in reality”), because of the weakness of his claims. District Judge Simon nevertheless granted Poole ninety days to file a Third Amended Complaint.

**PUERTO RICO** – U.S. District Judge Daniel R. Dominguez found that lesban state prisoners had made sufficient allegations to withstand motions to dismiss their complaints about discriminatory and oppressive treatment in violation of the 14th and 8th Amendments in *Lopez v. Ortiz*, 2015 WL 1470566 (D. P. R., March 31, 2015). The women alleged that they were segregated from other women prisoners and subjected to inferior and degrading treatment, denied recreation, suffered meal delays, and were subjected to homophobic slurs and mistreatment by prison guards. Although the court found that some of the plaintiffs should be dismissed from the case due to failure to exhaust administrative appeals, for those who met the exhaustion requirements, he rejected the defendants’ attempt to get the cases thrown out on converting the dismissal motion to a summary judgment motion on the merits. Pending discovery, he found that the women had sufficiently alleged equal protection violations and mistreatment severe enough to raise 8th Amendment concerns, finding unconvincing the defendants’ argument that segregating lesbian prisoners from heterosexual prisoners was necessary to maintain order in the prison. Beyond the segregation issue, the various allegations of mistreatment did not seem likely to be justified by any legitimate penological interest, but a final judgment on these claims will await discovery.

**VIRGINIA** – The Virginia Supreme Court held that a transgender federal prisoner incarcerated in Virginia who had applied for a name-change was entitled to receive it, reversing a decision by Prince George County Circuit Judge Nathan C. Lee. In re Robert Floyd Brown, 2015 WL 1727491 (April 16, 2015). Judge Lee had rejected Brown’s petition for a name change to Alicia Jade Brown, finding that Brown’s stated reasons for seeking a name change “do not outweigh the potential negative impact on the community. Given that the name change reflects a shift in gender identity of a federal prisoner, the court declines to accept the application.” On appeal, Brown’s case had been consolidated with that of another inmate seeking a name change, Steven Roy Arnold, and oral argument was held on January 5, but Arnold subsequently committed suicide while still incarcerated, rendering the Arnold appeal moot. Brown attached to her petition a medical record from the Federal Bureau of Prisons confirming her diagnosis of gender identity disorder and her intent to transition from male to female in accord with her gender identity. The court had first to address a preliminary issue; the state’s name change statute was amended after Brown’s petition was filed but prior to the oral argument of this case. The amendment added a new requirement for prisoner name change applications: a finding that the name change “would not frustrate a legitimate law-enforcement purpose.” The court determined that the version of the statute in effect when Brown filed her petition should govern this case, drawing a dissent from one of the justices. But Chief Justice Donald W. Lemons wrote for the remainder of the bench that actions by the legislature had “demonstrated a recognition . . . that being transgender and undergoing a gender and sex change is a valid basis for changing one’s name and amending a person’s vital record. Accordingly, the fact that an applicant is transgender and is changing their name to reflect a change in their gender identity cannot be the sole basis for a finding by a trial court that such an application is frivolous and lacks good cause.” In this case, wrote Lemons, the trial court had “abused its discretion in holding good cause did not exist” for the name change. Furthermore, he wrote, “There is also no evidence in this record that would support the trial court’s holding that this name change would have any negative impact on the community. The fact that Brown is a federal prisoner is also not a reason to deny the name change application.” The court directed Judge Lee to grant the application. In dissent, Justice McClanahan argued that the current version of the statute should apply, which would require a remand to Judge Lee for a determination whether the additional requirement of the amended statute had been met.

**WISCONSIN** – A transgender prisoner, identified in the docket as “Ms. Roy A. Mitchell, Jr.” filed a *pro se* civil rights case against several corrections officials for failure adequately to treat her “Gender Dysphoria.” Now, after her
release, United States District Judge Conley denied Mitchell’s motion for a preliminary injunction challenging parole officials’ requiring her to live in a male shelter in Mitchell v. Wall, 2015 U.S. Dist. LEXIS 46084 (W.D. Wisc., April 8, 2015). Judge Conley ruled that Mitchell could not join her claim – that parole officials violated her rights by requiring her to live in a shelter for men – with her lawsuit about medical care while in prison. He also found that she failed to satisfy procedural requirements for seeking a preliminary injunction, including a showing that she was likely to prevail on the merits. Although unstated, presumably the order is without prejudice, and Mitchell is free to commence a separate action concerning the requirement that she live in a shelter for men as a condition of parole. William J. Rold

PRISONER / LEGISLATIVE

LEGISLATIVE NOTES

U.S. CONGRESS – On April 30 the House Armed Services Committee approved a defense policy bill that includes a provision allowing transgender military veterans to get new discharge papers issued identifying them consistent with their gender identity. This is crucial to preserving their privacy and avoiding having to reveal their transgender status every time they are asked to provide documentation of their military service. Washington Times, May 1. *

* * On April 30, Rep. Mark Takano (D-Calif.) introduced H.R. 2025, to “amend title II of the Social Security Act to provide for equal treatment of individuals in same-sex marriages.” This proposal is intended to end the deprivation of benefits from same-sex spouses who live in states that don’t recognize their marriages. It might be rendered unnecessary if the Supreme Court rules for marriage equality in June. The measure was referred to the House Ways and Means Committee. Targeted News Service, May 1.

ARKANSAS – The Attorney General’s office cleared a proposed ballot measure to repeal a recently adopted law that prohibits local governments from adopting anti-discrimination laws covering characteristics not included in the state’s anti-discrimination law. Despite its generalized wording, the measure was clearly intended to override local laws banning sexual orientation or gender identity discrimination, of which Arkansas had few to being with. It will take about 51,000 valid voter signatures to put the measure on the ballot. Several municipalities had been entertaining proposals to pass such laws when the state measure was enacted, and a few have done so in defiance of the state legislation. The city board in Little Rock voted 7-2 on April 21 to prohibit the city from discriminating based on sexual orientation or gender identity, including contracting with businesses that discriminate on those bases, taking the position that the state law would only restrict it from attempting to impose a non-discrimination policy on private sector businesses. However, the Jonesboro city council rejected a proposal to adopt a similar policy on April 7. Eureka Springs has put an anti-discrimination proposal on the ballot for a municipal election on May 12; the city council approved the measure in February, but then bowed to pressure to let the residents vote on the policy before putting it into effect.

NORTH CAROLINA – House Speaker Tim Moore announced on April 23 that a proposed Religious Freedom Restoration Act will not be considered by the House this year. Moore told reporters that the bill’s sponsors “have good intentions” but that the issue has been “politically mischaracterized” due to reactions to the Indiana law that was in the news earlier this year. Gov. Pat McCrory, a Republican, has publically questioned the need for such a law. witn.com, April 23. Such laws are criticized as attempts to allow businesses to refuse to provide goods or services to same-sex couples for their weddings. North Carolina is one of many states where same-sex couples can marry pursuant to federal court orders rendered last year over the objections of state government officials.

MINNESOTA – The House of Representatives voted to approve an omnibus bill on April 25 that includes a repeal of transgender-inclusive policies that had been adopted by school districts in Minneapolis and St. Paul, and to prevent enactment of similar policies in other districts. State legislators object to the idea that transgender students should be able to use restroom and locker room facilities consistent with their gender identity because… well, because it makes them uncomfortable. They claim to be protecting student privacy, titling the amendment on this topic the “Student Physical Privacy Act.” The amendment passed by voice vote, then the main bill passed on a largely party-line vote with Republicans in favor and Democrat-Farmer-Labor Party members opposed. Bluestem Prairie, April 27.

OKLAHOMA – The Oklahoma legislature has given final passage to HB 1007 and SB 788, measures intended to “protect” clergy and religious organizations from being forced to solemnize same-sex marriages or to open their facilities, counseling programs, and so forth to same-sex couples, and to protect judges from being required to perform marriages to which they have religious objections. These measures may be
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mainly symbolic. No court would order a religious organization to violate the tenets of its faith in this regard, and judges are generally free to refuse to perform marriages, although there have been ethics opinions issued in some states holding that judges who do perform marriages cannot discriminate based on sexual orientation in deciding whether to officiate at any particular ceremony.... So perhaps SB 788 is not purely symbolic. SB 788 also purports to protect religious organizations from being compelled to participate in marriages violating their religious tenets. Religion Clause, April 24.

DISCRIMINATION IN THE NEW ECONOMY – A gay couple from Houston, Texas, that reserved a room in Galveston through Airbnb arrived and dropped off their things before heading out for an evening on the town. When they returned and met their host, she asked where the wives were, and on learning they were a same-sex couple, she told them to leave. After securing alternative lodging, they notified Airbnb, which removed that facility from its website. An Airbnb spokesperson stated, “We have a zero tolerance policy for discrimination on Airbnb. Airbnb has clear guidelines that a host or a guest may not promote hate or bigotry.” The discriminatory owner stated, “I’m completely of my legal realms and morals.” Perhaps, but she doesn’t sound particularly at ease with the English language. Houston Chronicle, May 1.

OUTING BY INTERNET – North Dakota State Representative Randy Boehning, a conservative Republican who has a terrible voting record on gay-related issues, was outed as gay when he sent a graphic photo of himself to another user of a gay dating service and his action surfaced in the press.

RUNNING CHRONICLE

PRESIDENT OBAMA – The White House announced that President Barack Obama is calling for an end to the use of “sexual orientation change efforts” (SOCE) on minors. A statement was posted on the White House website on April 8 articulating the president’s position. Responding to a petition with more than 120,000 signatures urging the President to take a position, the statement, composed by Valerie Jarrett, a senior advisor to the President, stated: “We share your concern about its potentially devastating effects on the lives of transgender as well as gay, lesbian, bisexual, and queer youth. As part of our dedication to protecting America’s youth, this administration supports efforts to ban the use of conversion therapy for minors.” The President does not contemplate seeking federal legislation on the subject, but is open to proposals from legislators. Administration officials also announced thecreation of the first all-gender restroom in the Eisenhower Executive Office Building, to provide an additional option for transgender individuals who are not comfortable using a restroom solely designated for one sex.

INTERNATIONAL NOTES

EUROPEAN COURT OF JUSTICE – The European Court of Justice issued an interim ruling on April 29 on the question whether a country subject to European law can categorically exclude from blood donation any man who has had sexual relations with another man for purposes of protecting transfusion recipients from contracting HIV. Leger v. Ministre des Affaires sociales, Case C-528/13. The question had been referred to the European Court by the Tribunal Administrative, Strasbourg (France), before which was pending a lawsuit by a gay Frenchman who was rejected as a blood donor after truthfully responding during the intake screening that he had engaged in sex with a man. Unlike some other countries in Europe, France has not modified its blood donation rules to allow for donations by gay men who have not had sex for some specified period of time, thus making it unlikely that they are infected with HIV but would test negative because their exposure was too recent for antibodies to be detected by the screening test that is routinely used by bloodbanks. The court did not give a firm answer to the question whether men who have had sex with men can be categorically excluded, instead offering a mode of analysis for that question depending upon fact-finding by the referring French court. Wrote the court: “The criterion for permanent deferral from blood donation in that provision relating to sexual behavior covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behavior puts those persons at a high

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risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods that such a counter indication for ensuring a high level of health protection for the recipients. It is for the referring court to determine whether, in Member State concerned, those conditions are met.” In the course of the opinion, the court noted studies showing that men who have sex with men in France seem to have a higher rate of HIV infection than such men in some other European countries, supporting the French government’s position that the epidemiological situation in France differs from other countries that have abandoned absolute categorical exclusions in favor of waiting periods. The opinion does not mention the effective of treatment for HIV on infectiousness specifically, but does, of course, refer to the requirement to make decisions that would exclude donors based on their sexual orientation in light of “current medical, scientific and epidemiological knowledge and data.” This basically throws the question back into the lap of the French court.

CANADA – Citizenship and Immigration Canada has announced that Canadians no longer need to undergo sex-reassignment surgery as a prerequisite to a legal change of gender designation on official documents. Beginning in February, those wishing a change on their citizenship certificate could obtain it with an amended birth certificate, bringing federal requirements in line with several provinces that have dropped the surgery requirement. National Post, April 29.

CHILE – President Michelle Bachelet signed into law a civil union bill for same-sex couples. The law, signed on April 13, takes effect in six months. It will provide civil union partners with many of the rights of married couples, but not the equivalent of all marital rights. The only countries in South America that allow full same-sex marriage are Argentina and Uruguay, but several other countries authorize same-sex civil unions with limited rights. New Zealand Herald.

ECUADOR – The Ecuadorian Assembly voted 89-1 to approve a bill allowing for the recognition of civil unions open to same-sex couples. The proposal is also open to unmarried heterosexual couples, and provides the same rights and obligations of marriage in limited respects. Although same-sex couples can now form civil unions, they are not authorized to jointly adopt children. As of the end of April it was uncertain whether the president would sign it into law.

EGYPT – An administrative tribunal affirmed a decision by the Interior Ministry to bar a Libyan student from returning to Egypt to resume his studies at the Arab Academy for Science, Technology and Maritime Transport in Alexandria because he is gay. This decision was said to be taken on grounds of protecting the public interest, religious and social values. Egyptian secular law does not prohibit homosexuality, but it is treated as a religious taboo. Associated Press, April 14.

EL SALVADOR – Moving contrary to the emerging trend in Latin America, the legislature in El Salvador has given preliminary approval to a measure that restricts marriage to different-sex couples and would bar same-sex couples from adopting children. A super-majority would be required to enact these measures as part of a package of constitutional “reforms.” A similar effort to amend the constitution to ban same-sex marriages failed in 2009. The country does not allow or recognize at present. AP Worldstream, April 17.

FRANCE – A French appeals court has approved a second parent adoption by a lesbian of the child born to her wife through donor insemination which was effected overseas, following up on a ruling last year by the country’s highest appellate court. The decision overruled a refusal to allow the adoption by a lower court in Versailles. In a separate ruling, a court in Aix-en-Provence approved a joint adoption by a lesbian couple after having previously denied their petition. Since France legislated for marriage equality last year, the courts have had difficulty agreeing on how this would affect adoption rights. BioNews, April 27.

INDIA – The upper house of the Parliament has approved a private member bill to bolster the rights of transgender persons. The measure “aims to provide for formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the state,” according to United News of India (April 24). Its reception in the lower house and by the conservative government is uncertain, but it responds to a decision last year by the Supreme Court of India confirming the right of transgender individuals to full civil rights. This was the first time in 45 years that a private member bill has actually been approved by either house of the Parliament, in which strict party discipline usually limits legislation to measure formulated and approved by party leadership.

IRELAND – The Legislative Assembly in Northern Ireland voted 49-47 to
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reject a marriage equality bill that had been proposed by Sinn Fein members on April 27. Northern Ireland is now the only part of the United Kingdom that does not have marriage equality. *GayStarNews*, April 29. **In the Republic of Ireland, a referendum on marriage equality will be held on May 22, with the government endorsing a “yes” vote and wide public support in polls. In preparation for the referendum, the legislature approved on April 6 the Children and Family Relationship Bill, which extends adoption rights to same-sex couples and cohabiting different-sex couples.

**ISRAEL** – The terrible earthquake in Nepal brought international attention to the phenomenon of gay couples from Israel arranging for Nepalese surrogates to bear children for them, as an Israeli plane brought out several wounded Israelis and premature babies of Israeli parents born to Nepalese mothers on April 27, with a second plane expected to follow with more babies and their parents. On April 26, Israel began airlifting 26 infants from Nepal born to surrogate mothers with their Israeli parents, most of whom were gay couples. Although the practice is locally controversial, Katmandu has become a major destination for Israeli gay men seeking surrogates to bear children for them. *i24news.com, Metro-Boston*, April 27.

**JAPAN** – The Education Ministry stirred comment throughout the country when it sent a notice to local education boards on April 30 calling for greater accommodation of students who are gay, lesbian, bisexual or transgender. It is customary for students in Japan to wear gender-specific uniforms to school. Some schools have allowed transgender-identified students to wear uniforms consistent with their gender identity. The Ministry notice urged all schools to adopt this practice. A year ago the Ministry revealed that a survey had shown that 606 students nationwide had been identified as transgender by their schools, but that the actual number was likely to be higher. The new notice was the first to go beyond transgender to identify other sexual minorities whose needs should be accommodated by the schools.

**KENYA** – The High Court of Kenya at Nairobi ruled in *Gitari v. Non-Governmental Organizations Co-ordination Board*, Petition No. 440 of 2013, that the Board may not reject the application from Eric Gitari to register a non-governmental organization that would work for the advancement of human rights, specifically, as described by the court, the proposed NGO “would seek to address the violence and human rights abuses suffered by gay and lesbian people.” The decision was issued by a panel of four judges on April 24. The court found that the Board’s denial of the application violated Kenya’s constitution, Article 36 of which grants “every person” the right to form an association of “any kind,” which can only be refused on “reasonable grounds.” Said the court, “It can only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” The court commented that “in a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable. The Constitution and the right to association are not selective. The right to associate is a right that is guaranteed to, and applies, to everyone. As submitted by the petitioner, it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. If only people with views that are popular are allowed to associate with others, then the room within which to have a rich dialogue and disagree with government and others in society would be thereby limited.” The attorney general promptly announced an appeal.

**MALTA** – Malta’s legislature has adopted what was described as the world’s most progressive gender identity law on April 1. This would allow anyone to change their legal gender through simply filing an affidavit with a notary without a significant waiting period, eliminating any requirement for surgical sex reassignment procedures, and prohibiting gender identity discrimination. It was expected that President Marie-Louise Coleiro Preca would sign the measure, which has the endorsement of the government. In addition, it prohibits non-medically necessary treatments on the sex characteristics of a person, a prohibition specifically intended to bar the practice of forced gender assignment surgery on minors and infants with atypical genitals. *BuzzFeed.com*, April 1.

**MEXICO** – The Supreme Court has been continuing in its course of issuing “amparos” – ordering authorizing the performance of same-sex marriages – as they come up to the court from various parts of the country. Under Mexico’s system of jurisprudence, these individual rulings do not create a precedent binding beyond the parties until a certain number has been achieved from a particular state, at which point there is an established precedent for that state. So far, same-sex marriages have been performed in a majority of the nation’s states, and years ago the Supreme Court issued a ruling binding on the nation that lawfully performed same-sex marriages would be recognized throughout the country.
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So far, only Mexico City itself has legislated to allow same-sex marriages. For several years, the Supreme Court has responded affirmatively to every application for an “amparo” for same-sex marriage, including some filed on behalf of groups of people.

NICARAGUA – A newly adopted family code makes same-sex marriage and adoption by same-sex couples illegal. It also bans gay couples from using fertility treatments to get pregnant. The code took effect on April 8. The Movement for Sexual Diversity, an umbrella group of LGBT rights associations in the country, planned to appeal against the law to the Supreme Court. In a recent poll, only 16% of respondents supported same-sex marriage. GayStarNews, April 9.

NORWAY – The government plans to introduce legislative proposals to liberalize and modernize the law dealing with transgender people, including ending the practice requiring mandatory irreversible sterilization before the state will recognize a change of gender. An expert group convened by the health ministry to recommend policy changes has condemned the sterilization requirement as a violation of human rights. Agence France Presse English Wire, April 10.

RUSSIA – A St. Petersburg court upheld the dismissal of a gay public school teacher for “immoral behavior,” consisting of publishing photos of herself with her same-sex partner on the internet. This was held to run afoul of Russia’s law banning “propaganda” of homosexual relationships to minors. During April, the same court ordered the blocking of a popular advice website for gay teenagers, saying that it was also prohibited by the same law, which was adopted in 2013 at the urging of President Putin.

SERBIA – AP Online (May 1) reported that a Serbian Human Rights tribunal has ruled that the Army improperly discriminated against an officer who came out as transgender and was asked to resign. The Commissioner for Protection of Equality, Nevena Petrusic, agreed with the contention by Helena (as the individual was identified in press reports) that the Army’s treatment of her was unacceptable, and recommended that the Army send her a written apology for having forced her early retirement. This is, however, merely a recommendation, but it was seen as remarkable for a country and society that has not exhibited any openness to sexual minorities.

VATICAN CITY – France has nominated an openly gay diplomat, Laurent Stefanini, to be its ambassador to the Vatican, but the Vatican refuses to formally acknowledge or accept the nomination. France previously proposed an openly gay ambassador to the Vatican in 2007. The Vatican never responded, never received the nominee or accepted his credentials. There were reports that Pope Francis actually met with Mr. Stefanini and told him directly that the Vatican cannot accept him as the French ambassador, but there has been no formal notification to the French government. So far, President Francois Hollande has stood firm and refused to withdraw the nomination, as sources close to the president state that the appointment was “the wish of the president” because Stefanini “is one of our best diplomats.” Agence France Presse English Wire, April 10.

AIDSWATCH 2015, the largest annual constituent-based national HIV/AIDS advocacy event, awarded the Positive Leadership Award to Lambda Legal’s HIV Project Director SCOTT SCHÖTTES and plaintiff JOHN EAST at its April 13 meeting. East was the plaintiff in Lambda’s successful effort to get Blue Cross Blue Shield of Louisiana to accept premium payments from the Ryan White Care Act program for the purchase of health insurance for people living with HIV, as well as in the areas of HIV criminalization and access to care.

“Saeed v. Kreutz” cont. from pg. 208

However, under New York law, “a contract cannot be implied in fact where there is an express contract covering the subject matter involved.” Julien J. Studley, Inc. v. N.Y. News Inc., 512 N.E.2d 300, 301 (N.Y. 1987). Because the collective bargaining agreement governing employment in the department, to which Saeed and the County were bound, overlapped in subject matter with the alleged implied-in-fact contract, the court finds that this implied contract claim fails as a matter of law.

For these reasons, the appeals court reverses the district court’s ruling on the implied contract claim and subsequently rejects the basis for the $200,000 award.

– Daniel Ryu

Daniel Ryu studies at Harvard (’16).

PROFESSIONAL NOTES

On April 27, New York Mayor Bill de Blasio administered the oath of office to 28 people had had recently appointed to the New York City Family Court, Civil Court and Criminal Court. Among them were four openly lesbian or gay lawyers appointed to the Family Court: JACQUELINE DEANE, PETER DELIZZO, ALMA GÓMEZ, and MICHAEL MILSAP. New York Law Journal, April 28.
1. Archibald, Catherine Jean, Transgender Student in Maine May Use Bathroom That Matches Gender Identity – Are Co-Ed Bathrooms Next?, 83 UMKC L. Rev. 57 (Fall 2014).

EDITOR’S NOTES

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

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

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