PRESumptuous

Appellate Courts in Arizona and New York Apply Marital Presumptions to Same-Sex Couples
EXECUTIVE SUMMARY

380 Arizona Supreme Court Holds Parental Presumption Applies to Lesbian Couples

382 Former Texas Supreme Court Chief Justice Wallace Jefferson Seeks Reversal of His Old Court’s Opinion in Pidgeon v. Turner

384 Another LGBT Case SCOTUS-Bound? Lambda Will Petition for Judicial Review of Ruling on Standing to Challenge Mississippi Statute

385 Illinois Federal Trial Court Finds Title VII Covers Gender Identity Discrimination Claims

386 Tennessee Appeals Court Finds Questionable “Paramour” and “Homosexual Activity” Restrictions, Added at Last Minute to Divorce Agreement, Denied Father Due Process

387 N.Y. Appellate Division Affirms Decision Vacating Adoption by Father’s New Boyfriend on Petition by Father’s Estranged Husband

388 Iowa Appeals Court Terminates Sperm Donor’s Parental Rights to Child Born to Married Lesbian Couple

389 Virginia Federal Court Dismisses Gay Student’s Title IX Sexual Orientation Wrongful Dismissal Claim

390 Alabama Federal Court Allows State Supreme Court Justice’s Challenge to Judicial Canons to Continue

393 Connecticut U.S. District Court Allows Sexual Orientation Plaintiff to Proceed on Gender Discrimination and Retaliation Claims

395 Washington Court of Appeals Revives Hostile Environment Case of Gay Couple under State Anti-Discrimination Law

396 Tennessee Court of Appeals Reverses Trial Court’s Refusal to Grant Name Change to Transgender Minor

397 Federal Court Ruling Against “Religious Exemptions” from Anti-Discrimination Laws on Same-Sex Weddings May Preview Supreme Court Decision

399 11th Circuit Rejects Tax Deductibility of Surrogacy Expenses for Gay Man

401 Court Rejects Federal Prosecutor’s Motion to Exclude Entrapment Defense from Internet Sting Prosecution

403 Australian Postal Survey on Marriage Equality Is Now Under Way

404 Federal District Court Adopts Magistrate’s Recommendation Allowing Eighth Amendment Challenges to California’s Inmate Transgender Rules

405 N.Y. Family Court Judge Uses Equitable Estoppel to Find Co-Parent Standing in the Absence of Pre-Conception Agreement

407 Notes 431 Citations
**Arizona Supreme Court Holds Parental Presumption Applies to Lesbian Couples**

Resolving a difference of views between two panels of the state’s intermediate Court of Appeals, the Arizona Supreme Court ruled on September 19 that the family law presumption, codified in state statutes, providing that the husband of a woman who gives birth to a child after undergoing donor insemination with the husband’s consent is a legal parent of the child must extend equally to the wife of a woman who gives birth to a child after undergoing anonymous donor insemination with her wife’s consent. The ruling in *McLaughlin v. Jones* (RPI/McLaughlin), 2017 WL 4126939, 2017 Ariz. LEXIS 263 is a logical application of the U.S. Supreme Court’s June 26, 2017 ruling in *Pavan v. Smith*, which dealt affirmatively with dissenting judge that correcting the statute’s constitutional flaw should be left to the legislature.

Kimberly and Suzan were married in California in 2008, during the five-month period between the California Supreme Court’s *In re Marriage Cases* decision and the adoption of Proposition 8, which enacted a constitutional amendment limiting marriage to different-sex couples. The California Supreme Court subsequently ruled that the same-sex marriages contracted during that five-month period, such as the McLaughlin marriage, were fully valid under California law. The women then decided to have a child together. Suzan went through donor insemination, but unsuccessfully. Kimberly then went through the procedure and became pregnant. They moved to Arizona during the pregnancy.

Before the birth of their child, they signed a joint parenting agreement in February 2011, in which they declared that Suzan would be a “co-parent” of the child, stating: “Kimberly McLaughlin intends for Suzan McLaughlin to be a second parent to her child, with the same rights, responsibilities, and obligations that a biological parent would have to her child” and that “should the relationship between us end, it is the parties’ intention that the parenting relationship between Suzan McLaughlin and the child shall continue with shared custody, regular visitation, and child support proportional to custody time and income.” State courts generally take the position that such parenting contracts, while evidence of the intent of the parties, is not binding on the court in a subsequent custody determination during a divorce, where the court’s legal role is to determine custody and visitation issues based on the court’s evaluation of the child’s best interests. The women also executed wills naming Suzan as a parent of the child, a boy who was born in June 2011.

Kimberly, a doctor, worked to support the family, and Suzan stayed at home to care for the baby. By the time the child was almost two years old in 2013, the women’s relationship had deteriorated and Kimberly moved out with the child, cutting off Suzan’s contact with her son. Suzan then filed petitions in state court seeking dissolution of the marriage and legal decision-making and parenting time with the child. She couldn’t file for a divorce, because Arizona did not recognize same-sex marriages at that time. She included a constitutional

Applying this principal to an Arizona parentage statute that, by its terms, only applies to the parental rights of men, the Arizona court adopted a gender-neutral construction of the statute.

the related question of whether a state must recognize the parental status of a same-sex spouse by listing her as a parent on the child’s birth certificate, and of course was ultimately governed by the Supreme Court’s marriage equality ruling, *Obergefell v. Hodges*.

The Supreme Court made clear in *Pavan* that the constitutional right for same-sex couples to marry, earlier recognized by the Court in *Obergefell* in 2015, is not just about the right to marry and have other states recognize the marriage, but also about the right to enjoy all the benefits and be subject to all the obligations of marriage on an equal basis with different-sex couples. Applying this principal to an Arizona parentage statute that, by its terms, only applies to the parental rights of men, the Arizona court adopted a gender-neutral construction of the statute, rejecting the argument by one partially

October 2017 LGBT Law Notes 380
The trial judge in Pima County, Lori B. Jones, confronted a parentage statute stating that “a man is presumed to be the father of the child if he and the mother of the child were married at any time in the ten months immediately preceding the birth or the child is born within ten months after the marriage is terminated.” The parental status under the statute is legal, not biological, although a man could rebut the legal presumption by showing that another man was the biological father or that his wife had conceived through donor insemination without his consent. However, the Arizona laws made clear that if a husband consented to his wife’s donor insemination, he would be presumed to be the child’s legal father. The problem was the gendered language of the statute.

Wrote Arizona Supreme Court Chief Justice Scott Bales in describing the trial court’s reasoning in ruling in favor of Suzan, “Based on Obergefell, the court reasoned that it would violate Suzan’s Fourteenth Amendment rights not to afford her the same presumption of paternity that applies to a similarly situated man in an opposite-sex marriage.” Judge Jones also concluded that in this kind of case, the birth mother should not be allowed to attempt to rebut the presumption where it was undisputed that her same-sex spouse had consented to the insemination process and would be obligated to contribute to the support of the child.

Kimberly sought relief from the court of appeals, which was denied. That court both agreed with Judge Jones’ reasoning on the Fourteenth Amendment issue and further reasoned that Kimberly should be “equitably estopped from rebutting Suzan’s presumption of parentage.” Equitable estoppel is a legal doctrine that courts invoke to prevent a party from attempting to assert a legal right that would be contrary to their prior representations and actions. In this case, since Kimberley consented to the insemination and contracted with Suzan to recognize her full parental rights toward the child, she could not now turn around and attempt to avoid those actions by showing that Suzan was not the child’s biological father, which Suzan clearly is not.

After the court of appeals issued its opinion in this case, a different division of the state’s court of appeals released a contrary ruling in Turner v. Steiner, 242 Ariz. 494 (2017). By a 2-1 vote, that court “concluded that a female same-sex spouse could not be presumed a legal parent [under the statute] because the presumption is based on biological differences between men and women and Obergefell does not require courts to interpret paternity statutes in a gender-neutral manner.”

The Arizona Supreme Court granted Kimberly’s petition to appeal the court of appeals ruling because application of the parentage statute to same-sex marriages “is a recurring issue of statewide importance.”

Chief Justice Bales’s opinion for the court made clear that one could easily resolve this dispute in favor of Suzan without even referring to the recent U.S. Supreme Court decision in Pavan, because the earlier Obergefell opinion by Justice Anthony Kennedy addressed all the salient issues in very clear language. The idea that Obergefell required only that states allow same-sex couples to marry and recognize as valid legally-contracted same-sex marriages from other states was contrary to the language and reasoning of the Supreme Court. “In Obergefell,” wrote Bales, “the Court repeatedly framed both the issue and its holding in terms of whether states can deny same-sex couples the same ‘right’ to marriage afforded opposite-sex couples.” For example, quoting from Kennedy’s opinion: “The Constitution does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex,” and further, wrote Bales, “noting harms that result from denying same-sex couples the ‘same legal treatment as opposite-sex couples.’” In particular, the Supreme Court had emphasized the importance to children of same-sex couples having equal recognition of their families.

“Such broad statements reflect that the plaintiffs in Obergefell sought more than just recognition of same-sex marriages,” wrote Bales, noting that the Michigan plaintiffs in one of the cases consolidated before the Court were a same-sex couple who sought to marry to secure the parental status of both of them to the children they were jointly raising, and, continued Bales, “the benefits attendant to marriage were expressly part of the Court’s rationale for concluding that the Constitution does not permit states to bar same-sex couples from marriage ‘on the same terms.’ It would be inconsistent with Obergefell,” he continued, “to conclude that same-sex couples can legally marry but states can then deny them the same benefits of marriage afforded opposite-sex couples.” The subsequent decision in Pavan, the Arkansas birth certificate case, just drove home the point in the specific context of parental status and rights.

The Arizona Supreme Court concluded that the benefit of the parental presumption that is enjoyed by the spouse of a woman who gives birth is one of the “benefits of marriage” that must be equally afforded to same-sex couples. It rejected Kimberly’s argument, similar to that of the other panel of the Arizona Court of Appeals, that the statute dealt only with biological parentage. This was never a particularly logical argument, since the overall statutory scheme in Arizona extended the parental presumption to situations where the man was not the child’s biological father, making it conclusive when he had consented to his wife’s insemination with donor sperm.

The court then faced the question of whether the statute should just be struck down as unconstitutional, terminating any parental presumption, or extended through a gender-neutral interpretation to apply to same-sex couples. The court decided that extending the statute was more in line with the legislature’s overall purpose than would be striking it down. The goal, after all, was to support families and solidify parent-child ties, which was best achieved by extending the parental presumption to lesbian couples. Thus, the court vacated the decision of the court of appeals and affirmed the decision of Pima County Superior Court Judge Jones, upholding Suzan’s parental status and rights, with details to be worked out in the trial court, hopefully by agreement of the ex-spouses.
The court lost one member on this last point, as Justice Clint Bolick argued in partial dissent that the court was exceeding its role by improperly reinterpretating statutory language to cure the constitutional problem. “The marital presumption that the majority finds unconstitutional and rewrites is not, as the majority characterizes it, a ‘state-benefit statute,’” he insisted. “Rather, it is part of an integrated, comprehensive statute that serves the highly important and wholly legitimate purpose of providing a mechanism to establish a father’s rights and obligations.” Viewed on its own, he insisted, it was not unconstitutional. “A paternity statute does not offend the Constitution because only men can be fathers,” he said, pointing to another opinion by Justice Kennedy in a case upholding different rules for determining a child’s U.S. citizenship based on the citizenship of the mother or the father in a marriage between citizens of different countries. The majority had rejected Kimberly’s reliance on this decision, but Bolick contended that “it is not the paternity statute that is unconstitutional, but rather the absence of a mechanism to provide parenthood opportunities to single-sex couples on equal terms appropriate to their circumstances.” He would leave it to the legislature to fix the problem.

Bolick would send the case to the trial court to be decided without any parental presumption, presumably (since he doesn’t spell it out) leaving the trial court to determine whether it was in the best interest of the child for the woman who was formerly married to the child’s birth mother to have decision-making and visitation rights.

Suzan is represented by the National Center for Lesbian Rights, whose legal director, Shannon Minter, argued the case in the Arizona Supreme Court, assisted by staff attorneys Emily Haan and Catherina Sakimura, with local counsel Claudia D. Work of Campbell and Catherina Sakimura, with local counsel Claudia D. Work of Campbell Law Group in Phoenix. Kimberly is represented by Keith Berkshire and Erica L. Gadberry of Berkshire Law Office in Phoenix. Several amicus briefs were filed with the court, including briefs from the ACLU, a University of Arizona law school clinic, and a group of Arizona Family Law Practitioners.

Jefferson & Townsend LLP, asked the U.S. Supreme Court to reverse the ruling, Turner v. Pidgeon, Docket No. 17-424. Justice Jefferson, an African-American Republican, was appointed to the court in 2001 by Governor Rick Perry, who then elevated him in 2004 to the Chief Justice position, where he served until retirement in October 2013. Justice Jefferson was the first African-American to serve on Texas’s highest court. His law firm was retained by Houston Mayor Sylvester Turner to represent the City in petitioning the U.S. Supreme Court for review.

Jefferson & Townsend LLP, asked the U.S. Supreme Court to reverse the ruling, Turner v. Pidgeon, Docket No. 17-424. Justice Jefferson, an African-American Republican, was appointed to the court in 2001 by Governor Rick Perry, who then elevated him in 2004 to the Chief Justice position, where he served until retirement in October 2013. Justice Jefferson was the first African-American to serve on Texas’s highest court. His law firm was retained by Houston Mayor Sylvester Turner to represent the City in petitioning the U.S. Supreme Court for review.

The case arose in 2013 when then-Mayor Annise Parker, an out lesbian and longtime LGBT rights activist, reacted to the Supreme Court’s decision to strike down the federal Defense of Marriage Act by asking her City Attorney whether the reasoning of that case would require the City of Houston to recognize same-sex marriages of City employees. Although Texas did not allow same-sex marriages then, some City employees had gone out of state to marry and were seeking health care benefits for their spouses under the City’s employee benefits plan. Parker got the answer she was seeking and ordered an extension of benefits to City employees’ same-sex spouses.

Two local Republican activists, Jack Pidgeon and Larry Hicks, sued the City and Mayor Parker, seeking an injunction against extension of the benefits. They persuaded a state trial judge to issue a preliminary injunction, barring the

On June 30, the Texas Supreme Court issued a ruling in Pidgeon v. Turner, 2017 WL 2829350, claiming that the U.S. Supreme Court’s Obergefell marriage equality decision from June 2015 (135 S. Ct. 2584) did not necessarily require state and local governments to treat same-sex and different-sex marriages the same for government employee benefits purposes. On September 15, asserting that his old court’s decision was clearly wrong, retired Texas Supreme Court Justice Wallace B. Jefferson and lawyers from his Austin firm, Alexander Dubose

Viewed on its own, he insisted, it was not unconstitutional. “A paternity statute does not offend the Constitution because only men can be fathers,” he said, pointing to another opinion by Justice Kennedy in a case upholding different rules for determining a child’s U.S. citizenship based on the citizenship of the mother or the father in a marriage between citizens of different countries. The majority had rejected Kimberly’s reliance on this decision, but Bolick contended that “it is not the paternity statute that is unconstitutional, but rather the absence of a mechanism to provide parenthood opportunities to single-sex couples on equal terms appropriate to their circumstances.” He would leave it to the legislature to fix the problem.

Bolick would send the case to the trial court to be decided without any parental presumption, presumably (since he doesn’t spell it out) leaving the trial court to determine whether it was in the best interest of the child for the woman who was formerly married to the child’s birth mother to have decision-making and visitation rights.

Suzan is represented by the National Center for Lesbian Rights, whose legal director, Shannon Minter, argued the case in the Arizona Supreme Court, assisted by staff attorneys Emily Haan and Catherina Sakimura, with local counsel Claudia D. Work of Campbell Law Group in Phoenix. Kimberly is represented by Keith Berkshire and Erica L. Gadberry of Berkshire Law Office in Phoenix. Several amicus briefs were filed with the court, including briefs from the ACLU, a University of Arizona law school clinic, and a group of Arizona Family Law Practitioners. ■

Jefferson & Townsend LLP, asked the U.S. Supreme Court to reverse the ruling, Turner v. Pidgeon, Docket No. 17-424. Justice Jefferson, an African-American Republican, was appointed to the court in 2001 by Governor Rick Perry, who then elevated him in 2004 to the Chief Justice position, where he served until retirement in October 2013. Justice Jefferson was the first African-American to serve on Texas’s highest court. His law firm was retained by Houston Mayor Sylvester Turner to represent the City in petitioning the U.S. Supreme Court for review.

The case arose in 2013 when then-Mayor Annise Parker, an out lesbian and longtime LGBT rights activist, reacted to the Supreme Court’s decision to strike down the federal Defense of Marriage Act by asking her City Attorney whether the reasoning of that case would require the City of Houston to recognize same-sex marriages of benefits from going into effect pending the outcome of the litigation. The court relied on the Texas constitutional and statutory bans on same-sex marriage, which had not yet been challenged in court as of that time. The City appealed the preliminary injunction.

While the appeal was pending before the Texas Court of Appeals, the U.S. Supreme Court decided the Obergefell case, and the U.S. Court of Appeals for the 5th Circuit, which is based in Houston, promptly affirmed a 2014 marriage equality ruling by the federal district court in San Antonio, DeLeon v. Abbott, 791 F.3d 619 (5th Cir. 2015), declaring unconstitutional the Texas same-sex marriage bans that had been the basis for the trial court’s injunction. Then the Texas Court of Appeals issued a ruling reversing the trial court’s preliminary injunction and instructing that court to decide the case consistent with the DeLeon decision, see 477 S.W.
This case is just as clear as Pavan was, and is likely to receive the same treatment from the U.S. Supreme Court, unless that Court finds some procedural or jurisdictional reason to dismiss the Petition.

On June 26, 2017, the U.S. Supreme Court issued its decision in Pavan v. Smith, 137 S. Ct. 2075, a challenge to the refusal by Arkansas officials to list both spouses in lesbian marriages on birth certificates when one of them gave birth to a child through donor insemination. In that ruling, the Supreme Court made abundantly clear that the Obergefell decision had effectively decided the Pavan case by holding that same-sex couples had the same constitutional rights regarding marriage as different sex couples, extending to the entire “constellation of rights” that went with marriage. The Supreme Court did not even bother to hold oral argument in the Pavan case, simultaneously granting the petition to review an adverse decision by the Arkansas Supreme Court and issuing a brief memorandum opinion, from which three members of the Court dissented in an argumentative and disingenuous memorandum attributed to recently-appointed Justice Neil Gorsuch and signed by Clarence Thomas and Samuel Alito. The Pavan opinion left no doubt that same-sex and different-sex married couples must be treated the same by government entities under the 14th Amendment.

But it was evidently not clear to a majority of the Texas Supreme Court, which just days later issued its unanimous ruling, reversing the court of appeals and sending the case back to the trial court in Houston, with instructions to give Pidgeon and Hicks an opportunity to try to convince the court that the City of Houston was still required to refuse recognition to the marriages of same-sex couples under its benefits plan, relying on the Texas constitutional and statutory ban that was declared unconstitutional by the 5th Circuit. A majority of the Texas Supreme Court clings to the idea that constitutional rulings by the lower federal courts are not binding on the Texas state courts; while this is technically correct, DeLeon was merely a straightforward application of Obergefell, which as a U.S. Supreme Court ruling, is clearly binding on Texas courts under the Supremacy Clause of the U.S. Constitution. The Texas court suggested that Obergefell could be interpreted narrowly to address solely the question of whether states must allow same-sex couples to marry and must recognize same-sex marriages contracted from out of state, but that Obergefell said nothing directly about what rights must be accorded to same-sex married couples. This is, as Justice Jefferson’s Petition to the Supreme Court makes clear, blatantly untrue. The Texas court treated Pavan as if Justice Gorsuch’s dissent was speaking for the Supreme Court.

Justice Jefferson’s Petition on behalf of Mayor Turner and the City of Houston makes mincemeat out of the work product of his former colleagues, quoting clear language from Obergefell which, among other things, specifically mentioned health insurance as an example of how the denial of marriage to same-sex couples violated their fundamental right to marry and to be treated equally with different-sex couples.

This case is just as clear as Pavan was, and is likely to receive the same treatment from the U.S. Supreme Court, unless that Court finds some procedural or jurisdictional reason to dismiss the Petition without deciding the question presented by the petitioners: “Did the Supreme Court of Texas correctly decide that Obergefell v. Hodges and Pavan v. Smith ‘did not hold that states must provide the same publicly funded benefits to all married persons,’ regardless of whether their marriages are same-sex or opposite-sex?” Some have suggested that because the Texas Supreme Court was ruling only on the validity of a preliminary injunction, the matter is not procedurally ripe for U.S. Supreme Court review, but any attempt to reinstate the preliminary injunction would directly violate the constitutional rights of Houston City employees in clear violation of the Obergefell ruling.

On a parallel track, Lambda Legal filed a federal district court lawsuit in Houston over the summer on behalf of some married LGBT City employees, seeking a declaratory judgment that they are entitled to the same benefits for their spouses that their straight colleagues get. Freeman v. Turner, Case 4:17-cv-02448 (S.D. Texas, filed Aug. 10, 2017). If the Supreme Court does not grant Justice Jefferson’s Petition, it is likely that the matter can be resolved relatively quickly through Lambda’s case, since the City would eagerly comply with an order by the U.S. District Court to provide equal benefits. This is, at heart, a dispute between the pro-LGBT Houston Democratic city government and the anti-LGBT Republican state government.
Another LGBT Case SCOTUS-Bound? Lambda Will Petition for Judicial Review of Ruling on Standing to Challenge Mississippi Statute

Mississippi enacted H.B. 1523 in 2016. The measure enshrines in state statutes a special privilege to discriminate for people whose religious or moral convictions oppose same-sex marriage and sexual relations outside of opposite-sex marriages, and who reject the idea that a person could have a gender identity different from their “biological sex” as identified through external observation of genitals at birth. As part of that special privilege, such individuals are immunized from any “discriminatory” action by the state government, government employees charged with issuing marriage licenses can decline to issue them to same-sex couples (provided that there is somebody in the pertinent clerk’s office who is willing to process the license application), religious organizations enjoy broad exemptions from complying with anti-discrimination laws, health care providers may withhold services, and businesses that provide wedding-related goods and services can refuse to deal with same-sex couples. The measure also includes a “bathroom bill” provision that protects entities that require transgender people to use bathrooms consistent with their birth certificate gender designation, and prohibits the state from taking adverse action against a state employee for expressing views consistent with those specially protected by the statute. Although the state’s anti-discrimination laws do not prohibit sexual orientation or gender identity discrimination, at least two municipal ordinances containing such prohibitions would be preempted by the state law. It is arguable, in light of pending litigation in other parts of the country, that some federal anti-discrimination laws (in particular, Title IX and Title VII) may be available in some of the situations covered by H.B. 1523.

Several lawsuits were quickly filed to challenge the constitutionality of this measure and keep it from going into effect on July 1, 2016. U.S. District Judge Carlton W. Reeves consolidated the lawsuits and granted a motion for a preliminary injunction to keep the measure from going into effect, finding that it was likely that the plaintiffs would prevail on their argument that the measure violates the 1st and 14th Amendments, specifically the Establishment and Equal Protection Clauses, and that allowing the measure to go into effect would inflict irreparable injury on the plaintiffs and those similarly situated. See 193 F. Supp.3d 677 (S.D. Miss. 2016). But upon the state’s appeal, a unanimous 5th Circuit panel ruled in June that plaintiffs lacked standing to bring suit before the measure actually went into effect. The panel opined that the mere enactment of a measure alleged to violate the Establishment Clause did not tangibly harm any individual sufficiently to give them standing to challenge the enactment in federal court. See 860 F.3d 345 (June 22, 2017).

Lambda Legal then filed a motion for rehearing en banc, which was denied by the court on September 29, with two judges dissenting in an opinion by Circuit Judge James L. Dennis. See 2017 U.S. App. LEXIS 19008. Dennis explained at length why the panel decision was inconsistent with prior 5th Circuit standing decisions, as well as rulings from other circuits and the Supreme Court. Numerous decisions by federal courts have rejected objections to standing when the lawsuit was challenging a statute alleged to violate the Establishment Clause through the enactment of a state policy improperly advancing or privileging particular religious beliefs at the expense of those who do not share those beliefs. Indeed, Judge Dennis anticipated that the plaintiffs would seek Supreme Court review, specifically stating in his opinion that the panel's ruling created a circuit split on the issue of standing to bring an Establishment Clause challenge against a state statute. Showing a circuit split of authority on an important question of federal law is a key factor in obtaining Supreme Court review.

Lambda Legal promptly announced that it would petition the Supreme Court to review the 5th Circuit’s ruling. Since this was an appeal by the state from the district court’s grant of a preliminary injunction, the Supreme Court would presumably not be asked to address the underlying merits of the case, but to focus solely on whether the 5th Circuit erred in dismissing the case on grounds of standing. Perhaps, if the Court found standing, it would also address the appropriateness of the district court’s issuance of the preliminary injunction, but more likely it would remand the case to the 5th Circuit for consideration of that issue. Meanwhile, Lambda's request that the 5th Circuit delay filing its mandate and not order the lifting of the preliminary injunction while Lambda seeks Supreme Court review was denied unceremoniously in a non-explanatory one-sentence order signed by Circuit Judge Jerry E. Smith on October 3, which meant that H.B. 1523 would finally go into effect on October 10 unless Lambda could get an emergency stay from the Supreme Court.

Counsel for plaintiffs listed in the June 22 Court of Appeals opinion include Robert Bruce McDuff, Sibyl C. Byrd, and Jacob Wayne Howard of McDuff & Byrd (Jackson, MS), Elizabeth Littrell of Lambda Legal’s Southern Regional Office in Atlanta, Beth Levine Orlansky of the Mississippi Center for Justice (Jackson, MS), and Susan Sommer from Lambda Legal’s headquarters office in New York. Amici in support of plaintiffs include the Southern Poverty Law Center, a variety of AIDS service organizations, a large group of liberal religious organizations, GLAD, NCLR, ACLU, and a coalition of pro-LGBT business groups, among others. In addition to Mississippi government attorneys providing primary defense for the statute, there were amicus briefs from conservative religious and “pro-family” (i.e., anti-LGBT family) groups and from outspokenly anti-LGBT officials from Texas, Louisiana, Nebraska, Arkansas,

October 2017 LGBT Law Notes 384
Illinois Federal Trial Court Finds Title VII Covers Gender Identity Discrimination Claims

Judge Colin S. Bruce of the U.S. District Court for the Central District of Illinois has denied both Plaintiff and Defendant summary judgment in a Title VII employment sex discrimination claim brought by a transgendered employee in EEOC v. Rent-A-Center East, Inc., 2017 WL 4021130, 2017 U.S. Dist. LEXIS 147695 (C.D.Ill., September 8, 2017). Crucially, however, Judge Bruce held that gender identity discrimination is actionable under Title VII, relying on recent 7th Circuit rulings under Title IX (gender identity as sex discrimination) and Title VII (sexual orientation discrimination as sex discrimination) to justify not following an old circuit precedent.

The Complainant, Megan Kerr (formally known as Jason Kerr), was an employee of Defendant beginning in May 2005. From 2011 to her discharge in 2014, she switched working to a different store. In early 2013, she announced an upcoming transition from male to female. Her manager informed the district manager, and claimed that the district manager “told him to look for ways to fire her.” The manager claimed that he was himself eventually fired because he did not terminate the transitioning employee, who was, however, eventually terminated as well. After reviewing the case, the EEOC filed a complaint on Kerr’s behalf under Title VII alleging sex discrimination.

The employer argued that Kerr had made inconsistent statements, entitling it to dismissal of the action, and further raised the affirmative defense that Kerr failed to mitigate her damages during a 2-year period before she secured new employment. EEOC sought partial summary judgment on the affirmative defense issue.

Judge Bruce stated that summary judgment was only an appropriate relief if no issue of fact existed on the issued

Judge Bruce recognized that there were issues of her credibility with respect to her use of a company vehicle and the purposes and scope of that use, but that that was not why she was terminated. Rather, “there is sufficient evidence that she was terminated because she was transgender to go to the jury.”

With respect to the claim that Subject suffered “sex discrimination,” Judge Bruce found that “there is evidence from which a reasonable factfinder could conclude that [Kerr’s] sex, specifically, her transgendered status, caused her discharge.” Judge Bruce recognized that there were issues of her credibility with respect to her use of a company vehicle and the purposes and scope of that use, but that that was not why she was terminated. Rather, “there is sufficient evidence that she was terminated because she was transgender to go to the jury.”

Judge Bruce confirmed that discrimination on account of transgender status, as argued in this case by the EEOC, constituted “sex discrimination” under Title VII, noting

Nevada, Oklahoma, South Carolina, Utah, and Maine. From the range and quantity of amicus parties listed, it should be clear to the Supreme Court that this litigation is of intense national interest.

Meanwhile, Judge Reeves, who had issued the preliminary injunction in Barber, quickly moved on a motion by Roberta Kaplan, counsel for plaintiffs in Campaign for Southern Equality v. Bryant, the original Mississippi marriage equality case (several constitutional challenges to anti-LGBT Mississippi laws share the same caption), to take up the question of whether H.B. 1523 violates the court’s ruling striking down the state’s constitutional and statutory bans on same-sex marriage by privileging state officials to refuse to issue marriage licenses to same-sex couples based on their religious of moral convictions. The Jackson Free Press reported on October 3 that Reeves scheduled a telephone conference with attorneys in the case for later in October. In agreeing to reopen the marriage case, Reeves had written that with H.B. 1523 “the State is permitting the differential treatment to be carried out by individual clerks. A statewide policy has been ‘pushed down’ to an individual-level policy. But the alleged constitutional infirmity is the same. The question remains whether the Fourteenth Amendment requires marriage licenses to be granted (and out of-state marriage licenses to be recognized) to same-sex couples on identical terms as they are to opposite-sex couples.” The question now will be whether Reeves will grant a motion to amend the permanent injunction he issued in that case, which had been upheld by the 5th Circuit pursuant to Obergefell v. Hodges, to bar the state from failing to provide services to same-sex couples equal to those afforded different-sex couples by letting individual clerks refuse to provide the services. At least one other U.S. District Judge is on record as to this: U.S. District Judge David Bunning, who threw Kim Davis, a county clerk who was refusing to issue marriage licenses to same-sex couples in Rowan County, Kentucky, into prison for contempt of the federal court. As the Supreme Court most recently made clear on June 26 in Pavan v. Smith, the Obergefell ruling requires states to afford same-sex couples equal treatment with regard to all aspects of marriage.
that while a binding 7th Circuit case from 1984, *Ulane v. Eastern Airlines*, 742 F.2d 1081, ruled that “Title VII does not protect transsexuals from discrimination,” recent decisions of 7th Circuit “have undermined that ruling” and that when a person “does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth” that the person would be protected under Title VII. He referred specifically to *Whitaker v. Kenoshia Unified School District No. 1, 858 F.3d 1034 (7th Cir. 2017)* (petition for cert. pending), holding that the ban on sex discrimination in schools that receive federal money applies to discrimination against transgender students, and *Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. en banc 2017)*, holding that Title VII’s sex discrimination ban applies to sexual orientation discrimination claims. In *Hively*, wrote Bruce, “the court noted *Ulane’s* unduly narrow conception of sex discrimination. Based upon *Whitaker* and *Hively*, this court concludes that discrimination based upon a person’s transgender status is a violation of Title VII.”

With respect to the affirmative defense that Kerr failed to mitigate her damages upon termination, Judge Bruce noted that a jury could find that she failed to exercise reasonable diligence in securing new employment when her resumes sent to potential employers “contain numerous spelling mistakes . . . and grammatical errors;” and when “some of the resumes include qualifications that are blatantly untrue.” Judge Bruce did find that the resumes “are sufficient to raise a genuine dispute of material fact” of whether the complainant attempted to find comparable employment.

Finding material issues of fact in both issues, Judge Bruce refused to grant either party summary judgment and further denied oral argument on the motions, finding that the parties “have ably set out their arguments in this case and that oral argument is not necessary.” Accordingly, the case will be heard at trial to determine the material facts of both issues if it isn’t settled. – Bryan Johnson-Xenitelis

---

**Tennessee Appeals Court Finds Questionable “Paramour” and “Homosexual Activity” Restrictions, Added at Last Minute to Divorce Agreement, Denied Father Due Process**

An unanimous three-judge panel of the Court of Appeals of Tennessee at Nashville vacated and remanded a marital dissolution agreement and permanent parenting plan that imposed permanent “paramour” and “homosexual activity” restrictions on a gay father when he was around his children. *Brantley v. Brantley*, 2017 Tenn. App. LEXIS 617, 2017 WL 4083881 (Tenn. Ct. App. Sept. 15, 2017). The court also cited authority making clear that, on remand, a revised agreement cannot again impose vague “lifestyle” limitations on the father.

Cordary Quincy Vernard Brantley filed a pro se complaint for divorce from Shayla Leanne Guy Brantley in 2015. They had two children, although Cordary disputes the youngest child is his. In August 2016, they presented Sumner County Chancellor Louis W. Oliver, III, a proposed marital dissolution agreement and permanent parenting plan that had been signed by both parties. At the hearing for the Chancellor to approve the parties’ agreement, Shayla requested certain changes. The judge heard from both parties, who revealed that Cordary was HIV-positive and had a boyfriend. Over Cordary’s objections, Chancellor Oliver modified the final divorce decree with several handwritten “Injunctions by Court,” including “No paramours overnight . . . . No homosexual activity around children. Father to avoid body fluid exchange with children, no bathing, showering or sleeping with children . . . . Father may have no paramours around children whatsoever.” Cordary appealed and sought reversal of these “injunctions.”

Judge Frank G. Clement, Jr. wrote for a panel that also included Judges D. Michael Swiney and Richard H. Dinkins. He saw the dispositive issue on appeal as “whether [Cordary] was deprived of due process by not being afforded a meaningful evidentiary hearing before the trial court made substantive changes to the agreed upon Final Decree of Divorce and Permanent Parenting Plan.” On that point, he wrote that “to comport with due process, the trial court should have afforded Father and Mother notice so they could be prepared to present competent evidence.”

Judge Clement, though, thankfully did not see Cordary getting ambushed at the final divorce hearing as the only problem. In addition, he noted that “some of the injunctions imposed on [Cordary] are too vague to be enforced.” He also quoted a long section from *Hogue v. Hogue*, 147 S.W.3d 245 (Tenn. Ct. App. 2004), a 2004 Court of Appeals of Tennessee ruling analyzing similar “lifestyle” restrictions on a gay father, to hammer home that homophobia must not influence visitation decisions. In that opinion, the court declared that “it is not necessary to create new and different visitation rules and restraints depending on sexual orientation. Visitation decisions should be guided by the best interests of the child . . . . Neither gay parents nor heterosexual parents have special rights. They are subject to the same laws, the same restrictions. Our courts should follow the same principles for placing restrictions on gay parents they use on any parents; those principles provide that after making an award of custody, the trial courts are to grant such rights of visitation as will enable the child and the noncustodial parent to maintain a parent-child relationship unless the court finds that visitation is likely to endanger the child’s physical or emotional health.”

Thus, the trial court’s judgment was reversed and the case remanded for further proceedings consistent with the appellate court’s guidance.

Cordary is represented by Morgan E. Smith of Nashville. – Matthew Skinner

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York (LeGaL).
Writing a headline for this article was difficult, because the story of this decision is a bit strange. On September 28, 2017, a unanimous five-judge panel of the N.Y. Appellate Division, First Department, held that New York County Family Court Judge Stewart H. Weinstein had properly granted a motion by Han Ming T., the husband of Marco D., to vacate a May 2016 order that had granted an adoption petition by Carlos A., Marco’s boyfriend, to adopt a child conceived through gestational surrogacy using Marco’s sperm at a time when Marco and Han Ming were subsequently deemed to be married. Ming, who had initiated a divorce proceeding in Florida in which he sought joint custody of the child, then unaware that the adoption petition had been filed in New York, showed that he was entitled to notice of the adoption petition and respect for his parental rights. Carlos and Marco had failed to inform the Family Court that the status of the child in question was implicated in an ongoing divorce proceeding, so that court had originally granted the adoption unaware that there was a legal impediment, as the consent of Ming was lacking. In re Maria-Irene D., 2017 N.Y. App. Div. LEXIS 6713, 2017 WL 4287334, 2017 N.Y. Slip Op 06716.

Marco and Ming, who are both British citizens, entered a formal civil partnership in the United Kingdom in 2008, which they converted into a legal marriage in 2015. Under British law, their marriage was treated as retroactive to the date of their civil partnership. Between those two dates they had relocated to the U.S., living in Florida. In 2013, they undertook to have a child through gestational surrogacy, a process by which an egg is extracted from a donor, fertilized in a petri dish, and then implanted in a surrogate. Both men contributed sperm for several in vitro fertilization attempts; the one that “took,” using Marco’s sperm, was implanted in the surrogate. This process was carried out in Missouri, where the child, who was named after the mothers of both men, was born in September 2014. A Missouri court then terminated any parental rights of the egg donor and the surrogate and designated Marco, the genetic father, as having “sole and exclusive custody” of the child. “Marco, Ming, and the child returned to Florida, where they lived as a family until October 2015, when Ming returned to the U.K. to seek employment,” wrote the court.

But evidently the relationship of the men was complicated during that time, because, the court reports, “[a]t some point in or after 2013, Marco entered a relationship with petitioner Carlos A., and they moved to New York with the child after Ming went to the U.K.” Carlos petitioned the New York County Family Court to adopt the child in January 2016. The adoption papers “disclosed that Marco and Ming were married in 2008, but alleged that they had not lived together continuously since 2012 and that Carlos and Marco have been caring for the child since her birth. A home study report stated that Marco and Ming legally separated in 2014 and had no children together.” That Ming had participated in the surrogacy process and that Marco, Ming, and the child lived together as a family thereafter were not disclosed to the Family Court in the adoption proceeding. Neither did Carlos and Marco disclose to that court, prior to the adoption order being granted, that Ming had filed a divorce action in Florida in March 2016, seeking joint custody of the child.

The Family Court granted the adoption in May 2016. When Ming learned of this, he filed a motion in the Family Court to vacate the adoption “on the ground that relevant facts had not been disclosed to the court and that he was entitled to notice of the adoption and an opportunity to be heard since he had parental rights.” Judge Weinstein granted Ming’s motion and vacated the adoption, finding that Carlos and Marco made “material misrepresentations” to the court and that Ming was entitled to notice of the proceeding. Weinstein did leave open the possibility that depending how the divorce proceedings were resolved in Florida, Carlos might later renew his petition to adopt the child. Carlos moved for re-argument, but the motion was denied, and Carlos and Marco appealed.

The Appellate Division found that the Family Court “providently exercised its discretion in vacating the adoption.” Since the Marco-Ming marriage was retroactive to 2008 under U.K. law, it would be recognized as such under New York law as a matter of comity. Which meant that the child, born in 2014, was a child of the marriage, “giving rise to the presumption that the child is the legitimate child of both Marco and Ming.” The court noted Ming’s allegation that they lived together as a family in Florida and that “the couple took affirmative steps in the U.K. to establish Ming’s parental rights in accordance with U.K. law.” The court doesn’t explain this further. Perhaps it refers to their subsequent 2015 marriage, which had retroactive effect under U.K. law to 2008, thus establishing Ming’s parental status, regardless of the Missouri judgement awarding Marco sole and exclusive custody. (One has to factor into the mix that in 2014, same-sex couples could not marry in Missouri and their U.K. legal status as civil partners when the child was born would have no recognition under Missouri law, so naturally a Missouri court at that time would not recognize Ming as having any legal relationship to the child.)
“The prevailing law at the time the adoption petition was granted does not compel a different result,” said the court. As far as this court was concerned, as a matter of New York law according comity to the retroactive effect of their U.K. marriage, “Marco and Ming were deemed legally married when they embarked on the surrogacy process to have a child together. Accordingly, the child was born in wedlock, and Ming was entitled to notice of the adoption proceeding. Under the Court of Appeals’ most recent decision concerning parental standing (Matter of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488 (2016)), Ming’s claim to have standing as a parent is even stronger.”

The court also found the failure by Carlos and Marco to disclose the Florida divorce proceeding to the Family Court to be “another ground to vacate the adoption,” since an adoption petition requires the petitioner to disclose to the court whether the child is the subject of any other legal proceeding affecting his or her custody or status, and Ming had petitioned for joint custody of the child in the Florida proceeding. Carlos and Marco learned of that proceeding a few months after Carlos’s adoption petition was filed, while that petition was still pending before the Family Court, so they had a duty to bring it to the attention of that court. Instead, they filed a supplemental affidavit claimed that there had been no change in the child’s circumstances “whatsoever” since the filing of the adoption petition.

Ming is represented by Nina E. Rumbold of Rumbold & Seidelman, LLP (Bronxville). Carlos and Marco are represented by Frederick J. Magovern of Magovern & Scalfani, Mineola. There is no attorney appointed to represent the child’s interest, a point that Carlos and Marco raised in their appeal but as to which the Appellate Division declined to rule. The court’s opinion does not report on the current status of Ming’s Florida divorce proceeding. It is possible that Ming and Marco are still legally married, which perhaps explains why Carlos and Marco are not?

Iowa Appeals Court Terminates Sperm Donor’s Parental Rights to Child Born to Married Lesbian Couple

The Court of Appeals of Iowa affirmed a decision by Scott County District Court Judge Nancy S. Tabor to terminate any parental rights of E.B., a man who is described as “a longtime friend of M.L.’s biological mother” who “agreed to have sexual relations with her with the hopes of producing a child, which the mother and the mother’s wife could raise as their own.” In the Interest of M.L., 2017 WL 4050981, 2017 Iowa App. LEXIS 974 (September 13, 2017). Judge Gayle Vogel wrote the opinion for the unanimous panel.

The child was conceived and born after the mother and her wife were married. On the birth certificate, the parents listed are the birth mother, of course, and her wife, pursuant to the legal presumption that the spouse of a birth mother is a legal parent of her child. Thus, E.B. was not listed as the father. E.B. maintained a friendship with the mother and even lived with her and her wife and child for a short time after the child was born, but his relationship with the birth mother’s wife has always been strained. Apart from brief contact from time to time, E.B. “was largely absent from M.L.’s life, providing only minimal support either financially or emotionally.” E.B. claims that he stayed away “out of respect for the marriage of the mother and her wife, and to allow them to raise M.L. as their daughter, with full parenting rights and without interference by him, the biological father,” wrote Vogel. He also said that the continuing stress with the mother’s wife made “attempts to contact with M.L. even more difficult.”

In October 2015, the Iowa Department of Human Services (DHS) became concerned about M.L.’s welfare because the mother was using illegal substances, including heroin. Although the record before the court in this case does not indicate that the mother’s wife was also using illegal substances, DHS removed the child from the home and placed her with her maternal grandmother. During most of the relevant time, E.B. was in prison. “With little effort by the father to respond to the DHS’s efforts to include him in these proceedings,” wrote Vogel, “the State sought to terminate his parental rights.”

In contesting the termination, E.B. argued it was not in M.L.’s best interests that his rights be terminated, and argued that after he is released from prison he should be given an opportunity to establish a relationship with M.L. He claimed that his successive incarcerations had interfered with his ability to do so. Vogel wrote, “he cannot use his incarceration as a justification for the lack of a relationship with M.L. In addition, when requested to provide verification that he had participated in various programs while incarcerated, the father failed to respond to the request.” Further, she wrote, “The record confirms that the father, while occasionally expressing an interest in participating in services or being involved in M.L.’s life, has wholly failed to carry out any of his expressed intentions. The district court found: ‘This child has waited three years for this biological father to decide that he wanted to revoke his agreement to allow the married couple to be the parents . . . [The mother and her wife] are still married, and [the wife] is providing exceptional care for the child, and the child is well bonded to her. The biological father has yet to even start to establish a relationship with the child and is currently unavailable to do so.’” Thus, termination of his parental rights was in the best interests of the child. The court of appeals stated its agreement with this analysis by the district court.
Virginia Federal Court Dismisses Gay Student’s Title IX Sexual Orientation Wrongful Dismissal Claim

U.S. District Judge Elizabeth K. Dillon granted a motion by Shenandoah University to dismiss a Title IX sex discrimination claim brought by a gay male student who was dismissed from the school pursuant to a disciplinary panel finding that he had sexually assaulted two male students. Streno v. Shenandoah University, 2017 U. S. Dist. LEXIS 162063, 2017 WL 4407938 (W.D. Va., Sept. 30, 2017). Spencer Streno argued that the conduct for which he was accused was consensual, and that similarly situated heterosexual students were not dismissed.

Streno, an openly gay man who described himself in his complaint as having “more feminine tendencies and mannerisms than typical heterosexual men” enrolled at Shenandoah as a musical theater student in August 2012. He was a member of “the Conservatory,” described as “a group of students working toward various degrees in the performing arts,” and was also a member of an improvisational comedy group called LOAF. His record was free of disciplinary issues until the final semester of his senior year, when two fellow performing arts students filed sexual assault charges against him with university administrators. Both students claimed to have been assaulted at social events where significant alcoholic beverage consumption was taking place. The first incident involved kissing, the second touching of genitals through clothing. Streno asserted that the actions were consensual, although he admitted that he was so drunk that his memory of what happened during the alleged second incident was “basically eradicated.” In both cases, Streno introduced evidence that the students hadn’t complained at the time and they remained friendly with him subsequently. Indeed, he produced photographs taken well after the first event showing the other man kissing Streno. As to the second complainant, Streno asserted that he had an argument with him about LOAF via text message shortly before the complaint was filed, and he believed the complaint was retaliatory.

The school’s Title IX coordinator, Whitney Pennington, was assigned to investigate the complaints. Streno met with her and alleges that her investigation was “inadequate and biased” and that the “finding report” she prepared failed to include evidence he had submitted tending to discredit the charges. Pennington referred the matter to a hearing panel, which ruled against Streno as to both charges, while denying him the opportunity to make an impact statement as provided in the school’s policy. The panel recommended dismissal, but Streno’s appeal sparked a new hearing to allow him to make an impact statement. However, the panel was not swayed and again recommended dismissal. Streno’s claim, essentially, is that he was railroaded unfairly because he is gay.

Streno sued in federal court, alleging violations of Title IX and 42 U.S.C. Section 1981, as well as state breach of contract claims; he amended his complaint to add a claim under Va. Code Sec. 8.01-40, after somebody slipped up and included his photograph in a promotional brochure for the University published after his dismissal.

Judge Dillon first addressed the lack of any appellate support in the 4th Circuit for including sexual orientation discrimination claims under Title IX as a form of sex discrimination. She noted that neither the court of appeals nor the district courts in the circuit had yet allowed such claims, and that all the cases cited by Streno came from outside the circuit. However, she noted, Streno’s alternative sex stereotype claim “stands on firmer ground,” in light of the Supreme Court’s ruling in Price Waterhouse v. Hopkins decision, 490 U.S. 228 (1989). However, she observed that the 4th Circuit hasn’t yet issued a decision on sexual orientation discrimination under Title IX, a question as to which courts around the country are divided. With perhaps a sigh of relief, she concluded that this case did not require a holding on either potential Title IX theory because, based on the plaintiff’s factual allegations, the court could not find that Streno’s dismissal was discriminatory.

The problem is that factual allegations necessary to state a claim for discrimination, as such, were missing from the complaint, in the judge’s estimation. Streno argued that the University’s disciplinary proceeding reached the wrong result because he was innocent of sexual assault, and that he was treated less favorably in the disciplinary process than a male student accused of sexual assault by a female student would be treated. But all of his factual allegations were conclusory, in Judge Dillon’s view, falling short of the civil pleading standard established by the Supreme Court to put the question of sexual orientation discrimination into play. Absent direct evidence of discriminatory animus by the decision-makers in the disciplinary process – and Streno pled nothing that could be construed as direct evidence of...
discriminatory intent – it was necessary for Streno to provide more specificity about his claim that a heterosexual male student charged with sexual assault by a female student under similar circumstances would not be dismissed from school. One might argue that it would be difficult – near impossible – for Streno to meet the pleading standard without access to discovery, so the motion to dismiss should not be granted, but Judge Dillon found it appropriate to dismiss the complaint when the factual allegations fell so short of the *Iqbal/Twombly* standard set by the Supreme Court, which requires factual pleading sufficient to support an inference of discriminatory intent. Having fallen short in this respect, wrote Dillon, the case could not rest on conjecture or overly-generalized rumors. Where are the comparators?

The question was not whether Streno was guilty of the sexual assault charges, but in this judicial forum under Title IX, the question would be whether the University dismissed him because he is openly gay, and the court found scant evidence for that in the pleadings or other official papers filed in the case – that is, even if the court was willing to follow persuasive precedents from other jurisdictions allowing LGBT plaintiffs to sue for discrimination.

The judge pointed out that Sec. 1981 is irrelevant to a sexual orientation or sex discrimination charge, as the section, enacted shortly after the Civil War’s end, was intended to forbid race discrimination, not sex discrimination. Having found no federal basis for the claim, the court found the case appropriate for dismissal of the state law claims as well, pointing out that they arose out of a separate event – the unauthorized publication of Streno’s photograph in University promotional material after he was dismissed – making it unlikely that adding the claim to the case would promote efficiency and consistent decision-making on legal claims arising from a common event.

Streno is represented by Andrew Carter Graves, Kaitlin Voller, and Michelle Blaylock Owens. There was no word as we went to press whether Streno would appeal to the 4th Circuit.

### Alabama Federal Court Allows State Supreme Court Justice’s Challenge to Judicial Canons to Continue


Referencing the Tenth Amendment, Justice Parker opined: “The state retains rights not delegated to the federal government” and “there is nothing in the Constitution that delegates any rights over marriage to the federal government.” Justice Parker continued to argue that the *Obergefell* decision was an example of the federal government “intruding into the state prerogative in violation of the Tenth Amendment,” and voiced the opinion that “states should be a check on the federal government.”

On October 12, 2015, in response to Justice Parker’s public comments, the Southern Poverty Law Center (“SPLC”) filed a complaint with the Judicial Inquiry Commission of Alabama (“JIC”), the body charged with investigating violations of Judicial Canons and the primary defendant in the current lawsuit. SPLC alleged that Justice Parker’s comments “assault the authority and integrity of the federal judiciary,” “publicly endorse defiance of *Obergefell*,” and “foments the false impression in the public’s mind that the federal judiciary has tyrannically taken for itself unconstitutional power.”

The complaint alleged that Justice Parker’s comments were worthy of state-sanctioned disciplinary action because they violated several of Alabama’s Judicial Canons. Specifically, SPLC claimed that the comments were in violation of Judicial Canon 1, which requires a judge to observe “high standards of conduct so that the integrity of the judiciary may be preserved”; Canon 2(a), which requires a judge

### Justice Parker appeared on a radio talk show, during which he was asked for his personal views on federalism and the *Obergefell* decision.

On October 6, 2015, Justice Parker, then a candidate for reelection to the Alabama Supreme Court, appeared on a radio talk show, during which he was asked for his personal views on federalism and the *Obergefell* decision, which had been announced a little more than three months earlier. Parker expressed the opinion that Wisconsin’s response, over 150 years ago, to the U.S. Supreme Court’s pro-slavery decisions provided precedent for states to ignore federal rulings that they believed were in conflict with the U.S. Constitution. When specifically asked about same-sex marriage, Judge Parker explained that, in his view, “the *Obergefell* mandate only extends to the one court of appeals that was the source of the original cases taken to the Supreme Court.” Justice Parker went on to remark that he believed that “the decision runs contrary to the constitution and is out of step with popular opinion.”
to “conduct himself at all times in a manner that promotes public confidence in the integrity of the judiciary”; and Canon 3(a)(6), which requires a judge to “abstain from public comment about a pending or impending proceeding in any court.”

On November 5, 2015, the JIC notified Justice Parker that it intended to investigate the alleged violations, and of his right to respond. Justice Parker responded on January 4, 2016. The JIC kept the investigation open but did not file a formal complaint with the Court of the Judiciary (COJ) – the body responsible for trying ethics complaints after formal charges are filed. As a result of the open investigation, Judge Parker filed a complaint in federal court against the JIC and the state Attorney General on June 15, 2016. In response, the defendants moved for dismissal on the grounds that Younger v. Harris, 401 U.S. 37 (1971), precluded federal court intervention in “ongoing” state proceedings, and therefore required the court to abstain from hearing the case. The defendants’ motion to dismiss were granted.

Judge Parker moved to appeal the dismissal ruling, and the JIC dropped the investigation while the appeal was pending. With Younger abstention no longer an issue, the Eleventh Circuit remanded the case and ordered the parties to file briefs “setting forth their position whether this case should be dismissed as moot or otherwise for lack of jurisdiction.” The JIC responded by filing a motion to dismiss, asserting that Justice Parker’s claims were moot and that he could not state a claim for relief. In addition, the Attorney General renewed his original motion to dismiss, concurring with the JIC’s mootness argument and adding two arguments of his own: “(1) Justice Parker lacks standing to sue the Attorney General, and (2) the Attorney General enjoys Eleventh Amendment sovereign immunity.”

Beginning with the defendant’s claim that Justice Parker lacked standing, Judge Watkins explained that the plaintiff bore the burden of establishing three elements: “(1) an injury in fact, (2) a sufficient ‘causal connection between injury and the conduct complained of,’ and (3) a ‘likelihood’ that the injury ‘will be redressed by a favorable decision,’” citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Here, Judge Watkins considered whether Justice Parker could satisfy the injury-in-fact requirement, since he had sought to challenge the law before it had been enforced against him. Judge Watkins observed that “a [preenforcement] plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.” Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (2014). Pointing to Justice Parker’s intention to engage in political speech that could result in his automatic suspension, Judge Watkins thoroughly rejected the defendants’ argument that Justice Parker failed to establish a credible threat of prosecution because the mere existence of canons was insufficient to “create an objectively reasonable fear of such threat.” He chastised: “The defendants not only misrepresent the standard for determining whether a credible threat exists; they also gloss the fact that Justice Parker has already once been subjected to investigation based on the alleged violation of the Judicial Canons he now challenges. This is enough to demonstrate that his fear of prosecution is ‘not imaginary or wholly speculative.’” Ultimately, finding a credible threat of prosecution and the possibility of another investigation, Judge Watkins held that Justice Parker had sufficient standing to bring his pre-enforcement First Amendment challenge.

In his motion to dismiss, the Attorney General argued that Justice Parker lacked standing to sue him, since the enforcement of Judicial Canons was not “fairly traceable” to any action he undertook, and therefore Justice Parker could not establish the causation or redressability necessary to demonstrate Article III standing. Moreover, the Attorney General contended that the “fact that the Attorney General does not and will not enforce the challenged judicial-ethics provisions against Justice Parker requires dismissal.” Judge Watkins dismissed this argument, reasoning that to demonstrate standing, what matters was whether the Attorney General had the power to enforce the “challenged provision against the plaintiff.” Pointing to precedent, Watkins wrote: “When a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule.” ACLU v. The Florida Bar, 999 F.3d 1486, 1490 (11th Cir. 1993).

With respect to the defendant’s argument that Justice Parker’s claim was barred by sovereign immunity, Judge Watkins acknowledged that “the Eleventh Amendment prevents nonconsenting states and state actors from being sued by private individuals in federal court.” McLendon v. Ga. Dep’t of Cnty. Health, 261 F.3d 1252, 1256 (11th Cir. 2001). However, Judge Watkins pointed to an exception to sovereign immunity, which allowed private parties to sue state officers in their official capacities for “prospective equitable relief to end continuing violations of federal law.” Lane v. Cent. Alabama Cnty. Coll., 722 F.3d 1349 (11th Cir. 2014).

The Attorney General countered by arguing that the exception does not apply because there is no connection between the enforcement of Judicial Canons and his job as Attorney General. Judge Watkins rejected this argument, reasoning that as “the chief law officer of the state,” the Attorney General was “expressly charged with the duty of prosecuting charges filed by the JIC with the Court of the Judiciary.”

“The Attorney General is sufficiently connected with the enforcement of the Judicial Canons,” wrote Judge Watkins, “he cannot be excepted from the Ex parte Young doctrine.” Accordingly, the court rejected the Attorney General’s motion to dismiss on sovereign immunity grounds.
Before analyzing whether Justice Parker stated a claim for a facial or as-applied Due Process challenge, Judge Watkins clarified that “the line between facial and as-applied challenges is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation,” citing *Amer. Fed'n of State, Cty., & Mun. Emps. Council v. Scott*, 717 F.3d 851, 865 (11th Cir. 2013). Watkins then explained that a § 1983 action alleging a Procedural Due Process violation requires proof of three elements: “A deprivation of a constitutionally-protected liberty or property interest; state action; and constitutionally inadequate process.” *Doe v. The Florida Bar*, 630 F.3d 1336, 1342 (11th Cir. 2011). Pointing to the Alabama Constitution’s automatic suspension of judges against whom there are pending JIC complaints and the JIC’s status as an arm of the state, Judge Watkins held that the first two elements had been established. Judge Watkins then considered the two remaining issues: (1) whether Justice Parker’s alleged injury constitutes the deprivation of a constitutionally protected property interest sufficient to trigger the Due Process Clause, and (2) whether the process called for under Section 159 is constitutionally adequate.

Considering the first question, Judge Watkins relied on *Cutler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257 (11th Cir. 2001), in which Alabama Supreme Court Justice Harold See sued the JIC for its enforcement of allegedly unconstitutional Judicial Canons. In that case, the Eleventh Circuit held that the Justice had failed to show irreparable injury, in part because the loss of his judicial office under Section 159 did not constitute the loss of a cognizable property interest. Reasoning that “if Justice See had no cognizable property interest in his post, then neither does Justice Parker,” Judge Watkins noted that the only other deprivation Parker pleaded is his reputation, which cannot alone support a Due Process claim. Accordingly, the court rejected Justice Parker’s Due Process challenge.

Judge Watkins addressed the defendants’ argument that Justice Parker’s as-applied First Amendment and Due Process claims were moot. The court pointed out that Justice Parker had already failed his Due Process claim, and therefore only addressed the First Amendment claim. Judge Watkins looked to Supreme Court precedent to decide whether Justice Parker’s First Amendment claim should be dismissed. The court recalled that “a case is moot when the issues presented are no longer ‘live’ or the parties lack legally cognizable interest in the outcome.” *Powell v. McCormack*, 385 U.S. 486 (1969). The defendants had argued that Justice Parker’s First Amendment challenge was moot because the ethics investigation was dropped, no official complaint was filed, Parker’s election was over, and he faced no continuing threat of prosecution.

The court rejected the defendants’ claim, finding plenty of evidence that Judge Parker’s First Amendment claim was “ripe for review.” Watkins held that Justice Parker’s status as justice of the Alabama Supreme Court subjects him to the continuing application of the Judicial Canons; thus, holding his position was sufficient to confer the necessary standing to bring a pre-enforcement lawsuit.

The court then contended that even if Justice Parker’s as-applied First Amendment challenge was moot, the court could still hear the case. Judge Watkins described in detail numerous precedent decisions making exceptions for the mootness doctrine, including *Roe v. Wade*, 410 U.S. 113, 125 (1973) (recognizing a mootness doctrine exception where controversies were “capable of repetition, yet evading review.”) and *Friends of the Earth*, 528 U.S. at 189 (holding “[i]t is well-settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’”).

Here, Judge Watkins found that both exceptions applied to the current case since JIC’s investigations were capable of repetition, and if JIC decided to withdraw investigations to avoid lawsuits, the claims would “evade review.” Watkins also underscored that the issue of mootness only arose because the JIC voluntarily decided to halt the investigation. “This,” reasoned Judge Watkins, “gives the court no strong assurances that the JIC would hesitate to enforce the challenged provisions in the future.” The defendants pointed to cases in which the state had been entitled to a presumption requiring the

**Watkins held that Justice Parker’s status as justice of the Alabama Supreme Court subjects him to the continuing application of the Judicial Canons.**

The court rejected the defendants’ motion to dismiss was denied as to all of Justice Parker’s claims except those brought pursuant to the Due Process Clause. The defendants’ motion to dismiss were granted in part as to Justice Parker’s Due Process claims, and Justice Parker’s Due Process claims were dismissed with prejudice. Additionally, Judge Watkins ordered the defendants to file an answer to the remainder of Justice Parker’s complaint. – *Chan Tov McNamarah (Cornell Law School class of 2019)*
Connecticut U.S. District Court Allows Sexual Orientation Plaintiff to Proceed on Gender Discrimination and Retaliation Claims

Until recent months, the 2nd Circuit has refused to consider overturning its decision in Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000), where the court held that Title VII of the Civil Rights Act of 1964 does not protect against sexual orientation discrimination. On September 26, 2017, the Second Circuit heard oral arguments en banc for Zarda v. Altitude Express to revisit its interpretation of Title VII’s scope. Pending Zarda’s holding, district courts in the 2nd Circuit will continue to struggle with how to treat claims of sexual orientation discrimination. In DeAngelis v. City of Bridgeport, 2017 WL 3880762 (D. Conn., Sept. 5, 2017), U.S. District Judge Jeffrey Alker Meyer, ruling on defendant’s motion for summary judgment, sustained the plaintiff’s lawsuit primarily through her claims of gender discrimination and retaliation while ruling against her on some other claims, without having addressing whether her sexual orientation claim could be pursued under Title VII, finding that she had effectively waived that claim.

 Plaintiff Carla DeAngelis filed the lawsuit against the City and three coworkers at the City’s Public Safety and Communications Center: Dorie Price, the Center’s director; Anthony P. D’Onofrio, Jr., the plaintiff’s supervisor; and Debra Deida, a training officer. Judge Meyer granted summary judgment to the defendants against DeAngelis’s claims of First Amendment retaliation, violations of procedural and substantive due process, conspiracy, abuse of process, indemnification, data disclosure, and sexual orientation discrimination and retaliation. In doing so, he concluded that DeAngelis failed to adduce enough evidence to support her claims. However, Judge Meyer also concluded that DeAngelis alleged sufficient facts to present her claims of gender discrimination and retaliation, negligent infliction of emotional distress, and intentional infliction of emotional distress to a jury. Interestingly, Judge Meyer’s ruling barely referred to DeAngelis’s claims of discrimination and retaliation based on her sexual orientation. According to his

footnotes, he treated the two claims as abandoned because the plaintiff did not address them in her brief in opposition to the motion for summary judgment, and thus granted the motion to dismiss as to them without any discussion of the merits. The 2nd Circuit’s pending determination on Title VII’s treatment of sexual orientation discrimination claims could also explain why the lengthy statement of facts in the opinion omitted any indication of whether DeAngelis is a lesbian.

DeAngelis worked as a telecommunicator at the Center between February 2012 and December 2013. The emergency call center already presented a stressful work environment; however, DeAngelis presented evidence that D’Onofrio made matters disparately worse for female employees, acting extremely aggressively towards his

female employees, yelling at them in front of their colleagues, and following them in and out of the office to continue arguing. Additionally, D’Onofrio enforced stricter restraints on female employees who sought to take a break than he did on male employees.

D’Onofrio’s aggressive behavior towards DeAngelis escalated in March 2013, when he yelled at her while she was handling an emergency call. He then called her into a meeting because of her tone towards him during the incident. At this meeting, D’Onofrio stated, “the only time you should answer me like that is when I am grabbing you by the neck and shaking you.” Afterwards, D’Onofrio continued to yell at DeAngelis and got uncomfortably close to her in the cafeteria. Fearing for her safety, DeAngelis brought her concerns to the Center’s director, Price, during a disciplinary meeting. Instead of addressing DeAngelis’s concerns, Price suspended her and filed a false complaint against her, alleging that DeAngelis threatened Price.

By September 16, 2013, DeAngelis had met with an investigator from the Connecticut Commission on Human Rights and Opportunities (CHRO) regarding her treatment at work, and filed a grievance with her union. DeAngelis then met with Deida for help to feel safe at her job. Instead, Deida wrote a disciplinary warning to DeAngelis regarding the latter’s absences over the prior year. On October 8, Deida also closed DeAngelis’s harassment grievance because the latter refused to disclose the names of other coworkers harassed by D’Onofrio.

The conflict between DeAngelis and D’Onofrio came to a head in November 2013, when she threatened to have him fired and he subsequently filed a police report stating he felt physically threatened. After Deida and Price also told the police that DeAngelis made them fear for their safety at work, two

Pending Zarda's holding, district courts in the 2nd Circuit will continue to struggle with how to treat claims of sexual orientation discrimination.
officers went to the call center and issued a summons to DeAngelis. Following a series of hearings with a labor relations officer and union representative, Price asked DeAngelis on December 19 to resume working at the Center; however, DeAngelis refused to return unless certain conditions regarding her safety and the defendants’ charges against her were met. Ultimately, DeAngelis did not return to work and her absence was considered a resignation.

Judge Meyer’s ruling primarily discussed why DeAngelis’s claims of gender discrimination and retaliation survive summary judgment. Under Title VII and the Connecticut Fair Employment Practices Act (CFEPA), a plaintiff can show she was discriminated against based on her gender by showing that she was subjected to a hostile work environment. In order to assert a hostile work environment claim, a plaintiff must show that the alleged conduct (1) was objectively severe or pervasive; (2) created an environment that the plaintiff subjectively perceived as hostile or abusive; and (3) created such an environment because of the plaintiff’s sex.

Judge Meyer quickly determined that DeAngelis satisfied the first two requirements to prevail on a hostile work environment claim. First, she provided enough evidence for a jury to reasonably find that D’Onofrio subjected female subordinates to a hostile work environment by yelling at them and physically intimidating them. Secondly, DeAngelis subjectively believed her work environment was hostile and abusive because she had filed grievances and complained of D’Onofrio’s behavior. Judge Meyer’s analysis then turned to the third requirement of gender as the cause of the hostile work environment. He noted that unlike other gender discrimination claims, DeAngelis did not submit any specific comments by the defendants that would indicate a gender-based discriminatory intent. Such comments include discussing body parts, sexual jokes, and sexual experiences. See, e.g., Alfano v. Costello, 294 F.3d 365, 379–80 (2d Cir. 2002). Even so, Judge Meyer found that DeAngelis had submitted enough evidence for a jury to reasonably find that D’Onofrio subjected her to a hostile work environment based on her gender, because she and three other female coworkers had submitted testimony indicating that D’Onofrio’s hostile behavior targeted women. Furthermore, Judge Meyer rejected the defendants’ contention that DeAngelis must submit evidence that she subjectively believed she was subject to a hostile work environment because of her gender. He explained that such a showing was not required under the three-prong test for showing a hostile work environment. The defendants erroneously combined the second and third requirements of subjective perception and causation.

Next, Judge Meyer addressed DeAngelis’s claim that the defendants retaliated against her because she complained of harassment and discriminatory conduct in violation of Title VII and the CFEPA. A retaliation claim must be analyzed under the McDonnell Douglas burden-shifting test. First the plaintiff must show: (1) that she participated in an activity protected by Title VII; (2) that her participation was known to her employer; (3) that her employer thereafter subjected her to a materially adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. Once she has established that, the burden shifts onto the defendants to show a legitimate non-retaliatory reason for their adverse employment action. After that, the plaintiff carries the burden of showing a genuine fact issue of retaliatory motivation.

Judge Meyer first rejected the defendants’ contention that DeAngelis’s grievances to management did not qualify as protected activity because she did not clarify that D’Onofrio’s conduct violated Title VII. He determined that her complaints sufficiently ensured that the defendants “understood or could reasonably have understood, that the plaintiff’s opposition was directed at conduct prohibited by Title VII.” See Kelly v. Howard I. Shapiro & Assoc. Consulting Engineers, P.C., 716 F.3d 10, 15 (2d Cir. 2013). DeAngelis’s grievances used buzzwords indicating that her claim had to do with a protected class like gender, including statements like “harassment and discrimination,” and “this has happened to women like me.” Furthermore, she informed her supervisors that she had scheduled a meeting with the CHRO. Thus, the defendants could have reasonably understood that DeAngelis’s complaints were directed at conduct prohibited by Title VII.

Because the defendants knew that DeAngelis was participating in a protected activity and then subjected her to a series of adverse employment actions, Judge Meyer’s analysis once again turned to the issue of causation: whether the defendants subjected DeAngelis to disciplinary actions because she engaged in protected activity. He determined that a reasonable jury could conclude the defendants’ disciplinary actions were a pretext motivated by DeAngelis’s complaint, and that there was no legitimate non-retaliatory reason for them. In November 2013, DeAngelis merely threatened to have D’Onofrio fired before he filed a police report stating he felt physically threatened. Given the proximity in time between the two incidents, a jury could reasonably find that D’Onofrio went to the police because of Angelis’s complaints. Furthermore, Price and Deida could have used DeAngelis’s subsequent arrest as an excuse to put her on administrative leave and to investigate her.

In spite of the lengthy facts and discussion of this case, this writer wonders whether the motive behind Price and Deida’s treatment of DeAngelis would have been clearer if DeAngelis had continued to allege that she was discriminated against based on her sexual orientation. Given the Second Circuit’s treatment of sexual orientation in sex discrimination cases, it is understandable that DeAngelis’s counsel tailored her story so that a presiding federal judge would easily find prima facie cases for gender discrimination and retaliation. – Timothy Ramos (NYLS class of 2019)
Washington Court of Appeals Revives Hostile Environment Case of Gay Couple under State Anti-Discrimination Law

A gay couple’s hostile environment case was revived by the Court of Appeals of Washington. Judge Ronald Cox authored the September 11 opinion for the three-judge panel, which reversed the trial court’s summary judgment in favor of employer Kam-Way Transportation (Kam-Way). *Coles v. Kam-Way Transportation*, 2017 Wash. App. Lexis 2099; 2017 WL 3980563.

The court held that, contrary to the trial court’s decision, a rational jury should decide whether certain actions of Kam-Way employees in this case were animated by homophobia and further held plaintiff-employees Logan Coles (Coles) and Cody Lord (Lord) had produced evidence that would support a reasonable inference that their sexual orientation motivated some of the harassing conduct to which they were subjected as Kam-Way employees.

Coles and Lord are two men in a committed intimate relationship. Both were employed for a few years by Kam-Way. The two men were fired by Kam-Way in 2011 and the circumstances of their departure are disputed. The firings themselves are not explained in any detail in the opinion. Coles and Lord both allege, however, they were fired because they are gay.

Coles and Lord allege that Kam-Way’s CFO, Dori Binder (Binder), was rude and crass to Coles when the two men drew her attention to a work matter shortly after her arrival at the company. In his deposition, Coles testified this made him feel that he was being treated differently than other employees though, at the time of this initial incident he did not ascribe the treatment to his or Lord’s sexual orientation.

Later, in a meeting with a few employees, Binder singled out Coles and Lord for taking morning rest breaks from work, which the men viewed as disparate treatment based on their sexuality because other employees who took similar breaks were not challenged. According to a former Kam-Way employee’s deposition, “Binder would constantly target Coles, nit-picking every detail of his work, calling him out in front of other employees for alleged mistakes. Based on Binder’s treatment of Coles, it was clear to me that Binder had an issue with Coles. Binder did not target other heterosexual employees in the same manner.”

Kam-Way’s CEO, Kamaljit Sihota, forwarded an e-mail to a group of employees in 2010, including Lord. That e-mail contained a derogatory phrase regarding homosexuals. Kam-Way’s COO, Herman Sihota, referred to Coles by a derogatory name outside his presence after Coles’ interview. Herman would also make derogatory comments or jokes in Coles’ presence stating, for example, “don’t be gay.”

The men sued after their termination, alleging a hostile work environment based on discrimination under the Washington Law against Discrimination (WLAD). WLAD prohibits discrimination against any person due to the person’s sexual orientation. To establish a hostile work environment claim, a plaintiff must show “(1) the harassment was unwelcome; (2) the harassment was because [plaintiff was a member of a protected class]; (3) the harassment affected the terms and conditions of employment and the harassment is imputable to the employer.”

The court wrote that “[i]n WLAD cases, granting summary judgment to an employer is seldom appropriate due to the difficulty of proving a discriminatory motivation.”

As to prong one above, the Court noted that Kam-Way did not dispute that the harassment that Coles and Lord experienced was unwelcome and this element of their claim was established.

As to prong two, harassment of a protected class, the court agreed the two men established this element of their hostile work environment claim. The court stated that “[a] jury could reasonably conclude that subjecting an employee to ‘derogatory [sexual orientation] name-calling,’ as Kam-Way COO Sihota had done, “[i]s motivated by [discriminatory] reasons.” The court went on “[i]f [sexual orientation] animus motivates a harasser to make provocative comments in the presence of an individual in order to anger and harass him, such comments are highly relevant . . . regardless of the identity of the person to whom the comments were superficially directed.”

In this connection, the court highlighted both Coles’ and Lord’s deposition testimony regarding interactions with Binder and why both believed Binder was discriminating on the basis of their sexual orientation. Additionally, the e-mail CEO Sihota forwarded to employees, including Lord, contained a derogatory phrase about homosexuals, which the CEO attempted to explain away as inadvertent. Inadvertence was irrelevant to the court, as the harm had been done, and a jury could reasonably infer that the CEO “conceivably intended it to have special meaning’ to Lord.” As to Coles, the COO had specifically referred to him by a derogatory name outside his presence which, according to the court, could lead to a reasonable inference Coles’ sexual orientation motivated the harassing conduct.

The court found the third prong satisfied as well and Coles and Lord presented sufficient evidence to raise a genuine issue of material fact on this element. Harassment affects the terms and conditions of employment if, “considering the totality of the circumstances, the harassment is sufficiently pervasive to alter the employee’s employment conditions and create an abusive working environment. The conduct must be ‘objectively abusive’ and subjectively perceived as abusive or offensive by the employee.” “The employee need not prove that the harassment impaired his or her ‘tangible productivity . . . .’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to ‘make it more difficult to do the job.’”
According to the court, a jury could reasonably find Binder’s actions and comments pervasive enough to alter Coles’ and Lord’s employment conditions and create a working environment. Indeed, Binder’s singling out Coles and Lord for their morning breaks made Coles and Lord understand Binder no longer wanted them involved in a certain working group any longer. Another employee testified that the COO “constantly” made jokes about homosexuals or callous remarks in Coles’ presence. The email from the CEO with derogatory remarks alone may not have been enough to affect terms or conditions of employment sufficient for a violation of the law, but taken together with the other incidents could lead a rational jury to find such a violation.

Kam-Way conceded that Coles and Lord had imputed the discrimination to them as their employer. The Court pointed out that the COO, CEO and Binder’s rank were high enough in the Kam-Way hierarchy to constitute Kam-Way’s “alter ego.” This allowed their conduct to be automatically imputed to Kam-Way.

The trial court also granted summary judgment to Kam-Way on Coles’ and Lord’s claims for retaliation and statutorily protected opposition activity. With very little discussion, the appeals court affirmed the dismissal of the retaliation claim. As to the opposition activity claim, “[a]n employee engages in WLAD-protected activity when he opposes employment practices forbidden by anti-discrimination law or other practices that he reasonably believed to be discriminatory.” The court stated that the record failed to show that Coles and Lord complained about discrimination based on their sexual orientation. This meant that Coles and Lord failed to show they engaged in activities protected by WLAD. – Matthew Goodwin

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

Tennessee Court of Appeals Reverses Trial Court’s Refusal to Grant Name Change to Transgender Minor

According to the 5th Edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (often abbreviated as the DSM-5), gender dysphoria involves a conflict between a person’s physical or assigned gender and the gender with which the person identifies. Treatment for gender dysphoria includes addressing psychological stress through social transition, which may include changing one’s legal name. It was no surprise, therefore, when the parents of a 16-year-old minor diagnosed with gender dysphoria filed a petition to change their child’s legal name from Leyna to Charlie (the name he had gone by socially for over a year) in furtherance of his gender dysphoria treatment.

However, a mere three days after they filed the petition, Williamson County Circuit Judge Deanna B. Johnson denied it with a terse order claiming that the petition failed to state a valid reason for the name change and, as if to rub salt in the wound, referring to Charlie as the petitioners’ “daughter” despite his male gender. The order concluded by advising that the petitioners’ “daughter” could petition the court “herself” when “she” reached the age of majority. In re Leyna A., 2017 Tenn. App. LEXIS 614, 2017 WL 4083644 (Tenn. Ct. App. Sept. 15, 2017) chronicles Charlie’s parents’ struggle to get their petition granted on their son’s behalf.

After the trial court denied the petition, Charlie’s parents moved to alter or amend the ruling, this time submitting overwhelming and unopposed evidence supporting the petition for a legal name change, including statements of support from Charlie, his parents, his doctor, his therapist, and a teacher. Nevertheless, the trial court denied the motion to alter or amend, stating that the law and facts had not changed and that “Petitioners have not shown that there was a clear error of law or that an injustice occurred.”

Charlie’s parents appealed, arguing that the trial court abused its discretion in refusing to grant the motion to alter or amend. The appeal also argued that the trial court had violated Charlie’s First Amendment right to be free from compelled speech and his parents’ fundamental right to select a name for their child under the Fourteenth Amendment, although the Court of Appeals disposed of the appeal on statutory grounds without broaching those constitutional issues. More specifically, a three-judge panel of the Court of Appeals, in an opinion by Judge Frank G. Clement, Jr., unanimously held that the petition met all the procedural requirements laid out by the state’s name change statute, the matter implicated no statutory restrictions (e.g., Charlie had no intent to mislead creditors by virtue of a name change), and the name change was in the best interest of the child as required under state law. Therefore, after the Court of Appeals concluded that the trial court had abused its discretion by failing to alter or amend its denial of the petition, it remanded the matter with instructions to enter judgment granting the petition to change the child’s name to Charlie.

In re Leyna A. serves as an unfortunate example of the struggle that transgender children must endure just to secure medical treatment for their gender dysphoria. Indeed, even when they are supported by their parents and medical professionals, securing a legal name change can be an uphill battle for transgender children. Thankfully, In re Leyna A. demonstrates that—even though trial courts may misapply state law to deny name change petitions filed on behalf of transgender children—appeal courts can save the day and ensure that transgender children are not denied a legal name change when such name changes are permitted under state law.

Elizabeth Noel Sitgreaves and Thomas H. Castelli of Nashville represented Charlie’s parents in appealing the trial court’s decision. – Ryan Nelson

Ryan Nelson is corporate counsel for employment law at MetLife.
Federal Court Ruling Against “Religious Exemptions” from Anti-Discrimination Laws on Same-Sex Weddings May Preview Supreme Court Decision

Chief Judge John R. Tunheim of the U.S. District Court in Minnesota ruled in Telescope Media Group v. Lindsey, 2017 WL 4179899, 2017 U.S. Dist. LEXIS 153014 (D. Minn., Sept. 20, 2017), that for-profit businesses do not enjoy a constitutional right to refuse to provide their services for same-sex weddings on the same basis that they provide services for different-sex weddings. Turning back a case brought by the anti-gay religious litigation organization, Alliance Defending Freedom (ADF), Judge Tunheim issued a comprehensive ruling that may provide a preview of what the U.S. Supreme Court will say in the Masterpiece Cakeshop case from Colorado during its forthcoming term, at least regarding the 1st Amendment issues common to both of the cases.

ADF immediately announced that it will appeal the court’s ruling to the U.S. Court of Appeals for the 8th Circuit, based in St. Louis, Missouri.

Judge Tunheim’s ruling is particularly significant because it is the first by a federal court to address this issue. Since 2013, several state appellate courts have ruled against such exemptions from compliance with state anti-discrimination laws, rejecting appeals by defendants who sought to overturn rulings against them by state human rights agencies in cases involving wedding photographers, florists, bakers, and wedding venues. In this case, however, a videography business that claimed to be planning to expand into the wedding video business sought an advance declaration from the federal court that they would be constitutionally protected if they were threatened with prosecution under Minnesota’s ban on public accommodations discrimination because of sexual orientation.

This issue has previously avoided litigation in the federal courts because there is no federal law prohibiting discrimination because of sex or sexual orientation by businesses providing goods or services to the public. When “sex” was added as a prohibited ground of discrimination through a floor amendment to the pending Civil Rights Act in Congress in 1964, the amendment was directed solely to the employment discrimination section of the bill. The public accommodations section was not amended to include “sex”. The Equality Act bill first introduced in Congress two years ago would add both “sex” and “sexual orientation” to that part of the Civil Rights Act.

The state rulings all came in cases where businesses were being prosecuted under a state law. Because these are local businesses operating in the same jurisdiction where the plaintiffs live, there was no basis for the defendants to remove them to federal court, since the federal constitutional arguments were raised as defenses, and federal “removal” jurisdiction is based either on diversity of citizenship of the parties or a federal question being raised by the plaintiff in the complaint.

This case was brought by ADF on behalf of Carl and Angel Larsen and their company, Telescope Media Group, which specializes in producing videos for a fee. They are interested in expanding their business to include wedding videos. They strongly oppose same-sex marriage, and one of their goals in expanding their business is to propagate their view that only a marriage between a man and a woman is appropriate by including in every contract they make a provision by which the couple purchasing the video gives Telescope Media the right to provide public access to the video through their website and postings on social media. Thus, their mission in expanding into the wedding video business is not just to make money but also to promote different-sex marriage, which they consider to be an institution that is endangered by social changes such as the marriage equality movement. They also want to be able to include a notice on their website that they do not provide video services for same-sex marriages.

Minnesota’s public accommodations law was amended in 1993 to add “sexual orientation” to the prohibited grounds of discrimination. After Minnesota’s legislature enacted a marriage equality law in 2013, the Minnesota Department of Human Rights (MDHR) published an “interpretive guidance” for businesses covered by the law, stating clearly that the state law “does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage.” The guidance makes clear that people denied services by such businesses could file discrimination charges with the agency, which could result in penalties for violation of the law.

ADF alleged in its complaint that Telescope Media has already been contacted by at least one same-sex couple seeking video services for their wedding, but they were told that Telescope Media does not do wedding videos. This is legal, since they are not discriminating between same-sex and different-sex couples. They claim they want to get into this potentially lucrative business, but are concerned about exposing themselves to legal liability, and seek the shelter of a declaratory judgment that they are privileged to turn down same-sex wedding business.

ADF came up with seven legal theories in support of their claim to constitutional protection, based on the 1st and 14th Amendments. They claimed that any legal requirement that they must provide services to same-sex couples would violate their rights to freedom of speech, expressive association, free exercise of religion, equal protection of the laws, and both procedural and substantive due process. Their freedom of speech argument subdivides into the freedom to advertise their wedding video business as available only to different-sex couples, and their freedom not to be compelled to produce wedding videos that celebrate same-sex marriages.
and thus communicate a message of approval that contradicts their religious-inspired views. The court rejected their argument that under the Minnesota law, they could be compelled to display publicly any same-sex marriage videos that they might produce.

Judge Tunheim carefully and systematically rejected all of their arguments, citing extensively to U.S. Supreme Court decisions dealing with comparable situations. Before tackling the substantive issues, he had to deal with whether this lawsuit was an attempt to get an advisory opinion, which is beyond the jurisdiction of federal courts. In this case, the fact that the MDHR has announced in advance its view that declining same-sex marriage business would violate the Human Rights Act helped to convince the court that prosecution of Telescope Media if it implemented its business plan was not merely theoretical. If they have a constitutional right, the existence of the law and the agency’s intention to enforce it back their claim that they are being deterred from potentially exercising a constitutional right by expanding their business. Thus, Tunheim rejected the argument by the state’s attorneys that the court had no jurisdiction over the case, since there is a real “case or controversy,” not a purely hypothetical case.

Turning to the merits, however, Judge Tunheim agreed with the growing body of state court appellate decisions that have rejected these constitutional arguments, for all the reasons that have been cited in those cases.

The court found that the MDHR is not a content-based regulation of speech, does not target religion, is subject only to intermediate scrutiny under 1st and 14th Amendment principles, and is sustained by the state’s important interest in preventing discrimination by businesses providing goods and services to the public.

Judge Tunheim rejected ADF’s argument that requiring a business to make wedding videos for same-sex couples if they make them for different-sex couples would violate the prohibition against government-compelled speech. “Where a business provides a ‘conduit’ that allows others to pay for speech,” as in the case where the business makes an expressive product like a video for monetary compensation, “strict scrutiny is usually unnecessary because there is ‘little risk’ of compelled speech or that the public will attribute the message to that of the speaker,” he wrote. “Further, courts generally do not find compelled speech where the speaker may easily disclaim the message of its customers.”

“The law does not compel the Larsens to speak a specific government message,” he continued, “unlike the message on the license plate in Wooley or the words of the pledge of allegiance in Barnette,” referring to cases where the Supreme Court held that a state cannot compel a person to display a political message on his license plate or to speak the flag salute against his will. “The law does not dictate how the Larsens carry out any of their creative decisions regarding filming and editing. While the law does incidentally require wedding videographers to make videos they might not want to make, the concerns undergirding the application of the compelled speech doctrine to instances of hosting another’s message are immaterial.”

At the heart of his analysis was the simple proposition that “speech-for-hire is commonly understood to reflect the views of the customer. Weddings are expressive events showcasing the messages and preference of the people getting married and attendees, who do things like speak, dress, and decorate in certain ways. A video of a wedding depicts this expressive event, and while videographers may exercise creative license to fashion such a video, the videographer is a ‘conduit’ for communication of the speech and expression taking place at the wedding.”

Further, he pointed out, the Larsens can always post an announcement on their website stating that they are complying with the law by making videos of same-sex weddings, but that they are opposed to same-sex marriage. This sets their case apart from Hurley, the Supreme Court case holding that Massachusetts could not compel parade organizers to include a gay group if the organizers did not want to send a gay rights message through their parade. Finally, he pointed out, making wedding videos for same-sex couples would not impede the Larsens’ ability to propagate their own message. They would not be required to exhibit these videos on their website or place them on social media, as the court found that the MDHR would not be interpreted to impose such a requirement.

The court held that the ability of the MDHR to decide whom to prosecute under the statute did not destroy its content-neutral character, and that requiring Telescope Media to afford equal access to its services for same-sex weddings did not violate its right of expressive association. Indeed, ADF’s argument on this issue would undermine all anti-discrimination laws, were a court to accept the argument that every interaction with a potential customer could be avoided on grounds of “forced association.” Historically-minded people may recall that then-Professor Robert Bork opposed the public accommodations provisions of the proposed Civil Rights Act in 1964 by describing the proposition that forcing businesses to provide services to people of color as one of “surpassing ugliness” because it would force people into unwanted personal associations. These sorts of views led to the defeat of Bork’s nomination by President Reagan to the Supreme Court in 1987.

Because the judge found the Minnesota Human Rights Act to be content-neutral as far as religion goes, it cooled rejected the idea that evenhanded application of the law would constitute a violation of free exercise, and it similarly rejected the argument that the law imposed an “unconstitutional condition” on the Larsen’s ability to conduct business in Minnesota. Because the law applied to all videography businesses, there was no viable Equal Protection claim. Similarly, there was no viable procedural due process claim since the law’s prohibition was not unduly vague, and its use of the phrase “legitimate business purposes” to describe circumstances under which a business could refuse to provide a service to a consumer had a well-established legal meaning that would not leave reasonable people guessing as to the scope of their legal obligations.

Finally, having found that the law did not unconstitutionally abridge any of
the Larsen’s substantive constitutional rights, the court easily concluded that it did not violate the 14th Amendment’s substantive due process protection for individual liberty. The court found that there is no recognized “fundamental right to work or operate a business free from regulations that one dislikes. Absent some authority to the contrary, the Court declines to expand the reach of substantive due process to these facts, as the doctrine is ‘reserved for truly egregious and extraordinary cases,’” citing several U.S. Supreme Court decisions limiting the scope of substantive due process doctrine.

Judge Tunheim found that the state’s attorneys had “met their burden to demonstrate that Counts I-VII in the Amended Complaint fail as a matter of law,” so there is nothing left to litigate and the court granted the state’s motion to dismiss the complaint.

ADF’s appeal to the 8th Circuit is unlikely to result in a quick decision, because the Supreme Court will hear oral arguments in the Masterpiece Cakeshop case, which presents many of the same issues, on December 5. This is an appeal of a ruling by the Colorado Court of Appeals that the Cakeshop and its proprietor, Jack Philips, violated the state’s human rights law by refusing to make a wedding cake for a same-sex couple because of his religious objections to same-sex marriages. (Discussed below under Civil Litigation Notes.) The 8th Circuit may decide to follow the same procedure it followed in 2014 and 2015 when it received state appeals from district court marriage equality rulings while a similar case from the 6th Circuit was pending in the Supreme Court. The 8th Circuit put the appeals “on hold” to see what the Supreme Court would do, and then after the Obergefell ruling it simply followed the Supreme Court’s lead, as it would be required to do by precedent.

However, because ADF has alleged various legal theories that were not advanced in the Masterpiece Cakeshop case, a Supreme Court ruling in that case may not definitively answer all the questions raised in Telescope Media, so it is possible that the 8th Circuit will find this case different enough to justify going forward without waiting for the Supreme Court’s ruling.

11th Circuit Rejects Tax Deductibility of Surrogacy Expenses for Gay Man

A gay male couple that wants to have a child who is genetically related to one of the men needs to retain the services of at least one and possibly two women, depending whether they are going to use ordinary surrogacy or gestational surrogacy to have the child. Should those expenses be deductible if they exceed the threshold set by the Internal Revenue Code for deductible medical expenses? On September 25, the 11th Circuit Court of Appeals, affirming a ruling by the Internal Revenue Service, answered in the negative. Morrissey v. United States, 2017 U.S. App. LEXIS 18479, 2017 WL 4229063.

Joseph F. Morrissey, the plaintiff, is a gay man who has been in a monogamous relationship with his same-sex partner since 2000. (They married after the events described in this case took place, when same-sex marriage became legal in Florida.) Morrissey characterizes himself as “effectively infertile” (since he is gay) because “it is physiologically impossible for two men to conceive a child through sexual relations.” The way out of this “effective infertility” is to use a surrogate, a woman who is willing to bear a child and give up her parental rights after the child is born.

In 2010, Morrissey and his partner decided to try to have children through in vitro fertilization (IVF) using a gestational surrogate, with Morrissey as the sperm donor. Morrissey’s sperm would be collected and then used to fertilize a donated egg in a petri dish; the resulting embryo would be implanted in a different woman than the egg donor. The gestational surrogate would then bear the child, both women having agreed to the termination of their parental rights as genetic mother and birth mother. Between 2010 and 2014 Morrissey went through several IVF procedures involving three egg donors, three surrogates, and two fertility specialists. He spent more than $100,000 altogether. (The opinion does not mention whether he actually ended up having kids.) During tax year 2011, he spent nearly $57,000 that was not covered by insurance on these IVF-surrogacy procedures. $1,500 of his expenditures that year went toward procedures performed directly on Morrissey – blood tests and sperm collection. The remainder of his expenditures that year went to identifying and retaining the women who would be egg donors and surrogates, for compensation of their services, reimbursement of their travel and other expenses, and providing medical care to the women.

Morrissey did not claim a deduction for these medical expenses when he filed his 2011 tax return, paying the full $22,449 that he owed in taxes without medical deductions. After paying his taxes, he filed an amended 2011 tax return, claiming a medical expense deduction of $36,538, the amount by which his claimed expenses exceeded the threshold specified in the Code, and seeking a $9,539 refund. At the time, the threshold was 7.5% of adjusted gross income. (Today it is 10%, having been increased effective with the 2013 tax year.) The $1500 he spent for medical services to himself could not be deducted on its own, because it would not exceed the threshold. Only by being able to claim the other expenses associated with the IVF-surrogacy procedures would he be able to have any medical deduction.

The IRS disallowed his deduction and denied the refund, taking the position that Sec. 213, which governs the “medical care” deductions, “states that Medical Care must be for Medical Services provided to the taxpayer, his spouse, or dependent.” As far as IRS was concerned, the expenses Morrissey incurred were not, with the exception of the $1500, for medical services provided to him.

Morrissey then sued in the federal district court, claiming first that Section 213 authorizes his claimed deduction, and second that the IRS’s disallowance of his claim violated his equal protection rights under the 5th Amendment. The district court granted summary judgment for the IRS.
Turning to the equal protection claim, Newsom described Morrissey’s two equal protection arguments. “First, he asserts that we should employ strict scrutiny because the IRS’s disallowance of his claimed deduction under IRC Sec. 213 infringes his fundamental right to reproduce. Second, he argues that some form of heightened scrutiny should apply because in disallowing the deduction the IRS discriminated against him on the basis of his sexual orientation.”

While conceding that the Supreme Court has described reproduction as a fundamental right in a broad sense, the court concluded that the issue here is “whether a man has a fundamental right to procreate via an IVF process that necessarily entails the participation of an unrelated third-party egg donor and a gestational surrogate.” As to that, the court concluded, “History and tradition provide no firm footing – let alone ‘deep rooting’ – for the right that underlies Mr. Morrissey’s claim. To the contrary, IVF, egg donation, and gestational surrogacy are decidedly modern phenomena. Indeed, not all that long ago, IVF was still (literally) the stuff of science fiction.” There follows a citation to and quotation from Aldous Huxley’s novel, Brave New World (1932).

Newsom then described the controversial history of alternative reproductive medicine, whose morality has been questioned by some major religions and whose legality has been put into play by a variety of state laws, ranging from regulation to criminalization of surrogacy agreements and laws against their enforcement. “Were we to confer ‘fundamental’ status on Mr. Morrissey’s asserted right to IVF-and-surrogacy-assisted reproduction,” wrote Newsom, “we would ‘to a great extent, place the matter outside the arena of public debate and legislative action.’ Particularly in view of the ethical issues implicated by IVF, egg donation, and gestational surrogacy,” he continued, “as well as the ongoing political dialogue about those issues – and mindful that ‘guideposts for responsible decision-making’ in the fundamental-rights area ‘are scarce and open-ended’ – we decline to take that step.”

The court rejected Morrissey’s invitation to opine as to whether sexual orientation is a “suspect classification” for equal protection purposes, because it found that the challenged statute – and its interpretation here – was neutral regarding sexual orientation. Newsom asserted that the statute “deals with heterosexual and homosexual taxpayers on equal terms.” The court found that Morrissey could not show that the IRS treated him differently from a heterosexual taxpayer who sought to claim a medical deduction for the expenses of IVF-surrogacy procedures. “The agency’s disallowance of Mr. Morrissey’s claimed deduction is consistent with longstanding IRS guidance and analogous Tax Court precedent,” he wrote, as “IRS has consistently refused deductions sought by heterosexual taxpayers for IVF-related expenses similar to Mr. Morrissey’s. An IRS guidance published in 2002 advised that ‘medical expenses paid for a surrogate mother and her unborn child would not qualify for deduction under Sec. 213(a),’” and this was upheld in several Tax Court cases. He pointed out that such deductions had even been disallowed where the surrogate was impregnated through sexual intercourse with the taxpayer!

The court refused to accept Morrissey’s analogy to the IRS’s allowance of deductions for fertility treatments, saying, “Even if Mr. Morrissey could show that he had been treated differently from similarly situated heterosexual taxpayers, he hasn’t shown that any difference was motivated by an intent to discriminate against him on the basis of his sexual orientation.” In essence, Morrissey’s equal protection claim was more of a disparate impact claim, not a disparate treatment claim, and the constitutional requirement of equal protection has been interpreted by the Supreme Court to apply only to intentional discrimination, not to the discriminatory effects of a tax regime that makes it more expensive for gay couples to have biological offspring than for those straight couples who do it the old-fashioned way.

continued on page 430
Court Rejects Federal Prosecutor’s Motion to Exclude Entrapment Defense from Internet Sting Prosecution

In an interesting and unusually detailed opinion, U.S. District Judge James M. Munley, rejected a pretrial motion by the federal prosecutor to preclude the defendant from using “entrapment” as a defense in a prosecution of a gay man for making an assignation with a purportedly underage youth through Gay.com. United States v. Senke, 2017 U.S. Dist. LEXIS 151639, 2017 WL 4159795 (M.D. Pa., Sept. 29, 2017). Judge Munley pointed out that if the defendant alleged facts sufficient to support an entrapment defense, the burden was on the prosecution to prove beyond a reasonable doubt that defendant was predisposed to commit the offense charged.

Judge Munley quotes extensively from the evidence presented, which makes clear that the investigator from the Pennsylvania Attorney General’s Office, posing as a minor, went to great lengths to get the defendant to agree to meet him.

The case originated with an internet sting operation conducted by an investigator for the Pennsylvania Attorney General’s Office, originally resulting in a state court prosecution, but ultimately the federal prosecutor took over, bringing charges in federal court, and the state prosecution against Charles Senke was dropped.

Judge Munley quotes extensively from the evidence presented, which makes clear that the investigator on Gay.com based on his listing in which he “presented himself as an eighteen-year-old man,” wrote Munley. “Defendant’s first message indicated that he sought a younger man who was looking for an older wealthier man. ‘U into generous older men’ he asked. The undercover agent said ‘how old r u I prob to young (:()” During the course of the back and forth messages, the investigator suggested that he was 14 or 15 at various times, and the defendant repeatedly asked for pictures. At one point in their interchanges, the investigator sent a picture. “The person in the photo does not appear obviously young,” wrote Munley. “In fact, the defendant said, ‘You don’t look that young.’ At one point, the defendant insisted he would “block” the investigator from being able to access defendant on the site, because the investigator kept insisting he was 14. But the investigator persisted, seeking to switch their communications to texting and phoning, and pleading with the defendant: “plz don’t be mean to me u were real mean to me.”

“It is not at all clear what the agent is talking about but it is evident that he is attempting to get the defendant to feel sorry for him and continue their communications,” wrote Munley. When the investigator failed to respond to the defendant’s requests for more information about him, the defendant said “OK I won’t text u no more.” But the investigator would not give up. Munley emphasized that the defendant had already twice indicated that their communication was at an end, but the agent came back with accusations that defendant was “mean” to him. This exchange ended when defendant “indicated that if the agent was not eighteen years old they could not ‘hook up.’”

After a four-month gap in communication, the agent then texted defendant again, seeking to initiate a new conversation. After examining these exchanges, Munley wrote, “it is unclear whether the defendant remembers or knows who texted him. The defendant asks about the agent’s sexual experience, and they also talk about meeting. The agent’s communications portray him as a sympathetic individual in need of help.”
The conversations continued, and there was some continued ambiguity about the agent’s age. Finally, after some talk about meeting, the agent sent a series of pathetic emails begging the defendant to meet him, asserting great love for the defendant. Finally, the defendant gave in and agreed to a meeting, but stated in a text message that the agent was too young so they would not have sex.

In light of all this (and this writer has summarized and abbreviated quite a bit), Judge Munley found, “Defendant certainly has evidence of inducement on the part of the government – the undercover agent accessed an adults-only website and created a phony profile on which he claimed to be eighteen years old. He pretended to be friends with/in love with the defendant and at certain points accused the defendant of being ‘mean’ to him by losing interest in pursuing the relationship. The investigator used other coercive tactics also. For example, he contacted the defendant several times after the defendant indicated he did not wish to continue to speak with the investigator. Further, the investigator contacted the defendant months after he had last heard anything from him. The defendant and the investigator had contact on twelve different days on both the website and in text messages. The first four days, the defendant initiated contact. The remaining times they had contact, it was initiated by the investigator. Based upon this evidence, the defendant could easily establish ‘inducement’ to commit a crime.”

As to the second element of entrapment, “non-disposition to commit the crime,” Munley found that the transcripts of contacts could also support the defendant’s entrapment claim, noting the adults-only nature of the website and the several times defendant cut off contact because the investigator kept insisting he was 14 or 15 (while sending a photo of a young man who was not obviously that young). Wrote Munley, “The government indicates that the defendant ‘pounced at the opportunity to entice a child to engage in sexual activity.’ The messages presented by the government do not support this conclusion. Several times, the defendant appeared to stop communicating with the investigator only to be drawn back in when the investigator played upon his sympathies. For example, the investigator called the defendant mean for not wanting to continue talking after he saw his photo, and he called the defendant ‘mean’ for other unclear reasons. Eventually, the investigator switched to the tactic of professing his love for the defendant. These were all enticement or luring on the part of the investigator, not on the part of the defendant.”

“The prosecution further argues that the defendant’s ‘own words and conduct . . . prove that he was eager to seduce a child.’ Perhaps this assertion is true when viewed with the eyes of a prosecutor,” wrote Judge Munley. “However, it could also be argued that the transcripts reveal a man who was eager to ask for naked photos and the sexual history of the investigator and then was eager to move on when they were not forthcoming. The investigator’s own words and conduct as discussed above may prove to a jury that the investigator was eager to entrap the defendant. In fact, the defendant never indicated he was seeking a minor. He asked the investigator several times if he was actually eighteen years old, and told the investigator multiple times that no sex would take place unless he was over eighteen years of age. Moreover, the investigator tried to lead the defendant into admitting he had had illicit sex with minors in the past. The defendant did not admit had ever done, or ever desired to do, anything sexual with a minor. He did state that he had married a twenty-year-old man. He did not demonstrate any particular enthusiasm in finding someone who was allegedly a minor.”

Judge Munley rejected the government’s assertion, on the issue of propensity to commit the offense, that the defendant had photos of child pornography on his computer and had sent them to the investigator, stating: “A review of the pictures reveals three that involve sexual activity. The subjects of the photographs are youthful looking men – but no evidence indicates that they are minors . . . . Nothing illegal is pictured unless, of course, the men are in fact minors. But more important for our analysis here, the government has not established when, or indeed if, defendant sent these photos to the agent. Thus, they do not weigh in our review on way or the other.”

Munley concluded, “For the reasons set forth above, we find that ample evidence exists that the government induced the defendant to commit a crime that he was not predisposed to commit . . . . The defendant evidently was on the website, which did not allow minors, to find a younger man for a relationship of some sort. He sent pictures of himself and also pictures of his possessions to establish that he could ‘spoil’ a younger man. In return, he sought naked pictures of the agent to determine if the agent was not ‘fake.’ It appears that the defendant assumed they were both on the website to find someone to date in the real world, and thus did not engage in a lot of conversation trying to entice or lure the agent to meet. Such as assumption might be reasonable on a dating website. Defendant grew reluctant to continue with the agent when the agent reiterated that he was only fourteen years old. He stopped chatting with the agent, only to be re-contacted against and again. At one point, a period of over four months passed with the defendant contacting the agent. Then the agent contacted him. He played on the sympathies of the defendant, and eventually they set up a meeting. A jury could find from these facts, that the government entrap the defendant. Accordingly, the government’s motion in limine to preclude the entrapment defense will be denied.”

This ruling should persuade the government to drop the charges against Senke. He was originally assigned an attorney from the Federal Public Defender’s Office, but the court granted a motion by counsel to withdraw and Senke represented himself pro se in asserting that he would present an entrapment defense and then responding to the government’s motion in limine.
The High Court of Australia has rejected an LGBTI community challenge to the federal government’s postal plebiscite as to whether the law should be changed to allow same-sex marriage (see last issue) and the plebiscite – now called a “postal survey” – is underway.

To recap, the Australian conservative government’s policy of not allowing a bill for marriage equality to even be debated unless it was supported by a plebiscite by ballot has always been opposed by the LGBTI communities. In 2016, the Labor opposition came around to the same view. In 2017, the Senate twice rejected government legislation for a plebiscite conducted by the Electoral Commission. So, instead, the government decided to have a postal plebiscite conducted by the Australian Bureau of Statistics (ABS) to determine voter opinion on the subject.

A variety of parliamentarians and LGBTI community members applied to the High Court for an injunction. On September 7, after an expedited hearing, in Wilkie v The Commonwealth, [2017] HCA 40, Australia’s apex court unanimously rejected the challenge. The plaintiffs’ grounds were (1) that the survey is outside the remit of the ABS in its statute; (2) that the funds to pay for it were not appropriated by Parliament and the advance to the Finance Minister for expenditure by way “urgent needs” and which was “unforeseen” was an impermissible delegation of the legislative power to appropriate funds for the Executive; and (3), if not, then the funds allocated from the Advance to pay for the survey were not expenditure for “urgent need” or which was “unforeseen”.

As to (1), the evidence was that the ABS had been directed by the government to collect and publish “statistical information” as to the proportion of participating electors who were in favour of or against the law being changed to allow same-sex couples to marry. The Court held that the fact that the exercise might also be described as a “vote” or “plebiscite” was irrelevant to whether the direction was for the collection of “statistical information”, an activity authorised by the ABS’ statute. The Court rejected an invitation to adopt an originalist approach to the construction of “statistical information” in the Act, saying that the Court’s job was to give “meaning to (the statute’s) enacted, frequently amended and continuously speaking text.” The Court pointed to a history of the ABS having collected information as to opinions and beliefs.

The Court held that the fact that the exercise might also be described as a “vote” or “plebiscite” was irrelevant.

As to (2), the Court restated the requirements that funds expended by the Executive must have been appropriated by Parliament from the Consolidated Revenue Fund and that appropriation must be for a legislatively determined purpose. However, the funds allocated by the Finance Minister for the postal survey had already been appropriated and for a specified purpose. Since Australia’s first Appropriation Act in 1901, a proportion of appropriated funds has been allocated to (then) the Treasurer “to permit the Treasurer to authorise the delegating to other heads of expenditure, of amounts issued from the Consolidated Revenue Fund under the authority of the Advance to the Treasurer”. In 2000, an overhaul of this structure reduced the advance to the (now) Finance Minister so that it could only be used for urgent or unforeseen events. The authorisation of the Finance Minister’s advance was not an impermissible delegation of legislative power because “the degree of specificity of the purpose of an appropriation is for Parliament to determine.”

As to (3), the Court noted that the legislation used the device of the Finance Minister’s “satisfaction” deliberately. To avoid legal contests as to whether the circumstances for the allocation of funds from the Advance met the legislative criterion in fact, Parliament chose to allow the matter to be one of judgment rather than fact. Thus, although his opinion must not be unreasonable or take irrelevant considerations into account, the judgement as to what was urgent or unforeseen was up to the Finance Minister – “(t)hat is the reason the amount . . . was appropriated in the first place.” “Urgency” needed to be determined in the context of when an appropriation bill could be submitted to Parliament (a roughly annual cycle) and, in this case, to be judged in light of the Executive’s decision that it wanted a result of the survey by November 15. The need to fund the survey was “unforeseen” by the Executive as at May 5, the last day on which it was practicable to provide for expenditure in the bill for the current Appropriation Act. The Court held that the Finance Minister’s reasoning in his affidavit as to why the expenditure had been urgent and unforeseen disclosed no error of law and that, in any event, the affidavit was not challenged by the plaintiffs. The Court rejected arguments the Finance Minister was obliged to consider whether such an allocation should be referred for parliamentary approval.

In view of its decision that the plaintiffs’ grounds “were demonstrably without substance”, the Court decided it would not consider the contested issue of whether the plaintiffs had standing. The High Court’s decision can be accessed at: www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/40.html

In the meantime, the Government has introduced and the Parliament has passed legislation prohibiting false and misleading advertising during the survey and vilification, and requiring identification of publishers of all material advocating a vote – the type of campaigning restrictions which
would apply had the postal ballot been conducted by the Electoral Commission.

Campaigning is underway and the ballot does not close until November 7. The conservative forces have thrown themselves into campaigning for a No vote. The main arguments are that marriage equality will impinge upon freedom of religion and freedom of speech, that same sex marriage will lead to sexuality and gender identity education in schools, that children need binary gender parents and that political correctness should be resisted. Particular efforts to boost the No vote are being made in non-English-speaking communities. After the High Court decision, the moderate left forces – the opposition Labor Party, the Greens and political forces in the LGBTI communities – decided to campaign actively for a Yes vote. Calls for a boycott have rarely been heard. Numerous large and multinational corporations have come out publicly in support of marriage equality as have a number of the sports bodies including, to the chagrin of prominent No campaigners, two major football codes.

For LGBTI people, however, the very fact of campaigning that homosexuals are not deserving of equal rights has been really unpleasant. Counselling services are report a significant increase in calls for help. There have been a number of ugly incidents. Opinion polls record support for marriage equality steadily falling (down from 72% to 57%). One opinion poll says that a slight majority of those returning or who will post their vote rather than record it at a polling booth.

The Labor Party has reiterated that it always opposed the survey and, if elected (in 2019), will introduce legislation for marriage equality irrespective of a No vote this year.

The result of the survey is due to be published on November 15. – David Buchanan

David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.

Federal District Court Adopts Magistrate’s Recommendation Allowing Eighth Amendment Challenges to California’s Inmate Transgender Rules


Judge Drozd considered the issues de novo, but did not repeat the entire analysis of Magistrate Judge Seng. Judge Drozd ruled that the magistrate “correctly found that Plaintiff’s Eighth Amendment medical indifference claim is not restricted to the provision of hormone therapy but rather, seeks to enjoin Defendants ‘from interfering with the discretion of the medical professionals involved in her care.’”

Judge Drozd found that the magistrate judge also “correctly concluded the regulation in question expressly provides that vaginoplasty is medically unnecessary except for the treatment of cystocele or rectocele and that regulation has the force of law in California. [citation omitted]. Thus, § 3350.1(b) continues to constitute a blanket ban on sex reassignment surgery for transgender women inmates such as plaintiff.”

Elsewhere in this issue, a group of transgender inmates tried unsuccessfully to intervene in the Quine litigation that prompted the regulations. The state vehemently opposed intervention and won. See discussion of California cases in “Prisoner Litigation,” infra.

California also tried here to bar Shabazz’ rights as precluded by two other class actions, Plato and Coleman, which deal generally with medical and mental health of California prisoners, but do not directly address transgender inmates. Judge Drozd affirmed the magistrate judge’s decision to allow Shabazz to proceed despite the class actions, because Shabazz is “bringing an individual claim for injunctive relief,” citing Pride v. Correa, 719 F.3d 1130, 1137 (9th Cir. 2013) (“Where a California prisoner brings an independent claim for injunctive relief solely on his own behalf for specific medical treatment denied to him, Plato does not bar the prisoner’s claim for injunctive relief.”)

As a whole, California is taking whatever position most limits transgender rights to those it chooses to provide. The state paroled the first inmate who was to get to the Ninth Circuit (Norsworthy). They settled the second case (Quine), but successfully opposed anyone intervening in that case. Here, they try to impose class membership to limit transgender inmate litigation, despite requests for individual injunctive relief. Thankfully, they lose, and the courts remain open to individual claims.

A class action for transgender inmates is a potential solution, but it faces numerosity problems in some jurisdictions; and typicality problems in most jurisdictions, particularly when: (1) plaintiffs are in various stages of transition; (2) some treatment, including hormones, is provided; and (3) the Supreme Court has tightened class action rules in civil rights cases – see Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-2 (2011) (restricting “typicality” rules in F.R.C.P. 23(b)(2) classes). This writer trusts that the creative counsel looking at these issues can thread this needle, perhaps by intervening in this case, which remains open in early stages.

– 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.

October 2017 LGBT Law Notes 404
N.Y. Family Court Judge Uses Equitable Estoppel to Find Co-Parent Standing in the Absence of Pre-Conception Agreement

Filling a gap in New York family law left open by the New York Court of Appeals’ 2016 decision In the Matter of Brooke S.B., 28 N.Y.3d 1, 61 N.E.3d 488, 39 N.Y.S.3d 89, Nassau County Family Court Judge Thomas Rademaker held in J.C. v. N.P., a decision published by the New York Law Journal on September 27, 2017, that the doctrine of equitable estoppel could be used to establish the standing of a lesbian co-parent who could not show that she and her former partner, the birth mother, had a written pre-conception agreement concerning the parentage of the two children that were born during their relationship. (At the time of writing, the opinion had not yet appeared in the Lexis or Westlaw databases or been assigned a N.Y. Slip Opinion number, but bore the date of publication of September 27.) In Brooke S.B., a similar case in other respects, the Court of Appeals had relied on the plaintiff’s allegation of the existence of a pre-conception agreement in determining the standing of an unmarried co-parent to seek custody, and stated “we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement.”

The Court of Appeals’ statement left an ambiguity for lower courts confronted by cases such as J.C. v. N.P.. Does “if any” mean that co-parents who lack evidence of a pre-conception agreement are categorically barred from establishing standing to seek custody and visitation after their relationship with the child’s birth mother ends, as would be the case under the older precedents overruled in Brooke? Or, to the contrary, could it just mean that lower courts have room to consider other legal doctrines that would enable them to reach what should be the overriding question in such custody/visitation disputes: what is in the best interest of the children?

Judge Rademaker explained that this doctrine has been frequently pressed into service by New York courts in determining that a man without a biological/genetic relationship to a child can be deemed a parent in certain circumstances, and he noted that those opinions emphasized that the overriding factor in such cases should be the best interest of the child.

“To prevail on the grounds of estoppel, the moving party bears the burden of proving, by clear and convincing evidence, that she has the right to the relief being sought,” the judge wrote, disclaiming any intent to create rigid guidelines or lists of factors that must be proven, while taking note of the factors that had been cited by the courts in cases determining men’s status as fathers.

In this case, the court found, J.C. and N.P. began their relationship around January 10, 2014, at which time N.P. was still married to, but separated from, another woman. Within days, N.P. became pregnant through donor insemination, and J.C. participated fully from, another woman. Within days, N.P. became pregnant through donor insemination, and J.C. participated fully during the pregnancy, accompanying N.P. on doctor visits. “Throughout their relationship,” Rademaker found, “including the pregnancies, the parties lived together in each other’s homes which they separately owned, dividing time between the two homes depending upon the season and work schedules.” When their first child, C.C., was born on September 29, 2014, they brought him to J.C.’s house, where a nursery room had been prepared for the child.
Through the women’s subsequent relationship, including the birth to N.P. of a second child conceived through donor insemination who was born in May 2016, the women both functioned as parents, were regarded as a family by the children’s pediatrician, neighbors, and their other family members. The two children are described by the court as “biological siblings,” presumably because the same man served as sperm donor for both children.

There was also documentary evidence, in the form of an email N.P. sent to her parents on October 16, 2015, as she and J.C. were going to the airport for N.P. to travel, in which she stated: “Since I have a child, don’t have a legal will and [JC] and I aren’t married yet, I figured I would put my wishes in writing just in case of an unfortunate event and I don’t return from Miami safely. Since [JC] is [CC]’s co-parent and other mommy, my wish is for her to have full custody and raise [CC] as her own in the instance I’m not on this earth to raise her myself. Thank you!”

Although N.P. testified that this was sent to assuage J.C.’s concerns, the court found no reason to believe the statement was sincerely meant.

In a footnote, Judge Rademaker specifically rejected N.P.’s argument that J.C.’s standing claim was barred by the fact that N.P. was married to another woman at the time of C.C.’s conception. “It has been held that the presumption of legitimacy is a presumption of a biological relationship, not a legal relationship,” he wrote, “and therefore has no application to same-gender married couples,” citing Matter of Paczkowski v. Paczkowski, 128 App. Div. 3d 968 (2nd Dept. 2001). “Moreover,” he wrote, “respondent’s judgment of divorce from her prior spouse clearly rebuts any presumption that C.C. is a child of that marriage, and respondent is bound by that determination under the doctrine of collateral estoppel.”

Rademaker found that J.C. had established by clear and convincing evidence that respondent created, fostered, furthered, and nurtured a parent-like relationship between the children and petitioner. Commencing just a few days after the older child’s conception, and continuing well after the demise of the parties’ relationship, respondent acted as if petitioner was a parent and acknowledged to petitioner, the children, and others that petition was essentially a parent, to wit, a “Mommy,” and both respondent and the children benefitted from this parent-like relationship on a daily basis for years. Petitioner is adjudicated to be a parent of the subject children and therefore, has standing to seek visitation and custody.

The next step will be for the court to determine whether it is in the best interest of the children for J.C. to be granted custody and visitation rights.

The Law Journal article reporting on the decision suggested that this was the “first” New York court decision to “offer an answer” to the question whether a co-parent could be adjudicated to be a parent in the absence of a pre-conception agreement. Neither the article nor the opinion identified counsel for the parties. In a footnote, Judge Rademaker acknowledged the “invaluable assistance of Court Attorney Jeremy Jorgensen in the preparation of this decision.”
SUPREME COURT – The Supreme Court will hold oral argument at 10 a.m. on Tuesday, December 5, in Masterpiece Cakeshop v. Colorado Human Rights Commission, in which a bakery proprietor claims that his 1st Amendment rights were violated by the Colorado Human Rights Commission’s decision – affirmed by the state’s court of appeals – that the baker had violated the state’s public accommodations law when he refused to provide his usual services to a same-sex couple seeking to order a custom wedding cake for use at their post-marriage celebration. (At the time of the underlying events, same-sex marriage was not available in Colorado, so the men planned to marry in Massachusetts and then hold a celebration for family and friends back in their home state.) Colorado’s law prohibits discrimination because of sexual orientation by businesses providing goods and services to the public. The baker claims that his religious objections to same-sex marriage should insulate him from prosecution under the law. He also contends that he was not discriminating because of sexual orientation, as he would be happy to sell the men a standard, off-the-rack cake or a cake for any other use than marriage; he was denying them his “artistic” cake-making services because he refused to in this sense participate in a ceremony to which he had religious objections, or to engage in which he is calling artistic expressive conduct that would send a message of artistic expressive conduct to order a custom wedding cake for a same-sex couple seeking to order a custom wedding cake for use at their post-marriage celebration. (At the time of the underlying events, same-sex marriage was not available in Colorado, so the men planned to marry in Massachusetts and then hold a celebration for family and friends back in their home state.) Colorado’s law prohibits discrimination because of sexual orientation by businesses providing goods and services to the public. The baker claims that his religious objections to same-sex marriage should insulate him from prosecution under the law. He also contends that he was not discriminating because of sexual orientation, as he would be happy to sell the men a standard, off-the-rack cake or a cake for any other use than marriage; he was denying them his “artistic” cake-making services because he refused to in this sense participate in a ceremony to which he had religious objections, or to engage in which he is calling artistic expressive conduct that would send a message of approval for same-sex marriages. It is noteworthy that Colorado does not have a Religious Freedom Act that would privilege individuals to avoid any serious burden on their religious beliefs that might otherwise be imposed by state law. Thus, this case is not parallel to the Supreme Court’s Hobby Lobby ruling of some years back, which turned on interpretation of the federal Religious Freedom Restoration Act, not on the 1st Amendment. In an amicus brief filed during September, the U.S. Justice Department, supporting the baker’s appeal, argued that this is a compelled speech case, minimizing to the extent possible the religious free exercise questions, and comparing this to cases in which the Supreme Court has found exceptions to state public accommodations laws based on “compelled speech” claims by the appellants. In both Boy Scouts of America v. Dale and Hurley v. Massachusetts, the Court found a 1st Amendment free speech shelter for non-profit groups engaged in expressive activities to overcome a requirement under state public accommodations laws prohibiting sexual orientation discrimination. Both cases are readily distinguishable, since Masterpiece Cakeshop is a for-profit business, and, as the Colorado Court of Appeals found, it is quite a stretch to argue that designing and baking a cake for use in a wedding ceremony is a form of compelled speech. A federal district court ruling in September may foreshadow the Supreme Court’s approach to this case: See Telescope Media Group v. Lindsey, 2017 WL 4179899, 2017 U.S. Dist. LEXIS 153014 (D. Minn., Sept. 20, 2017), discussed above in this issue of Law Notes.

TRANSGENDER MILITARY SERVICE

– Responding to the White House’s publication of a Memorandum signed by the president late in August fleshing out the “policy” announced in his July tweets, proclaiming that transgender people would not be allowed to serve “in any capacity” in the armed services, at least two new lawsuits were filed in various district courts questioning the constitutionality of the president’s actions, in addition to a suit filed quickly after the tweet declaration. Now all the major national LGBT rights groups and the ACLU are involved in litigation attacking the policy, as to the continuing ban on enlistment, the denial of appropriate health care to serving transgender people, and the mandate that those now serving be discharged by March 2018, solely because of their gender identity and without regard to the nature and quality of the service they have been rendering. Motions for preliminary injunctive relief have been filed in all the cases, to be met by the Justice Department’s contention that the lawsuits are all premature because no transgender service member has yet suffered any harm due to the delays built into the policy, in Motions to Dismiss filed on October 4 that will be discussed in more detail in the November issue of Law Notes. The Justice Department is arguing – laughably – that the district court’s must afford great deference to the Executive Branch on matters of military policy, as to which the courts have no particular expertise. Well, neither does President Trump have any particular expertise on military policy. Although his tweets in July stated that he was announcing his policy after conferring with “generals and experts,” the White House has never named any “general” or “expert” with whom the president “conferred,” other than to state that the Secretary of Defense, retired-general James Mattis (who was on vacation at the time), had been notified several hours before the president tweeted on the subject. Neither does the Memorandum issued by the White House cite any basis for the newly-announced policy other than those articulated in the tweets, none of which are credible. Over the coming weeks, it is likely that there will be federal district court rulings on the motions, especially as the dates for implementation draw nearer. As to one aspect of the policy, however, it is clear that there is a very tangible continuing harm being inflicted on transgender people: the ban on enlistment, which harms not only those in the civilian population who seek to enlist, but also those who are serving in reserve units and seek to transfer to the active forces, and those enrolled at the service academies who seek to be
commissioned upon graduation. There are also allegations that although the Memorandum stated that no action should be taken against any transgender individuals now serving and that nobody should be denied medical services prior to the implementation date, transgender service members have already encountered difficulty accessing medical services, and difficulties have been encountered by people whose enlistments are coming up for renewal and candidates for promotion. (Secretary Mattis issued an “interim guidance” during September that said, among other things, that the Department would continue to pay for sex-change surgeries for transgender members until March 22, 2018. “No new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except as necessary to protect the health of an individual who already has begun a course of treatment to reassign his or her gender,” wrote Mattis, according to press reports. Mattis has a February 21 deadline to submit a permanent policy recommendation to Trump.) Furthermore, those now serving are faced with uncertainty as to how they will be treated when/ if the policy is implemented, which raises questions on where they will live, how they will earn a living, how their families and dependents will be affect, etc. The bald proclamation that nobody yet has standing to challenge the policy or that the issue is not ripe for judicial consideration belie the facts . . . . But, of course, the Trump Administration is used to relying on “alternative facts” when it suits their purpose.

2ND CIRCUIT COURT OF APPEALS – A 13-member bench of the 2nd Circuit Court of Appeals heard oral argument en banc on September 26 in Zarda v. Altitude Express, in which a three-judge panel had rejected an appeal from the district court’s dismissal of a sexual orientation discrimination claim under Title VII. See 855 F.3d 76 (2d Cir. Apr. 18, 2017). Much of the media coverage of the argument focused on the unusual circumstances of the federal government arguing on both sides of the appeal in a case between private parties. Of course, the federal government has an interest in how the courts interpret Title VII, a federal statute, so it is not surprising that the court had specifically invited the Equal Employment Opportunity Commission to submit an amicus brief and participate in the argument. What was surprising—at least to those not sensitive to the politics of the situation—was that the Justice Department, which does not usually involve itself at the court of appeals level in litigation between private parties, filed its own amicus brief, opposing the EEOC’s position, and also participated in the oral argument. The EEOC has ruled in several federal employee discrimination cases that Title VII’s ban on sex discrimination covers sexual orientation discrimination claims, and it has also undertaken affirmative litigation on behalf of some LGBT complainants in non-governmental cases. At the deadline for submitting briefs in this case, the EEOC still had a majority of Democrat commissioners, and had not retreated from its position now dating back to the summer of 2015. The Trump Administration, speaking through Attorney General Jeff Sessions, outspokenly opposes applying Title VII to such claims, and sought to go on record in this case. (In a development that will be discussed in detail in the November issue of Law Notes, Attorney General Sessions issued several memoranda early in October putting the Administration on record as opposing any but the narrowest interpretation of federal sex discrimination laws.) The Administration will take a similar position before the Supreme Court if the cert petition is granted in Evans v. Georgia Regional Hospital, Lambda Legal’s appeal of an adverse ruling from the 11th Circuit in the case of a lesbian security guard. At the 2nd Circuit hearing, Gregory Antollino, counsel for the Zarda Estate, and Greg Nevins, the Lambda attorney who argued the Evans appeal in the 11th Circuit and the Hively appeal before the 7th Circuit, were joined by counsel from the EEOC in urging the court to reverse 2nd Circuit precedents and follow the 7th Circuit and the Commission in adopting a broad view of “sex discrimination” under Title VII. An audio recording of the oral argument is available on the court’s website. Now an interesting issue of timing appears. At this writing, the Supreme Court has yet to announce whether it will hear the Evans appeal. The existence of a circuit split, initiated by the 7th Circuit in Hively, makes it highly likely that the Supreme Court will grant review, but the petition was filed shortly before the commencement of the Court’s term and it is uncertain how quickly the Court will take it up. Even if cert is granted, the Court’s argument calendar is already full through mid-December, and it seems likely that the case would not be argued until later in the winter. The 2nd Circuit was very quick to get its 2012 Windsor decision out, and in this case, there is a ready-made opinion to adopt if a majority of the circuit, as expected, sides with the plaintiffs: Chief Judge Robert Katzmann’s concurring opinion in a similar case, Christiansen v. Omnicom Group, 852 F.3d 195 (2d Cir. Mar. 27, 2017). Suspense!!

5TH CIRCUIT COURT OF APPEALS – The court denied a petition for review of the Board of Immigration Appeals’ decision against protection under the Convention against Torture (CAT) for a gay man from Zambia. Mukuka v. Sessions, 2017 WL 4022354, 2017 U.S. App. LEXIS 17585 (Sept. 12, 2017). As usual with summary rulings from the circuit courts in refugee cases, the short per curiam opinion contains few facts, but it appears that
the petitioner was relying primarily on State Department country reports and some press reports to support his claim that he would be in danger of torture or serious harm if he were returned to Zambia. “The BIA agreed that Zambia was criminalizing homosexuality and that homosexuals might have to endure a hostile environment; however, the BIA concluded that the country reports did not support a finding that Mukuka would likely be tortured, particularly given that relatively few people had been arrested for homosexuality and most had either been acquitted or had not even been charged,” wrote the court. “Mukuka concede[s] that he did not present any evidence of past torture and does not challenge the determination that his accounts of alleged torture of other homosexuals was based on hearsay and media reports. Moreover, Mukuka notes that the country reports he submitted did not contain first-hand, explicit evidence of torture but simply implied that homosexuals would be arrested and tortured. In addition, Mukuka does not challenge the conclusion that he most feared economic persecution, namely that he would be unable to find employment, upon return to Zambia.” Thus, the court found, the petitioner had not “demonstrated that the evidence compels reversal of the BIA’s conclusion that he was not entitled to protection under the CAT.” Mukuka represented himself in the proceeding.

Board of Immigration Appeals erred as a matter of law when it excluded from its past-persecution analysis (related to the petitioner claims for asylum and withholding of removal) his allegation that he suffered sexual abuse at the hands of his uncle. The BIA had ruled that this allegation should not be considered because Recinos-Coronado had not reported the abuse to law enforcement authorities. “We have treated an applicant’s failure to report abuse as separate from the question whether the applicant suffered past persecution,” said the court, per curiam. “And in previously determining that an applicant suffered persecution based on cumulative incidents, we included in the past-persecution analysis (without discussion) an incident that the applicant failed to report—there, threatening ‘graffiti at his wife’s farm which alluded to [guerillas’] presence in the area, and referenced him specifically.’” While holding that it was up to the BIA to decide in the first evidence whether the record supported a finding that the petitioner suffered past persecution as bearing on his asylum and withholding applications, the court held that on remand the BIA should take into account his allegations of sexual assault by his uncle. The petitioner is represented by Charles H. Kuck and Johanna L. Cochrans of Kuck Immigration Partners, LLC, Atlanta.

11TH CIRCUIT COURT OF APPEALS

– The 11th Circuit upheld denial of relief under the Convention against Torture (CAT) to a gay man from Guatemala, finding that the conditions he alleges in that country “do not rise to the level of ‘torture,’ let alone torture at the hands of (or with the acquiescence of) the Guatemalan government.” Recinos-Coronado v. U.S. Attorney General, 2017 WL 40918845 (Sept. 29, 2017). On the other hand, the court found that the

ALABAMA – In Doggrell v. City of Anniston, 2017 U.S. Dist. LEXIS 160737 (N.D. Alabama, Sept. 29, 2017), U.S. District Judge Virginia Emerson Hopkins granted summary judgment to the City of Anniston and City Manager Brian Johnson, rejecting the 1st Amendment claims of a discharged city police officer who claimed that his free speech rights were violated when he was discharged after giving a speech to a white supremacist organization’s public meeting in which he indicated that he had plenty of support from the Anniston Police Department for his activities as a member and organizer for the white supremacist organization, which calls itself the League of the South. The police department had tolerated Josh Doggrell’s membership in League of the South so long as he avoided mixing his activities with his job. He was cautioned to be careful not to associate the APD with League of the South. After he made the speech, the Southern Poverty Law Center sent a letter to City Manager Johnson complaining about Doggrell, and produced a YouTube video that went viral. Protests caused the APD to have to close down its Facebook page, and protesters against white supremacists in the police department caused a commotion at APD headquarters. Finally, the city decided that Doggrell could no longer be associated with the Department, and Johnson ordered his discharge. Doggrell sued in state court, seeking a friendly forum, but the defendants removed the case to federal court under federal question and supplementary jurisdiction. The court found that Doggrell had waived his state constitutional claims by failing to support them in his opposition to the summary judgment motion filed by the defendants. Judge Hopkins found that Johnson enjoyed immunity from suit because the case law on public sector employee free speech clearly supported the city’s action in discharging Doggrell. Although public employees enjoy a certain degree of 1st Amendment protection for free speech, public employers are authorized under Supreme Court precedents to take action against them if their speech and associations significantly undermine the ability of the public employer to carry out its mission. Public identification with a white supremacist hate group is inconsistent with employment as a public law enforcement officer.

ARKANSAS – A Fayetteville city ordinance forbidding discrimination
CALIFORNIA – A grieving mother beat back a health care provider’s motion to dismiss or stay her lawsuit on behalf of herself and her deceased transgender son, who committed suicide after treatment at the defendant health care institution, in Prescott v. Rady Children’s Hospital-San Diego, 2017 U.S. Dist. LEXIS 160259 (S.D. Cal., Sept. 27, 2017). Katherine Prescott’s child, Kyler, was identified as female at birth but began to exhibit signs of male sexual identity by age ten. Writes District Judge Barry Ted Moskowitz, summarizing the complaint, “At the age of twelve, due to increasing gender dysphoria, Kyler began engaging in self-harming behaviors. When Kyler was thirteen, he told Ms. Prescott that he was a boy. As Kyler entered puberty, his gender dysphoria significantly worsened and he continued to engage in severe self-harming behaviors. Concerned about his mental health, Kyler’s parents and then-therapist focused their therapy sessions on helping him cope with his gender dysphoria and depression. When Kyler was thirteen, with the support of his parents, he socially transitioned to living life as a boy. At fourteen, Kyler began seeing Darlene Tando, an expert in providing therapy to transgender youth. In September 2014, Kyler’s endocrinologist, a physician in the Gender Management Clinic at [defendant] RCHSD, approved him for puberty-delaying medication. In October 2014, Kyler received his first treatment.” However, Kyler continued to experience depression and gender dysphoria despite his transitioning, and suffered particular psychological distress when people “misgendered” him by referring to him with feminine pronouns and treating him as a girl. To avoid such complications, he withdrew from his charter school and participated in private independent study, but he continued to be suicidal and depressed and his mother took him back to RCHSD, which advertised itself as “competent, careful, and experienced in the care and treatment of patients, particularly transgender patients and those with gender dysphoria.” According to Prescott’s complaint, however, Kyler did not receive appropriate care there, with staff members persistently misgendering him. After he was discharged from treatment there, Kyler told his mother that one employee said to him, “Honey, I would call you ‘he,’ but you’re such a pretty girl.” Prescott alleges that she frequently corrected staff who persisted in misgendering Kyler, but that RCHSD became hostile to her due to her complaints. She alleges that both Kyler and she suffered emotional distress due to this treatment. “Despite concerns over Kyler’s continuing depression and suicidal thoughts,” wrote the judge, “Kyler’s medical providers concluded that he should be discharged early from the hold at RCHSD because of the staff’s conduct.” Several weeks after his discharge he committed suicide. Prescott brought this action alleging violations of the Affordable Care Act (ACA), California’s Unruh Civil Rights Act, and various other California statutes involving business torts and advertising torts. Her complaint largely survived the motion to dismiss. The most significant point is Judge Moskowitz’s conclusion that the ACA’s provision barring sex discrimination in the provision of health care services to institutions receiving federal money under ACA applies to gender identity discrimination. Moskowitz did not rely on the Obama Administration’s regulatory interpretation of Sec. 1557 to reach this result, rather arriving there independently by reference to court decisions construing Title VII and Title IX. He rejected the defendant’s argument that he should stay the action either because of the Supreme Court’s having granted cert in the Gavin Grimm case (noting that cert had been dismissed) or because of the right-wing Texas district court judge having issued a nationwide injunction against the Executive Branch enforcing the Obama Administration’s interpretation of Title IX (which is incorporated by reference into interpretation of Sec. 1557). If the Supreme Court grants the cert petition in the pending Kenosha School District case, the defendant will likely renew the
motion to stay. The rulings on California statutory claims will be of interest to practitioners in that state. Ms. Prescott is represented by Eileen Regina Ridley, Alan R. Ouellette, and Kathryn Anna Shoemaker, of Foley & Lardner.

CALIFORNIA – Lackey v. Berryhill, 2017 WL 4176359, 2018 U.S. Dist. LEXIS 154602 (N.D. Calif., Sept. 21, 2017), is one of those rare social security disability cases in which the federal court finds multiple grounds to reverse an administrative denial of benefits. The plaintiff has been living with HIV for many years, and alleged that as part of his disability claim, but the HIV has been complicated by other physical and medical problems. The ALJ found that Lackey could perform a wide range of low-level jobs in the community, and thus was not “disabled” under the statute and not entitled to draw benefits. District Judge Susan Illston disagreed, finding that there was more fact-finding to be done, as the record was not totally complete or persuasive. The ALJ had not given adequate consideration to the plaintiff’s doctor’s opinion, and had, according to Judge Illston, apparently overlooked some important state court cases that had been recently published. “Here, the Court finds that the record as a whole continues to raise doubt over whether plaintiff is disabled,” wrote Illston, so a remand was necessary on that question.

CALIFORNIA – Civil rights statutes generally give courts discretion to award attorney fees and costs to prevailing parties, but U.S. District Judge Dean Pregerson has ruled in Videckis v. Pepperdine University, 2017 U.S. Dist. LEXIS 147628 (C.D. Cal., Sept. 11, 2017), that each party should bear its own costs and there should be no fee award to the University, even though it was the prevailing party before the jury. The plaintiffs, Haley Videckis and Layana White, were members of the University’s Women’s basketball team. They claimed that Pepperdine and its employees engaged in discriminatory actions against them because of their dating relationship while they were teammates. “As relevant here,” wrote Judge Pregerson, “Plaintiffs alleged that Pepperdine and its employees harassed and discriminated against them on the basis of their lesbian relationship in order to force them to quit the women’s basketball team.” The basis for federal jurisdiction was Title IX of the Education Amendments of 1972, and Pepperdine moved to dismiss, arguing that Title IX did not extend to sexual orientation discrimination. Judge Pregerson denied that motion, finding that Title IX’s ban on sex discrimination could be construed to apply to sexual orientation discrimination under the gender stereotyping theory. Nonetheless, the defendant prevailed on all counts before the jury. Pregerson observed that the 9th Circuit has ruled that “divesting district courts of discretion to limit or to refuse such overwhelming costs in important, close, but ultimately unsuccessful civil rights cases like this one might have the regrettable effect of discouraging potential plaintiffs from bringing such cases at all.” He continued, “This is precisely such a case. First, this matter raises issues of substantial public import. In its Order denying Defendants’ motion to dismiss, the court ruled on the important and unsettled legal issue of whether Title IX applies to sexual orientation discrimination . . . . For similar reasons, the court finds that the legal and factual issues in the case were close and difficult. The legal claims that Plaintiffs brought under Title IX were relatively novel and unsettled in this circuit, and the factual issues raised in the seventeen-day trial in this matter were numerous and complex.” Given the length of the trial, the court similar felt it would not be good to require plaintiffs to cover defendants’ substantial costs of the litigation. He noted that Pepperdine’s resources as a University vastly outweighed the Plaintiffs’ resources as “college athletes when the events behind the lawsuit transpired.”

CALIFORNIA – U.S. District Judge Jeffrey S. White granted summary judgment to defendants in Reed v. KRON/IBEW Local 45 Pension Plan, No. 4:16-cv-04471 (N.D. Cal., September 25, 2017), a dispute over pension entitlements by the surviving same-sex domestic partner of an employee who was a participant in the industry pension plan in which the employer participated. David Reed and Donald Gardner, the plan participant, were registered as domestic partners in California in 2004, and married there in 2014, several years after Gardner had retired. At retirement, he elected a single-life annuity pension benefit. Reed alleges that the employer’s HR department wrongly failed to advise Gardner that he could have elected a joint-and-survivor benefit, under which Reed would continue to receive a benefit if Gardner pre-deceased him; this despite the employer’s knowledge that Gardner had a registered domestic partner. Reed’s argument, in essence, is that under California law at the time that Gardner made his election, Reed was entitled to be treated as a spouse, and that Gardner should not have been told that his election depended on whether he was married. Gardner died shortly after the men married in 2014, and the Plan ceased paying his pension. Reed submitted a claim to the Plan Committee, the administrator of the Plan, that he was entitled to continue receiving pension payments as a surviving spouse. The Committee denied the claim. Reed moved for summary judgment on his claim under ERISA that the administrator and the employer violated fiduciary duties by refusing his claim, while defendants moved for summary judgment on
all remaining claims in the case. (A previous ruling had dismissed a claim for financial penalties against the plan administrator and the employer.) The court rejected defendants’ argument that ERISA entirely preempted Reed’s claim to be a surviving spouse, and specifically held that the Supreme Court’s Windsor decision, striking down Sec. 3 of DOMA as of June 26, 2013, should be applied retroactively so that – because the Plan by its terms designated California law as the determinant of marital status – Reed had plausibly alleged that he qualifies as a surviving spouse under the Pension Plan. Normally, under an ERISA plan, a married beneficiary cannot elect a pension that excludes survivorship coverage for their spouse unless the spouse consents. But that’s not the end of the story, unfortunately for Reed, because a federal district court’s role in a suit for benefits claimed to be due under an ERISA-regulated employee benefit plan is limited – where the Plan confers upon its administrator discretion to interpret the terms of the Plan in response to benefits claims – to “abuse of discretion” review. At the time Gardner retired, observed Judge White, “DOMA Section 3 was still considered good law. Because DOMA explicitly defined ‘spouse’ as limited to partners of the opposite sex, the Committee had no discretion under federal law to interpret ‘spouse’ to include Plaintiff. Pursuant to ERISA preemption, the federal definition of ‘spouse’ controls, if it exists. While the Committee may have been incorrect in light of Windsor’s subsequent holding, Plaintiff cannot reasonably allege that it abused its discretion at the time the Committee made its determination.” As to the employer, the court found, consistent with established ERISA precedents, that the employer was not an ERISA fiduciary, so it could not be sued for abuse of discretion in this situation. One of the important aspects of ERISA is to impose fiduciary duties on those who administer employee benefit plans, and the Plan entity itself is the body to be sued. Where the employer has no involvement in deciding how the Plan is to be interpreted in response to benefits elections and benefits claims, it can’t be sued for such decisions made by the Plan. “Here, the Committee has full discretion over management of the Plan,” wrote Judge White. “Plaintiff thus fails to allege KRON-TV has sufficient control of plan assets to qualify as a fiduciary. Therefore, this Court grants Defendants’ motion with respect to Plaintiff’s third claim for relief.” Reed is represented by Renaker Hasselman Scott LLP and the National Center for Lesbian Rights, which is considering a possible appeal to the 9th Circuit.

FLORIDA – In Doe v. Jasper & Connecticut General Life Insurance Company, 2017 WL 4286621, 2017 U.S. Dist. LEXIS 158808 (M.D. Fla., Sept. 27, 2017), U.S. District Judge Susan Bucklew remanded back to state court a claim that the insurance company had violated Florida law by improperly disclosing the John Doe plaintiff’s HIV status without authorization while reviewing his claim for long-term disability benefits. The complaint asserts only state law claims: invasion of privacy, negligence per se, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, and refers to an HIV confidentiality statute as grounding the tort claims. Connecticut General removed the case on federal question grounds, citing, among other things, ERISA preemption, based on the fact that Doe enjoyed disability insurance protection through his employer’s benefits plan. Although usually federal question determinations are based on the claims pleaded in the complaint, the Supreme Court has ruled that ERISA preemption, raised as a defense to state law claims, can be a basis for federal question jurisdiction. CG argued that the complaint “alleges no purpose for the disclosures other than Defendants’ review of Plaintiff’s eligibility to continue receiving benefits under the plan,” so “Plaintiff could have brought these claims in a suit for violation of fiduciary duty under ERISA.” Rejecting the argument, Judge Bucklew wrote, “However, the Court does not need to decide whether Plaintiff’s claims could have been brought under ERISA, because Defendants cannot satisfy the second step of the [preemption] analysis, which requires there be ‘no other independent legal duty that is implicated by a defendant’s actions. In this case, while Defendants point to ERISA’s fiduciary duty as the source of the duty to protect against unauthorized disclosure of Plaintiff’s confidential health information, an independent legal duty exists in the form of Section 381.004(f), Florida Statutes. That statute provides, in relevant part, that ‘no person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by this subsection and by sections 951.27 and 960.003.’ Therefore, the complete preemption analysis fails at the second step, and Plaintiff’s state law claims are not completely preempted by ERISA.” Thus, the case was remanded back to state court. Judge Bucklew had also rejected CG’s claim that the court lacked personal jurisdiction over the insurer, finding that under Florida’s Long-Arm statute, CG did enough business in the state to be amenable to suit there. However, the court found that a particular CG employee who resides and is employed in Texas, named defendant Jasper, was not amenable to suit in Florida.

FLORIDA – The ACLU of Florida filed suit in Sept. 25 in Escambia County seeking to establish that gender identity discrimination is covered under the state law prohibiting sex discrimination. The case originated from a local business expelling a transgender person from an
event open to the public on its premises. Nevaeh Love, a transgender woman, filed a discrimination charge with the Florida Commission on Human Relations, which determined reasonable to cause to believe that unlawful discrimination took place, authorizing Love to file suit against Katoshia Young, the organizer of the event who made the decision to require Love to leave. *Pensacola News Journal*, Sept. 26.

**ILLINOIS** – U.S. District Judge Edmond E. Chang granted a motion for summary judgment by the Archdiocese of Chicago, bringing to an end a discrimination case brought by Sandor Demkovich, who was fired as Music Director, Choir Director and Organist at St. Andrew the Apostle Parish Church in Calumet City after he married his same-sex partner. *Demkovich v. St. Andrew the Apostle Parish*, 2017 U.S. Dist. LEXIS 161658 (N.D. Ill., Sept. 29, 2017). Judge Chang accepted the defendants’ argument that Demkovich’s allegations of unlawful discrimination because of sex, sexual orientation, marital status and disability under federal, state and local laws failed to state a claim because the “ministerial exception” under the 1st Amendment applied to him. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the Supreme Court recognized this “exception” to the application of employment discrimination laws for the first time, although it had been widely adopted by lower courts. The idea behind it is that it would violate the 1st Amendment's protection for free exercise of religion for a government agency or court to interfere in any way with a church's selection of who will serve the function of ministering to the congregation. Although many employment discrimination statutes create religious exemptions of various kinds, this constitutionally-based exemption sweeps much more broadly than any statutory exemption. If a court determines that the employee in question serves a ministerial function for a religious employer, the employer may obtain dismissal of any employment discrimination charge – even charges of race discrimination or, as in the case of Demkovich, disability discrimination. (He alleged that a factor in his discharge was the cost of providing his health insurance due to claims stemming from his diabetes and overweight condition.) In this case, Judge Chang found the factual allegations in Demkovich’s complaint made it possible to determine that he could not state a claim, with no need for discovery or litigation, because prior cases involving church musicians have concluded with near unanimity that the typical job functions of a church musical director – which involve the selection and presentation of music for worship services and other religious ceremonies – easily fall within the definition of ministerial duties. Demkovich argued in opposition to the motion that he was not clergy, not ordained, not involved in selecting liturgy or leading prayer, but his argument was unavailing. Even though the Pastor of his church had a veto over his musical selections, Judge Chang asserted that this did not detract from the fact that Demkovich played a role in the activities of the church that courts have deemed to be ministerial. It is, of course, an open secret that the Catholic Church employs many gay men as music directors, choir directors, organists, teachers and – notoriously – priests and higher-ranking clergy. As long as they are reasonably discreet about their sexual orientation, the Church will usually look the other way. But over the past few years, as same-sex marriage has become available throughout the United States, there have been numerous cases where Church employees were fired for marrying their same-sex partners, creating in the Church’s view an unacceptably public rejection of Catholic teaching making their further employment intolerable. Under the ministerial exception, most of these men – and, in a smaller portion of cases, women serving mainly in the role of educators – will lose their jobs and have no legal recourse even though, as Demkovich alleges, his Pastor encouraged him to marry his long-time partner. Judge Chang also dismissed the supplementary state and local law claims. He noted that usually when courts find that a federal law claim has dropped from the case, they will dismiss the federal claim and decline to assert jurisdiction over the state and local law claims, but in this case, as the Church’s defense is constitutional, it would likely bar pursuing a discrimination claim in state or local court, since the determination that the employee in question comes within the ministerial exception is a matter of federal, not state, law. Demkovich’s counsel is Kristina Buchthal Regal of Lavelle Law, Ltd. (Palatine, IL).

**ILLINOIS** – U.S. District Judge Colin S. Bruce denied defendant’s motion for summary judgment in *Equal Employment Opportunity Commission v. Rent a Center East, Inc.*, 2017 U.S. Dist. LEXIS 147695, 2017 WL 4021130 (C.D. Ill., Sept. 8, 2017), finding that the EEOC had adequately alleged facts supporting a conclusion that an employee’s gender identity was a factor in her discharge by the employer, and that this would be actionable under Title VII within the 7th Circuit. Judge Bruce referred specifically to the 7th Circuit’s ruling in *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), which relied on the Supreme Court’s Title VII *Price Waterhouse v. Hopkins* decision to find that gender identity discrimination comes within the prohibition of discrimination because of sex under Title IX. He also noted that in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. en banc, 2017), the circuit court, in the course of finding that sexual orientation discrimination is
Jim Walder, a proprietor of Timber Creek Bed-and-Breakfast, is asking the Illinois Supreme Court to reverse a ruling by the Illinois Human Rights Commission that Walder illegally discriminated against a same-sex couple six years ago when he refused to let them hold their civil union ceremony at his establishment. This was shortly after Illinois had enacted a law providing civil unions for same-sex couples. State law forbids places of public accommodation to discriminate in providing goods or services because of sexual orientation. Walder’s business regularly hosted wedding ceremonies. Walder’s attorney claimed that because civil unions and weddings were not the same thing, there was no discrimination, as Walder would not host a civil union ceremony for a non-gay couple either. The HRC was not willing to engage in such hair-splitting, and imposed $80,000 in damages and attorney fees (for the gay couple’s attorneys). Interestingly, the fee award significantly outweighs the damage award: $50,000 as against $30,000. The Illinois Appellate Court (4th District) refused to overturn the Commission’s decision, and denied a petition to reconsider its ruling. The complainants are Todd and Mark Wathern, who are represented by the ACLU of Illinois and cooperating attorneys from the private bar. IlliniHQ, 2017 WLNR 29605538 (Sept. 26, 2017).

ILLINOIS – Jim Walder, a proprietor of Timber Creek Bed-and-Breakfast, is asking the Illinois Supreme Court to reverse a ruling by the Illinois Human Rights Commission that Walder illegally discriminated against a same-sex couple six years ago when he refused to let them hold their civil union ceremony at his establishment. This was shortly after Illinois had enacted a law providing civil unions for same-sex couples. State law forbids places of public accommodation to discriminate in providing goods or services because of sexual orientation. Walder’s business regularly hosted wedding ceremonies. Walder’s attorney claimed that because civil unions and weddings were not the same thing, there was no discrimination, as Walder would not host a civil union ceremony for a non-gay couple either. The HRC was not willing to engage in such hair-splitting, and imposed $80,000 in damages and attorney fees (for the gay couple’s attorneys). Interestingly, the fee award significantly outweighs the damage award: $50,000 as against $30,000. The Illinois Appellate Court (4th District) refused to overturn the Commission’s decision, and denied a petition to reconsider its ruling. The complainants are Todd and Mark Wathern, who are represented by the ACLU of Illinois and cooperating attorneys from the private bar. IlliniHQ, 2017 WLNR 29605538 (Sept. 26, 2017).

KENTUCKY – Three different trial judges erred by approving a petition by child welfare authorities to require that the father of two young boys have only supervised contact with them because more than a decade earlier he had been found guilty of engaging in oral sex with his younger half-brother, for which he was required to go through sex offender treatment and be a registered sex offender for the rest of his life. R.S. & A.S. v. Cabinet for Health and Family Services, 2017 Ky. App. LEXIS 562, 2017 WL 4320648 (Ky. App. Sept. 29, 2017). The court of appeals, reversing the trial court orders, found that the state had not proved through evidence that the father presented a risk to his young sons. Although he had violated probation by living for some time with a family with small children, and by missing some registration deadlines, the appeals court was unwilling to find on this basis that the father (and mother) were guilty of child neglect. The father was eighteen when he engaged in oral sex with his 12-year-old half-brother, and twenty-one when he against engaged in oral sex with the same half-brother, who was then 15. There was no record that father had subsequently engaged in oral sex with anybody, and he claims now to be “strictly heterosexual.” He met the woman he would marry in 2011, and told her about his criminal record. They married in 2012, and have two sons, born in 2012 and 2015. Father is now 30. The authorities claim based entirely on father’s status as a registered sex offender and his technical probation violations (which did not involve actually having sex with anybody) that he presents a risk of harm to his infant sons. The court of appeals evidently considered this absurd in the absence of any proof of harm.

MASSACHUSETTS – BloombergBNA Daily Labor Report (Sept. 1) reported that Massachusetts Attorney General Maura Healy had announced the settlement of a gender identity discrimination claim, asserted by a former intern against Dell EMC. Under the terms of the settlement, Dell EMC admitted no wrongdoing but agreed to pay the former intern $60,000, and to donate $25,000 to each of two non-profit groups – TransCanWork, which promotes the employment of transgender people in Massachusetts, and Girls Inc., which promotes the participation of girls in STEM-related activities. The company also agreed to training of staff on non-discrimination policy.

MICHIGAN – A transgender Social Security disability benefits applicant failed to persuade either the agency or a U.S. Magistrate Judge that the impact of the applicant’s gender dysphoria supported a finding of disability and qualification for benefits. Densmore v. Commissioner of Social Security, 2017 U.S. Dist. LEXIS 143532, 2017 WL 3887106 (Sept. 6, 2017). The Social Security ALJ had found Andrea Densmore to be physically and mentally capable of working, which she disputed without success, as U.S. Magistrate Judge Ray Kent concluded that the ALJ’s credibility determinations, on which that
part of the case turned, were supported by substantial evidence in the record. Densmore then argued, as summarized by Kent in his opinion, that “the ALJ failed to recognize the extraordinary nature of plaintiff’s diagnosis of gender identity disorder/gender dysphoria. The gist of plaintiff’s claim is that she could not function in the workplace. Plaintiff contends that the ALJ erred because finding ‘that someone might be able to go to a store, visit friends, or attend a wedding . . . does not necessarily mean that they could tolerate the inevitable comments and catcalls from co-employees and supervisors on a fulltime job, even with the limited interaction the ALJ provided for. While plaintiff appears to contest that portion of the ALJ’s residual functional capacity (RFC) that limits her to simple tasks and occasional interaction with the public and supervisors, she does not develop this argument. Rather, plaintiff contends that the ALJ never contemplated her unique difficulties in dealing with people’s remarks as the result of her efforts to dress like a female and wear makeup and that the case should be remanded ‘for further consideration of the impact of these decidedly unusual problems before a finding as to plaintiff’s RFC can be appropriately rendered.’ First, Judge Kent found the contention that the ALJ failed to “recognize the extraordinary nature of plaintiff’s diagnosis of gender identity disorder/gender dysphoria” to be without merit, as both the ALJ and plaintiff’s counsel had questioned her on “all of her non-physical problems, including the gender identity disorder,” and that “the ALJ’s review of the medical evidence included a detailed review of her diagnoses, alleged impairments, and treatment.” The problem was a disagreement between plaintiff and the ALJ as to the relevance of this evidence to the RFC finding. “RFC is a medical assessment of what an individual can do in a work setting in spite of functional limitations and environmental restrictions imposed by all of his medically determinable impairments,” wrote Judge Kent. “It is defined as ‘the maximum degree to which the individual retains the capacity for sustained performance of the physical-mental requirements of the jobs.’ Here, substantial evidence supports the ALJ’s conclusion that plaintiff could perform work involving simple tasks, simple work-related decisions, and occasional interaction with others (i.e., hand packager, material handler, and equipment cleaner). Accordingly, plaintiff’s claims of error will be denied.” In a footnote, Judge Kent mentioned that the decision from the agency identified the plaintiff as Andrew (aka Andrea) Robert Densmore and explains that the original draft of the administrative decision had been “altered to accommodate claimant’s gender preference” by referring to Densmore as “she,” to which Judge Kent deferred as well in his opinion. Densmore is represented by Daryl Claude Royal, Dearborn, MI.

**MICHIGAN** – The ACLU filed suit on September 20 challenging the Michigan Department of Health and Human Services’ alleged practice of permitting state-contracted and taxpayer-funded child placement agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system, turning away qualified families on the basis of sexual orientation. The complaint filed in *Dumont v. Lyon*, Civ. Action No. 2:17-cv-13080 (E.D. Mich.) asserted violations of the Establishment and Equal Protection Clauses of the 1st and 14th Amendments. Conceding that religious agencies are entitled to use whatever criteria they want to make such decisions, the complaint asserts that agencies who wish to engage in such discrimination when they are operating by contract with the state. The complaint calls into question the constitutionality of state laws enacted in 2015, stating in relevant part that “to the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs.” Mich. Comp. L. Sec. 722,124e(2). The statute also purports to shield such agencies from any adverse state action if they refuse to provide services based on their religious beliefs. Sec. 722.124e(3). Although the statute states that “services” it covers do not include those provided under a contract with the Department, the complaint alleges that several religious agencies appear to interpret the statutes to permit them in general to “turn away prospective families for children in foster care based on religious criteria,” and attempts to get the Attorney General’s Office to meet about this issue have been unsuccessful. The case has been assigned to District Judge Paul D. Borman, who was appointed to the court by President Bill Clinton. Counsel on the complaint include Jay D. Kaplan, Michael J. Steinberg and Kary L. Moss of the ACLU Fund of Michigan, Daniel Mach of the ACLU’s Washington office, and Leslie Cooper, an attorney with the ACLU’s LGBT Rights Project in New York. Cooperating attorneys from Sullivan & Cromwell, LLP, include Garrard R. Beeney, Ann-Elizabeth Ostrager, Ryan D. Galisewski, and Jason W. Schnier of that firm’s New York office.

**MINNESOTA** – The Minnesota Department of Human Rights has approved a settlement agreement between Elisa Umpierre and the City of Rochester, under which the City agreed to pay $1 million to settle claims
of discrimination and retaliation by Umpierre, an openly lesbian officer. *Umpierre v. City of Rochester*, Ref. No. 67468 (Minnesota Dept. of Hum. Rights, Sept. 18-19, 2017). The agreement allows Umpierre, who was the first openly lesbian officer in the city’s police department, to retire. The agreement specifies that Umpierre will get $600,000 and her attorney’s firm, Halunen Law, will receive $400,000. The settlement followed voluntary mediation of Umpierre’s charge that supervisors investigated her, put her on administrative leave, and sought her termination because of her sexual orientation and in response to her criticisms of departmental policies. The city’s attorney announced that they had settled to “bring finality and avoid the expense and uncertainty of protracted litigation.” The settlement does not require Umpierre to refrain from speaking about policy department policies or her treatment in the department. *BloombergBNA Daily Labor Report*, Sept. 20.

**MONTANA** – The Montana Supreme Court agreed with the ACLU that a proposed ballot question on access to public restrooms was unduly vague and must be rewritten if it is to appear on the state ballot. The measure on the ballot would require people to use single-sex public restrooms consistent with their sex as identified at birth, and would allow people to sue a facility for emotional or mental distress if they encountered a transgender person in a restroom and the facility had not taken steps to ensure that correlated with his limitations due to his mix of physical and psychosocial disabilities.” His attempt to get benefits was stymied by his inability to represent himself adequately in the process, and Judge Pitman found that the ALJ failed miserably in the role of developing the record to determine whether the plaintiff’s physical and mental limitations were such that he should found qualified for benefits. Wrote Pitman: “Given plaintiff’s pro se status, mental impairments and profound confusion as to the purpose of the hearing, the ALJ’s perfunctory questioning and failure to follow up on issues that were relevant to the disability determination were erroneous and denied plaintiff a full and fair hearing. The ALJ’s deficient questioning was exacerbated by the fact that she failed to develop the medical evidence and seek relevant documentary evidence before concluding that plaintiff’s disability claims were unsupported by the record.” Pitman noted that the plaintiff now has legal counsel (from Nassau Suffolk Law Services and the Urban Justice Center) and “may submit any new arguments and evidence to the SSA for consideration on remand. On remand,” he wrote, “the ALJ should provide plaintiff with the opportunity for an additional hearing, attempt to obtain medical records from all of plaintiff’s treating sources, and, where appropriate, obtain and weigh medical opinion evidence.”

**NEW YORK** – The Montana Supreme Court agreed with the ACLU that a proposed ballot question on access to public restrooms was unduly vague and must be rewritten if it is to appear on the state ballot. The measure on the ballot would require people to use single-sex public restrooms consistent with their sex as identified at birth, and would allow people to sue a facility for emotional or mental distress if they encountered a transgender person in a restroom and the facility had not taken steps to ensure compliance with this policy. The ACLU complained that as written the ballot question did not make clear to which facilities it applied and did not mention the costs involved in compliance. Once acceptable language is written, the Montana Family Foundation would have until June to gather almost 26,000 valid signatures from registered voters to put the measure on the ballot. A search of the court’s website and electronic databases failed to turn up a copy of the decision, which, according to an *Associated Press* report, was issued on September 19.

**NEW YORK** – Finding that a Social Security disability claimant had not received a full and fair hearing for his claim, U.S. Magistrate Judge Henry Pitman ordered a remand to the agency in *L’Ouverture v. Commissioner of Social Security*, 2017 U.S. Dist. LEXIS 151062, 2017 WL 4157369 (S.D.N.Y., Sept. 18, 2017). The plaintiff, who was 26 years old at the time of the hearing, identifies as “an African-American, bisexual, genderqueer male” who has struggled with developmental disabilities, having been diagnosed with Asperger’s Syndrome as a youth. He completed high school in an Individualized Education Program, and graduated college in 2010, but his attempt to complete a graduate program in a seminary ended abruptly when he was expelled from the program. He returned home to Indiana, but “left after three months because his mother did not accept his sexual orientation.”

Returning to New York without a place to stay, he ended up living at the Ali Forney Center, a gay-operated homeless youth program, but aged out of eligibility to live there when he reached age 25 and has since lived in a shelter. He held a variety of part-time jobs, but stopped working when he was expelled from the graduate program and became homeless, and he “was actively trying to find stable means to sustain himself that correlated with his limitations due to his mix of physical and psychosocial disabilities.” His attempt to get benefits was stymied by his inability to represent himself adequately in the process, and Judge Pitman found that the ALJ failed miserably in the role of developing the record to determine whether the plaintiff’s physical and mental limitations were such that he should found qualified for benefits. Wrote Pitman: “Given plaintiff’s pro se status, mental impairments and profound confusion as to the purpose of the hearing, the ALJ’s perfunctory questioning and failure to follow up on issues that were relevant to the disability determination were erroneous and denied plaintiff a full and fair hearing. The ALJ’s deficient questioning was exacerbated by the fact that she failed to develop the medical evidence and seek relevant documentary evidence before concluding that plaintiff’s disability claims were unsupported by the record.” Pitman noted that the plaintiff now has legal counsel (from Nassau Suffolk Law Services and the Urban Justice Center) and “may submit any new arguments and evidence to the SSA for consideration on remand. On remand,” he wrote, “the ALJ should provide plaintiff with the opportunity for an additional hearing, attempt to obtain medical records from all of plaintiff’s treating sources, and, where appropriate, obtain and weigh medical opinion evidence.”
the school’s principle was behind the alleged pattern of discrimination. She was placed on administrative leave after the suit was filed.

---

**PENNSYLVANIA** – An odd system, this, for dealing with removable aliens . . . Consider the procedural history of *Smith v. Sabol*, 107 WL 4269410 (M.D. Pa., Sept. 25, 2017). Petitioner Smith, a citizen of Jamaica, was admitted to the U.S. as a lawful permanent resident on October 13, 1987, but he blew his chance, ending up convicted on October 6, 1997, of possession of a Controlled Dangerous Substance on School Property, and served a one-year sentence, plus time on two counts of Robbery, for which he was sentenced to another twelve years. ICE served him with a notice to appear in March 1999, and an Immigration Judge ordered his removed on September 21 of that year, but he was not actually removed to Jamaica until January 26, 2002. But Smith, a bisexual man, knew where he wanted to be, and managed to reenter the U.S. later in 2002, evading contact with federal immigration officials until June 26, 2009, when a federal grand jury indicted him on an illegal re-entry conviction he had received a Note of Intent to Reinstate the Prior Order of Removal. He was released from federal prison early in 2016, being turned over to the custody of ICE on January 8, 2016, and has been in ICE custody ever since. At that point, his expressed fear of persecution in Jamaica as a bisexual became an issue, with the claim being forwarded to an Asylum Officer, who determined that Smith “had a reasonable fear of persecution or torture in Jamaica,” so the case was referred to an Immigration Judge for a “withholding-only” proceeding. Meanwhile, ICE had issued a Decision to Continue Detention, declaring that Smith was a danger to the community and should not be allowed to live outside a prison. ICE also considered him at flight risk, noting that when apprehended he was in possession with fake ID. His request for withholding of removal was rejected by the IJ on May 17, 2016, because of his conviction of a “particularly serious crime” (possession with intent to distribute). He was denied CTA relief, the IJ opining that he had not proved it was more likely than not that he would be tortured because of his sexual orientation in Jamaica. He was ordered removed, and he appealed to the BIA, where most appeals go to die and the Board acted accordingly, denying the appeal on September 8, 2016. He appealed to the 3rd Circuit, having obtained a stay of removal while his appeal was pending. The 3rd Circuit lifted its stay on April 12, 2017, so Smith filed a new application with the Supreme Court, seeking a writ of certiorari. Various further attempts to get relief from the 3rd Circuit did not pan out. In this ruling, District Judge A. Richard Caputo ruled that Smith’s prolonged detention by Ice while all these appeals were out there, did not violate Smith’s due process rights. The court did a little agonizing, then concluded that this clearly resourceful man (he filed lots of motions along the way when he could have been studying. The court concluded that he was entitled to a bond hearing, his last custody review having occurred on September 26, 2016, but otherwise denied him relief. So a man who was ordered deported (“removed”) first on January 21, 1999, is still here, having managed through representing himself to have so tied up the relevant bureaucracy with motions and appeals that he may be here indefinitely, perhaps in custody, but at least not in homophobic Jamaica.

---

**TENNESSEE** – In McGlone v. Metropolitan Government of Nashville, 2017 WL 4310097, 2017 U.S. Dist. LEXIS 159920 (M.D. Tenn., Sept. 28, 2017), Chief U.S. District Judge Waverly D. Crenshaw, Jr., rejected a claim by two anti-gay street preachers that the city of Nashville violated their 1st Amendment rights when they were not allowed to spout anti-gay preaching using bullhorns in the immediate vicinity of the Nashville Pride Festival on June 26-27, 2015. The Festival organizers had obtained a permit to hold the event in Public Square Park directly in front of the historic Metro Courthouse in downtown Nashville. This was an event open to members of the public who had to buy tickets for entry, and was intended to “celebrate the culture and community of the LGBTQ people in Nashville in a safe space.” The security plan for the event, approved by the police department, involve placing fencing, barricades and street closures. When the plaintiffs showed up to start preaching in a plaza directly in front of the entry to the event, they were told by an employee of the security company hired for the event that they would have to move across the street and would be arrested if they insisted on preaching directly in front of the entrance. They moved under protest and subsequently brought this 1st Amendment action, claiming that they were excluded from engaging in 1st Amendment activities on public property. While the court acknowledged that the public square aspect of the event was a quintessential public forum, it noted plenty of federal appellate precedent supporting the view that a “permitted” event that was intended to transmit a message on public property could trump the access rights of those who sought to communicate a contrary message, so long as they were allowed to conduct their 1st Amendment activities in reasonable proximity, which in this case was across the street from the permitted event. “In this case,” wrote Judge Crenshaw, “the facts are undisputed that Plaintiffs continued to preach with bullhorns for some four to five hours during the Festival and their
message was heard loud and clear by those passing by. While they may have wanted to preach on permitted Festival ground instead of on the perimeter, the Court’s ‘task is to strike a balance between the rights’ of event organizers and counter protestors, ‘while at all times remaining true to the essence of the First Amendment.’ The balance in this case tips in favor of Metro,” and thus the court granted the city’s motion for summary judgment and denied the plaintiff’s cross-motion.

**VERMONT** – U.S. District Judge William K. Sessions, III, issued a new decision in the long-running lawsuit brought by Janet Jenkins, the legal mother and custodian of Isabella Miller Jenkins, against Kenneth L. Miller and several other defendants and organizations concerning the abduction and concealment of Isabella (now a teenager) in defiance of Virginia and Vermont court orders. *Jenkins v. Miller*, 2017 U.S. Dist. LEXIS 160793 (D. Vt., Sept. 29, 2017). The 42-page decision goes into great detail in discussing the various defense motions, much beyond the scope of Law Notes to rehash in full here. Those who have been following this story will want to read the decision. The short version is that Janet Jenkins and Lisa Miller were Vermont civil union partners when their daughter Isabella was born to Miller. The women separated when Isabella was 17 months old, and Miller took Isabella with her to Virginia; Miller subsequently renounced homosexuality, undergoing a religious “awakening,” and was allegedly encouraged by her co-religionists to avoid any contact between Jenkins and the child. (Since Isabella was born when the women were civil union partners, Jenkins would be deemed a parent under Vermont law.) After much wrangling back and forth between courts in both states, it was determined that the Vermont courts had primary jurisdiction over custody and visitation, since Miller had filed an action there to dissolve the civil union, and ultimately, in light of Miller’s defiance in refusing to comply with visitation orders, the Vermont courts assigned sole custody to Jenkins, a ruling sustained by the Vermont Supreme Court and accorded deference by the Virginia courts. But Jenkins has never enjoyed that custody, because Miller refused to comply with temporary visitation orders and subsequently fled the country – allegedly with the assistance of various defendants and organizations named in this lawsuit – and took Isabella to Nicaragua, where they joined a Mennonite religious community affiliated with religious communities in the U.S. that were supporting Miller’s resistance, and where they remain. In this lawsuit, Jenkins has asserted various claims against individuals and organizations accused of conspiring with and assisting Jenkins to abduct Isabella, spirit her out of the country, conceal her location from Jenkins, and interfere with Jenkins’ parental rights. Liberty Counsel is providing legal representation to defendants, and Liberty University and Mat Staver are also drawn in as defendants. In this ruling, Judge Sessions largely rejects attempts by the defendants to get various counts dismissed and allegations of the complaint stricken. Of particular interest to those concerned with LGBT legal issues is Judge Sessions’ finding that Jenkins could maintain an action against various defendants under 42 U.S.C. Sec. 1985(3) for violation of the Ku Klux Klan Act, concerning conspiracies to deprive people of their civil rights. An essential component of such a claim is class-based animus, and Liberty Counsel argued that because sexual orientation is not a “suspect” classification, no Section 1985(3) claim can be brought on that basis. They point out that the Supreme Court did not address the question of suspect classification in *Windsor* and *Obergefell*, so the court should look to a host of lower court rulings, mainly pre-dating those cases, some of which specifically rejected Section 1985(3) claims on behalf of gay plaintiffs. Sessions noted the detailed description by the Supreme Court in *Windsor* and *Obergefell* of historic and continuing discrimination against gay people, and decisively rejected Liberty Counsel’s argument, stating: “In short, while this Court previously acknowledged the protection that *Windsor* provides to same sex couples, the Supreme Court’s decision in *Obergefell* clearly establishes that the constitutional protection afforded to gays and lesbians arises from their historic subordination as a class, and that it attaches to them as individuals. As such, Jenkins’ allegation that Defendants conspired to violate her civil rights based on discriminatory animus due to her sexual orientation states a valid claim under Sec. 1985(3).” LGBT rights litigators should take note of this portion of the opinion as a valuable resource to cite in support of future claims under this provision. In the course of dealing with Liberty Counsel’s arguments, many of which were attempting to re-litigate substantive and procedural issues that had been addressed in prior motions, Judge Sessions rejected a 1st Amendment challenge to the Ku Klux Klan Act and rejected the suggestion that the court should seek an advisory opinion from the Vermont Supreme Court on whether the Vermont would recognize the “intentional tort of kidnapping.” In the end, the judge largely denied the defendants’ motions to dismiss and motions to strike the amended complaint, while allowing Liberty University to escape vicarious liability for Staver’s actions, finding that the court could not exercise personal jurisdiction over Staver, and dismissing Jenkins’ attempt to assert certain claims on behalf of Isabella as her “best friend” (the traditional location when a parent sues on behalf of a minor’s constitutional claims). Story to be continued . . .
WEST VIRGINIA – Gilmer County agreed to a $10,000 settlement of a suit brought in federal district court by Americans United for Separation of Church and State and Fairness West Virginia, with cooperating attorneys from Mayer Brown, on behalf of a lesbian couple who were subjected to abusive treatment by the County Clerk’s Office when they sought a marriage license seven months after the Supreme Court’s Obergefell decision was announced. Amanda Abramovich and Samantha Bookover were chastised by a deputy clerk, who called them an “abomination” and said that God would “deal” with them. According to their complaint, as summarized in a press report, “Deputy Clerk Debbie Allen slammed the paperwork on the desk, said she was a Christian and called the couple an “abomination” in a rant that continued for several minutes. Another clerk joined in, shouting that it was Allen’s ‘religious right’ to harass the couple.” In addition to the settlement payment, the County issued a statement characterizing what had happened as “wrong,” stating: “It is the policy of Gilmer County and the Gilmer County Clerk’s Office that all people seeking services and doing business with the County will be treated courteously and with respect regardless of their sexual orientation or gender identity.”

The county also agreed to require county employees to attend a training session run by Fairness West Virginia. Independent Online, Sept. 1.

CRIMINAL LITIGATION NOTES

GEORGIA – The Court of Appeals of Georgia (4th Division) affirmed the conviction of Craig Davis on two counts of reckless conduct in violation of OCGA Sec. 16-5-60(c), for engaging in sex with a woman without disclosing that he was HIV-positive (and apparently infecting her with HIV). Davis v. The State, 2017 Ga. App. LEXIS 429, 2017 WL 4275863 (Sept. 27, 2017). The opinion for the panel by Judge Tilman Self must be read to be believed. Absurdity abounds, at least in the court’s recounting of the expert testimony offered by Davis’s defense counsel in attempting to discredit the state’s evidence that Davis knew he was HIV positive. The experts were affiliated with an organization called Office of Medical and Scientific Justice, and they were permitted to spout nonsense from the witness stand about HIV testing and the cause of opportunistic infections whose presence helps to confirm an AIDS diagnosis. They were ultimately not believed by the trial court, and Davis claimed on appeal that he received ineffective assistance of counsel because his attorney had these people testify. The attorney, in turn, contended that he had these witnesses testify at Davis’s insistence, and that he concentrated on his alternative defense theory, that Davis did not engage in sexual conduct that could have transmitted HIV to his sexual partner, a claim that the court also did not believe, obviously. Davis’s own testimony on this point is hilarious. Denying that he had sex with the victim, he testified that he told him that he “was too large for her” after seeing a photograph of his penis, so they decided they would only engage in mutual masturbation. “During cross-examination,” writes Judge Self, “he clarified that she told him that ‘she liked small penises, that she didn’t like large penises.’ According to Davis, she also described a photograph of his penis as ‘a Picasa’ [sic] that she was going to put in a frame. He claimed that his ejaculate never came anywhere near the victim and that there was no need to inform her of his HIV status. He called her a liar for testifying that they had sexual intercourse.” We recall from our law school days that a certain volume of West’s Southeastern Reporter was so worn from people going to read a salacious court opinion that it just fell open to the correct page automatically. We suspect that once this opinion is officially reported in the current version of that Reporter, a similar phenomenon may well occur.

MARYLAND – In Poole v. State, 2017 Md. App. LEXIS 936 (Sept. 13, 2017), the Maryland Court of Special Appeals rejected the contention by Bryan Lamont Poole that he received ineffective assistance of counsel in defending against the first-degree murder charges against him. A jury convicted him on the main charge and a weapons charge in the murder of David Dior, a Silver Spring hairdresser who was found dead in his apartment from a bullet to the back of his head. Testimony at trial supported the jury’s conclusion that Poole had gone home with Dior from Dior’s salon the evening of April 28, 1995, Dior had solicited sex from Poole, and Poole had shot Dior as he was lying face-down on the bed waiting for Poole to mount him from behind. (Dior told a fellow inmate who turned state’s witness against him that he had crinkled a condom wrapper to make it sound like he was preparing for sex.) Instead, after shooting Dior and wrapping him in a blanket where he had rolled to the floor, Poole stole Dior’s wallet and car keys and drove away in Dior’s red BMW. When Dior was apprehended in the red BMW, he claimed that he was going to buy it from “a faggot” named David, who had allowed him to drive it. Numerous witnesses – Dior’s sisters, friends, colleagues – all testified that Dior never allowed anyone else to drive his red BMW. That seems to have sealed Poole’s fate, together with so much incriminating evidence that neither the trial judge nor the appellate judges would allow small flaws in the trial conduct by Poole’s attorney to justify overturning the jury’s verdict.

MISSOURI – The Associated Press reported that Michael Johnson, 25, was
sentenced on September 21 to ten years in prison for infecting another man with HIV and endangering four other sexual partners. An appeals court had reversed and remanded in earlier guilty verdict (upon which Johnson had been sentenced to 30 years), finding that the trial court had erroneously admitted jail recordings in evidence that had not been disclosed to Johnson’s defense counsel prior to the beginning of the trial.

It is difficult to see how Judge Kellison could regard SRS as “moot” when surgery has neither occurred nor been ruled out. Compare Judge Chuang’s requirement of bi-monthly follow-up reports in a pro se transgender case in Maryland under a claim of mootness (regarding pre-SRS hormones), in last month’s Law Notes: “Federal Judge’s Novel Decision to Monitor Transgender Inmate’s Case, Claimed to be Moot, Results in Maryland’s Liberalization of Transgender Treatment Standards” (September 2017 at pages 325-6). It is unclear what happened between December 2016 and the present on the surgery referral (except that Young appears to still be waiting for a “second” opinion requested by the SRS surgeon). Judge Kellison rejected Young’s attempt to update the court to an improper “sur-reply” barred by local procedural rules – a harsh treatment of papers in a pro se case like this one, where events are unfolding. The second issue deals with provision of hair removal, bleaching creams, and female clothing, which Judge Kellison finds not to be “moot,” but also not to trigger any Eighth Amendment issues. Both actions are contrary to the procedures and rules painstakingly litigated in the Norsworthy v. Beard and Quine v. Beard cases. See Law Notes, “Federal Magistrate Refuses to Accept Limitations of California’s Inmate Transgender Rules as Satisfying Eighth Amendment” (Summer 2017 at page 245-246) (delays in processing requests as interference with professional judgment); and “Federal Judge Applies Equal Protection ‘Intermediate Scrutiny’ to Denial of Gender Appropriate Items to Transgender Prisoners,” (June 2017 at pages 238-9). Judge Kellison’s R & R does not address Equal Protection. In Young’s appeal of the R & R, she requests as alternative relief that her case be transferred and handled with the Quine litigation. This case is a hatchet-job. The failure to cite either Quine or Norsworthy is inexcusable. William J. Rold

CALIFORNIA – This is the second time a federal magistrate judge has (in this writer’s view) dismissed a valid claim on screening in the same case. Pro se transgender inmate Jose Silva originally sued because her psychiatrist (Dr. Nathu) was massaging his own penis while demanding that she “perform” for him in order to receive medications and treatment. Magistrate Judge Kendall J. Newman dismissed the claim on screening in 2016 because there was no alleged touching, only alleged “gestures, statements, and bribery, also mental manipulation”. This writer wondered at the time whether “the harassment standard has been relaxed for a transgender victim and whether the analysis would differ had a psychiatrist been a male provider with a female patient in a women’s prison.” The case, Silva v. Nathu, 2016 U.S. Dist. LEXIS 53754 (E.D. Calif., April 21, 2016), is reported in Law Notes (May 2016 at pages 215-6). Silva promptly refiled; and, now, sixteen months later, U.S. Magistrate Judge Deborah Barnes dismissed it on screening again, in Silva v. Nathu, 2017 U.S. Dist. LEXIS 159214 (E.D. Calif., September 27, 2017), because there were no allegations of “touching” or “that the defendant acted in an effort to cause plaintiff psychological damage.” It is difficult to take the last statement seriously. The Defendant is a psychiatrist who is presumed to understand the psychological effect of his/her words, gestures, and “manipulation” of the patient. Judge Barnes, in essence, is saying that transgender patients have no right to expect better. Analyzing this case as purely one of sexual harassment under Hudson v. McMillian, 503 U.S. 1, 8 (1992); and Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000) – while it should have been enough – misses a key point: Silva was denied access to care in pure Eighth Amendment terms under Estelle v. Gamble, 429 U.S. 97 (1976), unless she paid for it in kind. (The first magistrate even recognized that a

October 2017  LGBT Law Notes  420
form a bribery was alleged). There was nothing “vague or conclusory” here, as Judge Barnes wrote. Silva claimed that Dr. Nathu was masturbating during a mental health session and demanding that Silva perform for him sexually to enhance his fantasies, or she would be denied mental health treatment. There is no possible penological purpose for such behavior. Judge Barnes has allowed a third amendment. It should not be needed before the defendant was required to answer. William J. Rold

CALIFORNIA – Ryan Bigoski-Odom is a transgender inmate with multiple medical problems (her single-spaced problem list on medical records in PACER extended over two pages), including HIV, pancreatitis, and mental health issues. Her original case, filed in 2012, concerns interruption of her HIV medication during four months while she was in a county jail. U.S. Magistrate Judge Craig M. Kellison required her to file four complaints before one passed screening. He has twice recommended summary judgment against her, but the recommendations were both rejected by District Judge Kimberly J. Mueller (the second time, despite Bigoski-Odom’s failure to oppose it). Bigoski-Odom has apparently been in state prison for homicide since 2013, and her last communication with the court (per PACER) appears to have been in March of 2015. The second remand from Judge Mueller to Judge Kellison and the procedural history of Odom v. Firman, 2016 WL 403263 (E.D. Calif., February 3, 2016), is reported in Law Notes (March 2016 at page 111), when the case was returned because Judge Kellison did not account for a key defendant, the jail’s medical director, Dr. Firman. Now, in Bigoski v. Firman, 2017 WL 3953944 (E.D. Calif., September 8, 2017), again without opposition from Bigoski-Odom, Judge Kellison grants summary judgment in favor of Firman on one claim (deliberate indifference to HIV and other medical treatment), but denied summary judgment (and presumably sends to trial) on Firman’s decision to discharge Bigoski-Odom from the infirmary to general population while her HIV was not under control and she was awaiting tests and specialist consultations. Firman presented an expert affidavit from a certified emergency medicine specialist, stating that the infirmary discharge decision was “appropriate” given other medications prescribed and monitoring available through sick call. Bigoski-Odom, although very sick, improved in population when her HIV medications were reinstated; and the affidavit said the interruption was reasonable because of the contraindications posed by the pancreatitis. This writer has never seen a pro se inmate without an expert defeat a medical judgment decision in summary judgment, supported with a specialist’s declaration, without filing any opposition papers. Normally, an inmate’s pro se opposition papers are never enough without an expert. Could it be that Bigoski-Odom (six years later) has lost interest or is just exhausted fighting about a case concerning her few months at the county jail? Or that Judge Kellison (who will not try the case because he does not have full referral on consent) has decided that he is done: Judge Mueller can reverse him a third time and try the case herself, or she can affirm him and grant full summary judgment? It is sad that this very sick transgender woman, whose needs were acute in her short confinement in the county jail, is still a legal ping-pong ball in the federal courts. Firman’s lawyer has filed objections to the recommendation with Judge Mueller. William J. Rold

CALIFORNIA – Thirteen transgender inmates tried to intervene in litigation involving transgender inmate Shiloh Heavenly Quine, alleging that they were intended beneficiaries of the class-like relief granted by the amending of California regulations regarding property that could be possessed and other treatment of transgender inmates arising from the Quine litigation. U.S. District Judge Jon S. Tigar denied intervention in Quine v. Beard, 2017 U.S. Dist. LEXIS 148571, 2017 WL 4082411 (N.D. Calif., September 13, 2017). In addition to the thirteen, there were twenty others in the wings, whose informal application was likewise denied – and inmate Cindy Ce Ce Young (this issue of Law Notes) is likely to receive the same ruling in her plea to have her claims handled with Quine. Judge Tigar found that the proposed intervenors were not intended beneficiaries of the Quine settlement. Mentioned in only one paragraph, they were at most incidental beneficiaries. Judge Tigar found that “[o]nly intended beneficiaries have standing to sue to enforce a settlement agreement,” citing Hook v. State of Ariz., Dep’t of Corr., 972 F.2d 1012, 1014-15 (9th Cir. 1992). In Hook, unlike here, inmates as a group were expressly identified as beneficiaries of a consent decree in Arizona. No such language appears in Quine, which granted enforcement rights to the “Plaintiff only.” Judge Tigar surveys other class action case law, including litigation about kosher meals that found relief granted to inmates at one prison did not allow enforcement by inmates at other prisons – Cooper v. California, 2007 WL 1703829 at *1 (N.D. Cal., June 12, 2007). Language in the opinion suggests that a pre-judgment motion to intervene while the case is still in litigation or under settlement negotiations might meet with a more favorable result. William J. Rold
proceed against all but one defendant on a protection from harm claim in Luck v. Smith, 2017 WL 3970512, 2017 U.S. Dist. LEXIS 145337 (D. Colo., September 8, 2017). Luck warned officials that he was being targeted by white supremacists but he was nevertheless double-celled with a white supremacist and he was assaulted by his cellmate. Judge Wang dismissed Luck’s claims on qualified immunity grounds (basically for failing to plead a constitutional tort) for all claims regarding: (1) First Amendment retaliation – because Luck did not plead who retaliated and how and focused on denial of his grievances, which was not actionable under the circumstances; (2) Fourth Amendment excessive force (treated as an Eighth Amendment claim by the court) – because Luck did not plead the force used to move him to a new cell was done “maliciously and sadistically to cause harm” and admitted that he “went limp and tried to impede the officers from dragging me into the cell”; and (3) Fourteenth Amendment due process – because conditions of confinement after Luck’s transfer were not “atypical and significant hardships” when compared with his previous confinement. On protection from harm, Judge Wang dismissed as to one defendant only, because Luck failed to plead that this officer knew of the risk. The other defendants (ten of them, ranging from officers to a major) answered the complaint without moving for dismissal on this claim, and they remain in the case. One can logically expect another procedural motion after discovery. It will be difficult for Luck to marshal systemic proof about gang activity at the prison without a lawyer, and attempts to do so may place him in danger again. William J. Rold

GEORGIA – When will it stop? Federal courts continue to dismiss summarily the possibly meritorious pro se complaints of transgender inmates. This time, U.S. District Judge William S. Duffy, Jr., in an unsigned opinion, approved in full the Report and Recommendation [R & R] of U.S. Magistrate Judge Linda T. Walker that transgender inmate Robert D. Bayse’s complaints of deliberate indifference to her medical care and safety be dismissed on screening, without requiring an answer, in Bayse v. Holt, 2017 WL 3911244, 2017 U.S. Dist. LEXIS 144441 (N. D. Ga., September 7, 2017). Hayes objected to the R & R’s recommendation on medical care, so Judge Duffy ostensibly reviewed it de novo. He found from the complaint that Bayse was receiving hormones and wanted sex reassignment surgery [SRS]. This is not a fair reading of the complaint in PACER (the medical claims of which are filed upside down). Bayse claims that she was told by the chief physician at the prison that “no one” had any experience there treating gender dysphoria and that she was denied access to a return visit with an endocrinologist to review her course of treatment. Although Bayse mentioned SRS, her primary complaint is that she is denied access to anyone with knowledge of treating transgender patients. She also alleges that she has attempted self-castration twice. Neither Judges Duffy nor Walker cite to transgender cases, despite the leading Eleventh Circuit ruling in Kothman v. Rosario, 558 Fed. App’x 907, 910 (11th Cir. 2014). Judge Duffy’s de novo review consumes three paragraphs, citing only Melton v. Abston, 841 F.3d 1207, 1221-22 (11th Cir. 2016). This case involved a pre-existing injury to the inmate’s humerus that was re-injured during a prison transport. The court spent five two-column pages discussing the treatment for this arm, eventually over-ruling a granting of summary judgment to several medical personnel. In one paragraph, Judge Duffy dismissed Bayse’s medical needs as not “serious” because she was receiving hormones, writing: “Simply because Plaintiff would prefer another course of treatment—one which is not alleged to be medically necessary—does not mean that Defendants have acted with deliberate indifference toward Plaintiff’s medical needs.” [Emphasis by Judge Duffy]. Again, this is not a fair reading of the complaint, which seeks knowledgeable evaluation and the opportunity to have SRS recommended, not regurgitation of
Georgia’s refusal to provide SRS. The opinion also ignores the extended public saga of Georgia inmate Ashley Diamond, who was paroled to avoid Georgia’s having to address SRS and after the U.S. Department of Justice filed a “Statement of Interest” in her case. Her odyssey was so serious that she was permitted to continue damage claims even after parole in *Diamond v. Owens*, 2015 U.S. Dist. LEXIS 122189 (M.D. Ga., September 14, 2015), reported in *Law Notes*, “Transgender Prisoner Allowed to Proceed on Damages Claims for Denial of Medical Care and Failure to Protect and Train” (October 2015 at pages 435-6). As to Bayse’s protection from harm claim, apparently, she was not assaulted at the particular prison at issue (although she was raped at previous Georgia institutions). Judge Duffy upheld the R & R’s recommendation that these claims be dismissed, as well as claims that officers verbally abused her, “outed” her to other inmates, and treated her roughly. None rose to actionable conduct. Judge Walker did allow Bayse to proceed against a warden and another defendant on a First Amendment claim of retaliation and denial of access to court – which Judge Walker recommended to proceed. At the warden’s direction, Bayse’s legal and writing materials were confiscated. She was ordered to only “write any complaints in the presence of a counselor and get approval prior to sending them.” Judge Walker found that these were “adverse acts that would deter a prisoner of ordinary firmness from making the complaints.” Judge Duffy found no plan error in this recommendation (to which no objection was made), but such extraordinary actions by a warden – which go far beyond well-established law on the right to petition the courts – seems not to have affected the way Judge Duffy viewed the milieu in which Bayse’s other claims were brought. *William J. Rold*

**ILLINOIS** – United States District Judge Nancy J. Rosenstengel allows *pro se* inmate Dwain Coleman to proceed on several claims arising at Illinois’ Menard Correctional Center in *Coleman v. Lindenberg*, 2017 WL 4154933, 2017 U.S. Dist. LEXIS 152047 (S.D. Ill., September 19, 2017), wherein he alleges that defendants violated his rights by sexually harassing him, retaliating against him when he complained about that treatment, and depriving him of due process. Judge Rosenstengel dismisses the initial complaint of threats and sexual harassment as too vague and undefined to state a claim. It is the *sequalae* that followed Coleman’s complaint of a violation of PREA (Prison Rape Elimination Act) that are allowed to proceed. First, defendants took away Coleman’s recreation, then they stripped his cell, leaving no receipt for items confiscated. Then they told other inmates that Coleman was a “homosexual snitch” and liked to “suck dick.” After that, they “rigged” the sink in his cell to explode water, following which he fell and sustained serious injuries to his head, neck, and back. Judge Rosenstengel found that Coleman’s PREA complaint was First Amendment protected activity, for which he received retaliation, even if certain acts by themselves would have correctional justification. She analyzed the claims against each defendant separately, but these distinctions, while important to a closer study of this case, are omitted from this summary. That retaliation for First Amendment activity was “at least a motivating factor” in the defendants’ retaliatory actions was sufficient basis to proceed under *Bridges v. Gilbert*, 557 F.3d 541, 551 (7th Cir. 2009). Judge Rosenstengel dismissed the property claims because Coleman had a remedy under state law, vitiating his allegation of a due process violation under *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984). Defendants’ alleged deliberate indifference to the physical harm that could ensue from rigging Coleman’s sink to explode was sufficient to satisfy both arms of the Eighth Amendment (serious risk and subjective indifference to it), at least for screening purposes. Judge Rosenstengel does not analyze Coleman’s “outing” or defendants’ calling him a “snitch” under protection from harm or Eighth Amendment standards, although there is precedent in the Seventh Circuit. See *Beal v. Foster*, 803 F.3d 356, 359 (7th Cir. 2015) (verbal abuse designed to create danger and make inmate a “pariah” to fellow inmates is actionable under Eighth Amendment). She does include such comments in the First Amendment retaliation claim. While failure to investigate or respond adequately to inmate grievances is ordinarily not itself actionable, Judge Rosenstengel allows Coleman to proceed on the theory that these failures were also retaliatory for his PREA complaint. Finally, Judge Rosenstengel dismisses Coleman’s claim against the officers’ union, AFSCME, for lack of state action. Although officers bragged that their union would protect them, there were no allegations of civil rights conspiracy with a non-state actor in this *pro se* case. *William J. Rold*

**ILLINOIS** – *Pro se* inmate Stevie Jackson is well known to federal courts in Illinois, having filed “several dozen” actions in many institutions. His complaint in *Jackson v. Stolworthy*, 2017 WL 4122786 (S.D. Ill., Sept. 18, 2017), is primarily about retaliation. Reading U.S. District Judge David R. Herndon’s opinion itself approaches cruel and unusual punishment as it discusses three times the 19 causes of action against 29 defendants (plus unnamed “John Does”) raised in the complaint. This report is a capsule of those claims allowed to proceed on screening. Officers allegedly used homophobic slurs and sexual and racially derogatory terms to refer to Jackson. They also called him a “snitch.” Judge Herndon

423 LGBT Law Notes October 2017
allowed this claim to proceed against those officers under *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015) (with extensive discussion involving multiple counts), as well as against bystander officers who did not intervene, under *Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015). Judge Herndon also allowed Jackson to proceed on the theory that he suffered retaliation in violation of the First Amendment for complaining about prior retaliation and conditions. For a time, Jackson says that officers deliberately assigned him a sexually aggressive cellmate, who taunted, threatened, and sexually assaulted him, stating a claim under *Farmer v. Brennan*, 511 U.S. 825, 828, 831-33 (1994). The claim includes officers who knew of the risk but failed to protect Jackson, under *Farmer* and *Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006). It also includes officers who placed him in segregation for 26 days for complaining about the sexual assault. Officers also were deliberately indifferent to Jackson’s serious medical needs by refusing to honor his permits for a lower bunk and denying him the use of his cane on multiple occasions. Judge Herndon allowed “further development of the record” regarding allegations that officers searched Jackson’s cell every day, while calling him “every homosexual name in the book” and referring to sexual acts. Judge Herndon allowed “limited discovery” to Jackson to identify the “John Doe” defendants. He dismissed claims that do not suggest a constitutional violation, like mice in the prison and missed days of recreation. It seems clear to this writer that Illinois officials are intent are making Jackson do “hard time” because of his dozens of complaints, but difficult plaintiffs can have their rights violated, too. It is unfortunate that Jackson has not been able to find counsel and that Judge Herndon did not let Jackson proceed against supervisory officials (like Illinois’ Director of PREA), who undoubtedly have heard of Jackson and the multi-institution vendetta he is facing because of his complaints – some seriously actionable. William J. Rold

**ILLINOIS** – United States District Judge J. Phil Gilbert screens the complaint of federal transgender inmate Anthony Johnson for the second time, and he divides the voluminous factual recital concerning 9 defendants into 12 separate claims, in *Johnson v. Kruse*, 2017 U.S. Dist. LEXIS 143138, 2017 WL 4122786 (S.D. Ill., September 5, 2017). Judge Gilbert allows Johnson to proceed *pro se* on most of them under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Tracing each defendant and claim is beyond the scope of this report, but the reading is useful to counsel facing personal involvement and screening issues, where the judge makes an unusually complete effort to address each claim. Claims seeking, directly or indirectly, the restoration of “good time” are dismissed without prejudice because such relief is available only through habeas corpus under *Heck v. Humphrey*, 512 U.S. 477, 486-7 (1994); and finding her medical needs to be serious, Judge Gilbert allowed Johnson to proceed beyond screening on allegations regarding “terminating Plaintiff’s hormone therapy, canceling Plaintiff’s Spironolactone without any replacement medication, and denying Plaintiff’s requests for a lower-bunk permit [given her bowel and bladder problems and general weakness] and hair-removal products.” He allowed such claims to proceed even against non-medical defendants, who had knowledge and interfered, such as the warden, citing *Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015). He allowed Equal Protection claims to proceed under the Fifth Amendment, finding “animus” in defendants’ characterization of Johnson as presenting “transgender bull crap” and similar slurs, citing *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2695-96 (2013); and *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). He invoked “class of one” theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). He also included an Equal Protection claim based on requiring Johnson to shave with a razor, given her hormone treatment and the scarring caused by use of a regular razor while on hormones. Unusually frequent cell searches and confiscation of “female” items of clothing and cosmetics may also constitute an Equal Protection claim, but relief may also be barred by the Heck doctrine, since Johnson seeks restoration of good time, as part of the remedy. Several incidents, some of which resulted in tickets, are allowed to go forward – even though they involved different defendants and different times and circumstances – because they present common Equal Protection issues of “revenge” against Johnson, with the caveat that further investigation may show that Heck bars certain relief, including declaratory relief that could result in restoration of good time. Retaliatory loss of e-mail, visitation, and certain other privileges are also allowed to proceed past screening on Equal Protection theory. Finally, although the pleading is “sparse,” Judge Gilbert allows Johnson to proceed on her claim that her complaint of rape was not investigated because she is transgender, based on the remark “welcome to being a female” made by one of the defendants. This case is recommended reading to anyone seeking a better understanding of the day-to-day life of transgender people in custody. William J. Rold

**INDIANA** – U.S. District Judge Philip P. Simon dismissed intersex inmate Elmer D. Charles’ *pro se* civil rights complaint without prejudice in *Charles v. Neal*, 2017 U.S. Dist. LEXIS 143138, 2017 WL 4122786 (S.D. Ill., September 5, 2017). He invoked “class of one” theory under *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). He also included an Equal Protection claim based on requiring Johnson to shave with a razor, given her hormone treatment and the scarring caused by use of a regular razor while on hormones. Unusually frequent cell searches and confiscation of “female” items of clothing and cosmetics may also constitute an Equal Protection claim, but relief may also be barred by the Heck doctrine, since Johnson seeks restoration of good time, as part of the remedy. Several incidents, some of which resulted in tickets, are allowed to go forward – even though they involved different defendants and different times and circumstances – because they present common Equal Protection issues of “revenge” against Johnson, with the caveat that further investigation may show that Heck bars certain relief, including declaratory relief that could result in restoration of good time. Retaliatory loss of e-mail, visitation, and certain other privileges are also allowed to proceed past screening on Equal Protection theory. Finally, although the pleading is “sparse,” Judge Gilbert allows Johnson to proceed on her claim that her complaint of rape was not investigated because she is transgender, based on the remark “welcome to being a female” made by one of the defendants. This case is recommended reading to anyone seeking a better understanding of the day-to-day life of transgender people in custody. William J. Rold

October 2017 LGBT Law Notes 424
LEXIS 149045, 2017 WL 4075217 (N. D. Ind., Sept. 14, 2017). She sues only the warden and the corrections commissioner and primarily for events at an Indiana prison where she was previously incarcerated, which, if true, would clearly state a claim insomuch as they involve as many as 38 rapes. Her primary claim here is that she is not receiving female clothing and housing at a female institution and that officials are not doing enough to calm her likely legitimate fears of future harassment and assault, although no harassment or assault was alleged at her current place of confinement. Charles has Klinefelter’s Syndrome, which presents with both male and female traits. She wants to live as a woman, but her claim for surgery is not supported by allegations that she has had surgery recommended by a professional. She is receiving hormones. Judge Simon found that she has probably named the wrong defendants insofar as personal involvement is concerned and that she does not allege actionable conduct by any defendants at her current place of incarceration. Her claim that she is improperly strip searched and monitored by male officers, despite her anatomy, is rejected on the authority of Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995), because she does not allege that the searches are conducted for abusive or non-penological purposes. Judge Simon allows Charles to try to amend her current complaint, if she can support a claim that her current treatment for Klinefelter’s Syndrome – a serious medical need – is inadequate; but he explains that she must sue (in fact encourages her to do so) in the Southern District of Indiana for her prior mistreatment. William J. Rold

LOUISIANA – Even more than the Eighth Circuit, the Fifth Circuit is inhospitable ground for transgender inmates. The Fifth Circuit’s summary per curiam denial of hormones in Praylor v. TDCJ, 430 F.3d 1208, 1209 (5th Cir. 2005), is still the last word. Here, in Clark v. Leblanc, 2017 U.S. Dist. LEXIS 155260, 2017 WL 4220080 (M.D. La., September 22, 2017), Chief U.S. District Judge Brian A. Jackson gives thoughtful consideration to the pro se plea of Robert Clark for injunctive relief (even while using male pronouns). Clark sought to compel hormone treatment, female clothing, name, and grooming items. Judge Jackson finds her needs are “serious” – something the Fifth Circuit is alone in assuming without deciding in Praylor – but the deliberate indifference arm is not satisfied, at least for preliminary relief. Clark did not have an expert, and Judge Jackson allowed the affidavit of the medical director at Angola Prison (a/k/a “The Farm”) to serve as defendants’ expert report. It said that Clark was receiving mental health treatment and “medication deemed appropriate for his condition.” Clark “has been allowed to shower in private because of his privacy and security concerns.” Clark failed to satisfy a double negative: failing to show that she “is not receiving any treatment at all.” Judge Jackson also discounts Clark’s complaints because they were not raised until two years after her arrival at the prison. Judge Jackson surveys district court decisions in Louisiana and Texas (none from Mississippi) that have tried to find substantive life after Praylor, without success, noting the absence of “controlling precedent,” as bemoaned in Young v. Adams, 693 F.Supp.2d 635, 640-1 (W.D. Tex. 2010), which listed all of the other circuits (repeated here) providing a framework for litigating such claims. There is much work to do here. William J. Rold

MAINE – U.S. Magistrate Judge John C. Judge Nivison recommended summary judgment in his Report and Recommendation against pro se plaintiff Scott Gagnon, a/k/a Missy Gagnon, a former Maine prison inmate, in Gagnon v. Correct Care Solutions, 2017 U.S. Dist. LEXIS 154906, 2017 WL 4228886 (D. Me., September 22, 2017). Gagnon filed no papers in opposition to summary judgment. Based on defendants’ submissions, Judge Nivison found that Gagnon wanted to “move slowly” with her transition. He found that Gagnon “waited” for over two years before seeking to meet with the Maine Gender Dysphoria Committee. Judge Nivison found that Maine officials through their contract vendor, defendant Correct Care Solutions, followed the World Professional Association for Transgender Health [WPATH] guidelines. Defendant has a Gender Dysphoria Committee that provides consultation for treatment for individuals with gender dysphoria that meets periodically to assess “the effectiveness of the treatment” in individual cases. Gagnon was placed on female hormones, and she was moved to be housed in female housing in a single cell. The treatment team declined a request for laser hair removal, but they offered “other options” for facial hair removal. Gagnon received weekly mental health treatment, and reportedly did not exhibit emotional symptoms requiring intervention prior to her release from incarceration. The R & R found that officials provided a 14-day supply of hormones upon her release. No other details appear in the opinion. The R & R found that the complaint was vague as to what was denied and by whom. Maine officials argued that, because plaintiff sued only the corporate entity and failed to show any unconstitutional care by any agent thereof, there could be no claim against the contract provider as a matter of law. The R & R spends a fair amount of time discussing Monell liability for “pattern and practices” that are unconstitutional, analogizing it to corporate liability in the Eighth Amendment context, and citing to several First Circuit cases, including Morales v. Chadbourne, 793...
Thomas was given an additional six points to his “custody score,” which already contained points from two prior altercations. Judge Karas finds that Thomas failed to allege that he ever came into contact with bodily fluids or that they were not “cleaned up” within a reasonable time, while citing cases that seem to suggest that such specificity is not essential at this stage. See Gaston v. Coughlin, 249 F.3d 156, 165 (2d Cir. 2001) (holding that the plaintiff stated a claim where “for several consecutive days and one noncontiguous day . . . , the area directly in front of his cell was filled with human feces, urine, and sewage water”); Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967) (holding that the plaintiff had stated a claim where the “bodily wastes of previous occupants . . . covered the floor, the sink, and the toilet”). Plaintiff is not required to detail the “exact extent or duration of his exposure to unsanitary conditions.” Walker v. Schuele, 717 F.3d 119, 128 (2d Cir. 2013). Thomas failed here, however, because he did not plead “both the duration and severity of [his] exposure to unsanitary conditions.” Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015). One wonders if Judge Karas has ever seen a prison cell block or a flimsy prison mattress (and how quickly it could become saturated) or has any knowledge of the proximity where the “bodily wastes of previous occupants . . ., the area directly in front of his cell was filled with human feces, urine, and sewage water”. Plaintiff is not required to detail the “exact extent or duration of his exposure to unsanitary conditions.” Walker v. Schuele, 717 F.3d 119, 128 (2d Cir. 2013). Thomas failed here, however, because he did not plead “both the duration and severity of [his] exposure to unsanitary conditions.” Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015). One wonders if Judge Karas has ever seen a prison cell block or a flimsy prison mattress (and how quickly it could become saturated) or has any knowledge of the proximity where the “bodily wastes of previous occupants . . .覆盖了地板，水槽，和厕所”).原告不需要详细描述“其接触不洁条件的精确程度或持续时间。”Walker v. Schuele, 717 F.3d 119, 128 (2d Cir. 2013).托马斯在这里失败了，因为他没有提出“其暴露于不洁条件的持续时间和严重程度。”Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015)。人们会想知道，如果卡拉斯法官曾经见过监狱的牢房或一个粗糙的监狱床垫（它很快就会饱和）或者有任何关于这个牢房的接近度，这样才能解决这个问题。即使不违反第一修正案。该冗长的投诉包括对共谋和其他索赔的遗漏。该报告的作者代表HIV阳性囚犯与精神病与失禁。将他们置于上铺是坏政策。也许the “unreasonable” fear that HIV can be contracted environmentally. Judge Karas found that response to Thomas’s complaints and the action taken after his altercation with this cellmate did not violate the First Amendment. The rambling complaint has allegations of conspiracy and other claims omitted from this report. This writer has represented HIV-positive inmates with dementia and incontinence. Placing them in an upper bunk in general population is bad policy. Perhaps the class action decision in the Virgin Islands litigation put it best: “Failure to house mentally ill inmates apart from the general population . . . violates the rights of both groups.” 957 F. Supp. 727, 738-9 (D.V.I. 1997); see also Langley v. Coughlin, 709 F. Supp. 482, 484-85 (S.D.N.Y. 1989) and cases cited and its progeny. This housing situation was a classification disaster waiting to happen. William J. Rold

NEW YORK – Back in the 1970s, the litmus test for prison condition cases was that you tried to state a claim that would make the judge throw up. In many ways, it still is the test, but U.S. District Judge Kenneth M. Karas has a strong constitution, although not necessarily the one established by the Founders. In Thomas v. DeMeeo, 2017 WL 3726759 (S.D.N.Y., Aug. 28, 2017), Judge Karas dismissed pro se inmate Benjamin Thomas’s complaint that he was double-celled in the lower bunk with an inmate who lacked control of bladder or bowels, was mentally ill and violent, and reportedly had AIDS. Thomas sought reassignment of the other inmate, who had been previously moved at least three times. Thomas complained that the conditions of his cell violated the Eighth Amendment, that officials were deliberately indifferent to his risk of contracting HIV, and that he suffered retaliation for complaining, in violation of the First Amendment. Thomas said he could not sleep, was nauseous and could not eat, and was in constant fear of exposure to the bodily fluids from the bunk above him. Thomas objected to, in effect, being asked to serve as an inmate “caretaker” for the sick cellmate. Eventually a fight broke out between the inmates, after which Thomas said contracting HIV, and that he suffered indifference to his health needs, and Judge Karas judicially notices the “unreasonable” fear that HIV can be contracted environmentally. Judge Karas found that response to Thomas’s complaints and the action taken after his altercation with this cellmate did not violate the First Amendment. The rambling complaint has allegations of conspiracy and other claims omitted from this report. This writer has represented HIV-positive inmates with dementia and incontinence. Placing them in an upper bunk in general population is bad policy. Perhaps the class action decision in the Virgin Islands litigation put it best: “Failure to house mentally ill inmates apart from the general population . . . violates the rights of both groups.” 957 F. Supp. 727, 738-9 (D.V.I. 1997); see also Langley v. Coughlin, 709 F. Supp. 482, 484-85 (S.D.N.Y. 1989) and cases cited and its progeny. This housing situation was a classification disaster waiting to happen. William J. Rold

U.S. SENATE – Responding to President Trump’s announcement of a ban on transgender military service, U.S. Senator Kirsten Gillibrand has introduced S. 1820 to “provide for the retention and service of transgender members of the Armed Forces.” Her proposal has bipartisan co-sponsorship, including Republican Senators John McCain and Susan Collins, together with Democratic Senator Jack Reed. It has been referred to the Senate Armed Services Committee, which McCain chairs. Sponsorship by the Chair means that, at least, the Committee will hold hearings. Whether McCain could bring along enough of his colleagues to get the measure approved and sent to the Senate floor is an open question at this point.

U.S. CENSUS BUREAU – The National LGBTQ Task Force reported on September 28 that the Census Bureau has reversed a previous decision to drop all questions about sexual orientation from its ongoing survey activities, and will include a question in its study Census Barriers, Attitudes and Motivators. It is still uncertain whether the Bureau will
include sexual orientation questions in the decennial census in 2020, a presidential election year.

**EEOC (EQUAL EMPLOYMENT OPPORTUNITY COMMISSION)** – President Trump’s nominees to fill two vacancies on the EEOC were closely questioned by Democratic Senators at a confirmation hearing on September 19 about their views on sexual orientation and gender identity discrimination. The EEOC ruled during the Obama Administration that both forms of employment discrimination are forbidden under Title VII’s ban on sex discrimination. This position has been disclaimed by the Trump Administration Justice Department but, interestingly, the Republican EEOC Commissioner designated as acting chair by Trump before he made nominations of new Commissioners appeared to stand by the agency’s current position, and the EEOC has continued to file briefs and initiate lawsuits consistent with this position since the change of administration. Both of the nominees, Janet Dhillon and Daniel Gade, said they were opposed to such discrimination, but they could not assure the Senators that they would support the agency’s current view about interpreting Title VII, especially as the Justice Department had changed its position and has filed amicus briefs opposing this interpretation. Dhillon testified: “The current law is in flux. We now have a split in the circuits and two agencies that have taken differing views of the same text.” Dhillon said that “ideally” a legislative solution would end the discordant positions within the executive and judicial branches on this issue. Gade testified that he would not seek to reinterpret the EEOC position unless there was a clear legal reason to do so. *National Law Journal*, Sept. 19.

**ALABAMA** – Few state governments are as proudly and openly anti-LGBT as the Alabama government, but its view does not necessarily represent those of the state’s few large metropolitan areas. On September 26, the Birmingham City Council made history by being the first city in the state to outlaw anti-LGBT discrimination, adopting an ordinance imposing criminal penalties for any entity operating in the city to discriminate because of race, sexual orientation, national origin, gender identity, or disability. The ordinance, to be enforce by the Municipal Court, covers housing, public accommodations, and employment. The measure was passed unanimously, but two members were absent from the vote. City Council President Johnathan Austin said his expectation that the state legislature will take some action in response. “Whenever we try to do something to protect the citizens, in any form, it has always been attacked by the state legislature,” he told the *Birmingham News* (Sept. 29). “I anticipate that the state legislature may try to pass some legislation that says we can’t do this, but we will let them deal with that. The reason the measure provides criminal rather than civil penalties is because Alabama’s delegation of legislative authority to city governments is limited to passing criminal penalties. Civil fines and penalties are clearly outside the scope of their authority.

**CALIFORNIA** – LGBT rights advocates obtained legislative approval of seven measures on their agenda for the current session. In the November issue of *Law Notes* we will report on the governor’s reaction to them. Jerry Brown faced on October 15 deadline to decide whether to sign or veto the measures.

**LOUISIANA** – Attorney General Jeff Landry, who is litigating against Governor Edwards’ LGBT anti-discrimination executive order, has told the Louisiana State Bar Association that it should not adopt an anti-discrimination provision that covers categories not found in the state’s antidiscrimination law, including, of course, sexual orientation and gender identity. The proposed rule would bring Louisiana into line with the Model Rules of Professional Responsibility advocated by the American Bar Association. A local district attorney had asked Landry to opine on the issue. His opinion does not carry the force of law. *AP State News*, Sept. 14. Landry appears to be vying for the title of chief homophobe in Louisiana, now that the governorship is in Democratic hands.

**NEW YORK** – Albany County legislators approved a bill on September 11 intended to ensure that LGBT military veterans who were discharged under the “don’t ask, don’t tell” policy that ended in September 2011 will receive county-level veterans’ benefits, including property-tax exemptions, civil service points, and the opportunity to participate in various veterans programs run by the county. Veterans’ eligibility for such benefits has traditionally depended upon their discharge status, and prior to the change in policy, many LGBT people were given general or undesirable discharges. *Albany Times Union*, Sept. 12.
For his first openly-gay appointment, President Trump has nominated RICHARD GRENNELL, a former spokesperson for the U.S. Mission to the United Nations under President George W. Bush, to be the U.S. Ambassador to NATO. RICHARD GRENNELL was appointed to this position by the Human Rights Council, which will designate a successor at an organizational meeting on December 4. RICHARD GRENNELL was appointed last September. He cited illness in his household as a reason for leaving the position. AP Online, Sept. 22.

UNITED NATIONS – The U.N.’s first independent expert on sexual orientation and gender identity has resigned for “personal reasons.” Vitit Muntarbhorn was appointed to this position by the Human Rights Council, which will designate a successor at an organizational meeting on December 4. Muntarbhorn, from Thailand, was appointed last September. He cited illness in his household as a reason for leaving the position. AP Online, Sept. 22.

AZERBAIJAN – Yet another anti-gay government crackdown is reported in Eastern Europe in the former Soviet Republic of Azerbaijan. Local activists say that dozens of LGBT people were swept up in raids in Baku during September, with some being sentence up to 30 days in jail. The government denied that people were being locked up just for being gay, contending that these were prostitutes who were arrested for spreading STDs, including HIV, and that the arrests were carried out on complaints from the public. An Interior Ministry spokesperson said that sixteen of the detained individuals tested positive for HIV or syphilis. But there were statements from those who were arrested that they were not engaged in sex work. Gay sex is not illegal in Azerbaijan, but it is culturally condemned. Associated Press, September 29.

BERMUDA – Judge Charles-Etta Simmons of the Supreme Court of Bermuda issued a new decision in the marriage equality case, Godwin v. Registrar General, [2017] SC (Bda) 75 Civ (Sept. 22, 2017), resolving arguments about the final wording of the court’s order pursuant to its ruling of May 5, 2017, that denial of marriage to same-sex couples violated the constitutional rights of LGBT people, and awarding costs to the plaintiffs “to be paid by the Defendants on an indemnity basis to be taxed if not agreed.” The final order adopted by the court provides that “the common law definition of marriage shall be inoperative to the extent that it contains the term “one man and one woman” and does not provide for the marriage of a same-sex couples,” and that various provisions of the Marriage Act 1944 are inoperative to the extent that they include gendered language to describe the parties to a marriage, thus not providing for same-sex couples to be able to marry.

BOTSWANA– The Botswana High Court ruled on September 29 that the Registrar of National Registration should record a sex change on behalf of a person who had transition as a transgender man. The court characterized as “unreasonable” the refusal to change the applicant’s gender marker, violating his rights to dignity, privacy, freedom of expression, equal protection of the law, freedom from discrimination, and freedom from inhumane and degrading treatment. The court had previously issued an order that the applicant’s female and male names and other personal information be kept confidential, in order to protect their privacy. Botswana is now known as a country tolerant of sexual diversity, and the penal law mandates a seven-year prison sentence for homosexual activity. The government is expected to seek an appeal of this ruling. Agence de Presse Africaine, Sept. 29.

BRAZIL – The Federal Council of Psychology adopted a resolution in 1999 condemning conversion therapy and prohibiting licensed psychologists from practicing it. In 2016, Rozangela Justino, an evangelical Christian and psychologist was barred from practice after having been found guilty of violating this professional norm by offering such therapy. She appealed, and found a receptive ear from Judge Waldemar Claudio de Carvalho, who purported to overrule the 1999 resolution, setting off an uproar among civil liberties advocates and the LGBT community in a country that has generally been considered to be progressive on LGBT rights. The head of the Federal Council, Rogerio Giannini, responded to the ruling by stating that there is “no way to cure what is not a disease,” adding: “It is not a serious academic debate; it is a debate connected to religious or conservative positions.” Daily Mail Online, Sept. 20.

CAMBODIA – The nation’s Appeal Court has affirmed a 25-year prison sentence for Yem Chrin, a doctor who was arrested in 2014 in Northwestern Battambang Province after most of his patients tested positive for HIV and it was determined that he was reusing unsterilized needles, resulting in creating a virtual epidemic of HIV transmission in his community. The Provincial
INTERNATIONAL

Court found him guilty of committing “cruel torture” and ordered him to pay monetary compensation to more than 100 victims who had filed complaints against him. Chrin, who confessed error to the trial court, claimed that he reused syringes on multiple patients because it was difficult to get new ones and he did not know that unsterilized needles could transmit HIV. His actions are now connected with about 290 infections, with at least 20 dead from complications of HIV/AIDS. News Agency of Nigeria, Sept. 9.

CHILE – President Michelle Bachelet has presented a marriage equality bill to Congress, but it is uncertain how quickly it will be taken up for consideration.

GERMANY – The first same-sex marriages were celebrated in Germany on October 1, as local authorities in many municipalities opened facilities that are normally closed on Sundays in order to meet the demand! Depending how one counts – given that same-sex marriage is not available nationwide in every country in which some political subdivisions allow it – Germany is generally counted as the 24th country to adopt marriage equality, in this case through legislation rather than by judicial decree.

HONG KONG – The Court of Appeal ruled that the Immigration Department’s refusal to grant a spousal visa to the same-sex partner of a foreign national employed in the city who formed a civil partnership with her in the U.K. before they moved to Hong Kong was unlawful discrimination. Although Hong Kong does not official allow same-sex marriages or formally recognize such marriages performed overseas, its judiciary and its influential business community have successful urged on the court that failure to grant spousal visas is counter to the city’s prosperity.

High Court Judge Andrew Cheung Kui-nung wrote, “Excluding the foreign worker’s lawfully married [although same-sex] spouse or civil partner under a civil partnership lawfully entered into in a foreign country from coming to Hong Kong to join the worker is, quite obviously, counter-productive to attracting the worker to come to or remain in Hong Kong in the first place.” The three-judge appeal panel said that the Department had failed to show that its visa scheme was “rational.” The lower court judge had ruled that the request for the visa was effectively asking the Department to engage in a “backdoor” recognition of same-sex marriage, but the appeal judges, disagreeing, said that the dependent visa as a “privilege” and that the Department was not required to follow local marriage law in deciding whether to issue it. South China Morning Post, Sept. 25.

NEPAL – The Supreme Court has ruled that under Nepal’s constitution transgender people should be entitled to appropriate recognition of their gender in citizenship papers and other official documents, and should not have to jump through procedural hurdles to get local bodies to agree to make changes. The online news report about this contains an English translation which is not easy to follow, but it appears that the court’s ruling will allow for gender changes on official records based on the applicants’ declaration. Pahichan.com, Sept. 19.

PHILIPPINES – The House of Representatives has approved a wide-ranging LGBT rights bill by unanimous vote on September 20. House Bill No. 4982 (the Sexual Orientation and Gender Identity and Expression Equality bill) now must go through an extended consideration process in the Senate, followed by a process of conforming whatever emerges from the Senate with the bill approved by the House, final ratification votes, and then consideration by the President. Thus, the Philippines is probably still a long way from enactment of an LGBT rights bill, but the unanimous passage on final reading in the House is a major first step. ABS-CBN News, Sept. 20.

REPUBLIC OF CHINA (TAIWAN) – Conflicting reports have emerged from Taiwan about progress towards marriage equality. The Supreme Court ruled on May 24 that denying same-sex couples the right to marry violated constitutional equality requirements, but gave the government two years to comply with the ruling. The failure of the government to advance a measure in the current legislative session was criticized as obstruction and delay, but government leaders have stated that they intend to comply with the deadline. Of course, it is possible that political changes in the intervening two years will create problems. Stephen Lee, a politics professor at National Taiwan University, told a reporter that if legislation is not passed during this calendar year, it is not likely to be up for debate until after national parliamentary elections are held in November 2018. Legislators are reluctant to take a position on a hot issue on which polls show the public narrowly divided, with a slim majority in favor of marriage equality. EFE Ingles, Sept. 20.

SCOTLAND – Although Scotland, together with the rest of the U.K. apart from Northern Ireland, has not had same-sex marriage for some time, it was considered an important breakthrough when the first same-sex wedding ceremony within the Scottish Episcopal Church took place at the end of September in St. John’s Church, Edinburgh. Same-sex weddings commenced in the civil realm on December 31, 2014. Several church weddings took place in September in various locations. Glasgow Evening Times, Sept. 29.
**INTERNATIONAL / PROFESSIONAL**

**SOUTH AFRICA** – What happens to an existing different-sex marriage when a spouse changes his or her gender designation? South African officials were not nimble in dealing with the situation, a bit surprisingly when one considers that South Africa was one of the earlier countries to allow same-sex marriages. The *Herald* (South Africa) reported on September 9 about a ruling by the Western Cape High Court, directly the Department of Home Affairs that it was unlawful for Department of Home Affairs to fail to respond appropriately to news that a person had changed gender. In one of the cases consolidated before the court, the Department reacted to such a change by removing the record of a marriage from the National Population Register. In another case, a person was advised to divorce her spouse, and then remarry as a same-sex marriage. Neither course of action was appropriate, said the court, which ordered that the identities of the individual plaintiffs be kept confidential. The Legal Resources Centre represents the plaintiffs. The court ordered that the marriage record of one plaintiff be restored, and declared that no divorce was required for the Department to merely alter the existing marriage records.

**TANZANIA** – Regional police in Zanzibar Region have detained 20 people accused of engaging in homosexual activities, who were arrested following a police raid at a hotel where they were attending a “workshop” on LGBT issues. As part of a recent “crackdown” on homosexuality, the government suspended HIV/AIDS outreach projects targeting gay men, and stopped 40 privately run health centers from providing AIDS-related services that the government claimed were being provided mainly to homosexuals, according to a report by the *Associated Press*, Sept. 16.

---

**PROFESSIONAL NOTES**

**BELATED CHAMPION OF LGBT LEGAL RIGHTS RETIRES FROM FEDERAL BENCH** – Few might have predicted when President Ronald Reagan nominated conservative law & economics scholar Richard Posner to the 7th Circuit Court of Appeals in 1981 that Posner would evolve into an outspoken proponent of LGBT legal rights, following up on an oral argument in the circuit’s marriage equality case with an opinion for the court that was outspokenly sarcastic about the states’ absurd arguments seeking to justify a continuing ban on same-sex marriages. *See Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). More recently, he concurred in the 7th Circuit’s *en banc* decision to allow sexual orientation claims under Title VII’s ban on sex discrimination in employment, in an intellectually provocative opinion suggesting that the court should frankly “update” Title VII to recognize such claims without having to resort to the majority’s various doctrinal arguments. In a typically erudite and persuasive passage, he wrote: “We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal in the ways that count, and beyond that have made many outstanding intellectual and cultural contributions to society (think for example of Tchaikovsky, Oscar Wilde, Jane Addams, André Gide, Thomas Mann, Marlene Dietrich, Bayard Rustin, Alan Turing, Alec Guinness, Leonard Bernstein, Van Cliburn, and James Baldwin—a very partial list). We now understand that homosexuals, male and female, play an essential role, in this country at any rate, as adopters of children from foster homes—a point emphasized in our *Baskin* decision. The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose ‘interpretation’ of the word ‘sex’ in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) ‘what this country has become,’ or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.” *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring). An intermediate stage in his evolution can be documented by his book, *Sex and Reason* (Harvard University Press, 1992), which controversially applied his law and economics analysis to laws regulating sex, and signaled openness to reconsidering traditional legal hostility to homosexuality. In interviews given after his retirement announcement, Judge Posner cited as a motivating factor to retire his unhappiness about the way federal courts treat pro se plaintiffs, and stated his hope to advocate reform efforts to see that they get a fair shake from the courts. Perhaps he has been reading *Law Notes*’ reporting on prisoner litigation and refugee cases, where LGBT pro se litigations frequently get the shaft.

“Morissey” cont. from page 400

Although Morissey was able to come up with an internal IRS document in which an agent made a remark that might be construed as showing discriminatory intent, the court insisted that the official explanation provided by IRS for denying his claim carried no implication of any discriminatory purpose. “Because there is no evidence that the IRS’s actual decision-makers engaged in any intentional discrimination,” wrote Newsom, “Mr. Morissey’s equal protection claim fails.”

Morissey is represented by Richard Donald Euliss of Carlton Fields Jorden Burt PA (Washington, DC) and David Paul Burke, Scott D. Feather, and Gary L. Sasso, of the same firm’s Tampa office.
PUBLICATIONS NOTED


SPEcially noted

The Summer 2017 issue of Journal of Legal Education (66 J. Legal Ed. No. 4) is a symposium issue on “Sexual Misconduct, Title IX and Academic Policies.” Not significantly addressed are the questions whether sexual orientation and gender identity issues come within the scope of Title IX. The focus is primarily on Title IX campus policies, their enforcement, and the constitutional issues they raise.

EDITOR’S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at 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 LGBT Law Notes are those of the author, and are not official positions of LeGaL – The LGBT Bar Association of Greater New York or the LeGaL Foundation. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in LGBT Law Notes is welcome and will be published subject to editing. Please submit all correspondence to info@le-gal.org.

431 LGBT Law Notes October 2017