SCOTUS REAFFIRMS OBERGEFELL

But Texas Supreme Court Doesn’t Get the Memo
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U.S. Supreme Court Rules Same-Sex Spouses Entitled to Be Listed on Birth Certificates

When a child is born to a woman married to another woman, both women should be listed as parents on the child’s birth certificate. So ruled the U.S. Supreme Court, voting 6-3 and summarily reversing a decision by the Arkansas Supreme Court on the last day of its October 2016 Term. The date was coincidentally the second anniversary of the Court’s historic marriage equality ruling, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which provides the basis for this new ruling in *Pavan v. Smith*, No. 16-992 (June 26, 2017), reversing 505 S.W.3d 169 (2016).

The petitioners in this case were two married same-sex couples, Leigh and Jana Jacobs and Terrah and Marisa Pavan. Both couples resided in Arkansas when their children were born in 2015, having previously married out of state. Both couples filed paperwork with the state seeking birth certificates listing both mothers as parents. The state turned them down, issuing birth certificates listing just the birth mothers and leaving the space for fathers blank.

Incredibly, the Health Department sought to justify its refusal to name both parents on birth certificates by saying that the purpose of the birth certificate is to record biological lineage, which is pretty strange if husbands get listed regardless of their biological relation to the child. Furthermore, Arkansas, like other states, issues amended birth certificates if children are adopted, listing their new legal parents, again regardless of the fact that one or both of the adoptive parents are not biologically related to the child.

The women sued the Health Commissioner. The trial court agreed with them that this result was unconstitutional under *Obergefell*, because the statute “categorically prohibits every same-sex married couple from enjoying the same spousal benefits which are available to every opposite-sex married couple.” In *Obergefell*, the Supreme Court ruled that same-sex couples have the same right to marry as opposite-sex couples, which means they are entitled to be treated the same by the state for all reasons of law.

The Arkansas Supreme Court was divided in this case. A majority sided with the Health Department, buying the incredible argument that birth certificates are supposed to be a record of biological lineage. The Arkansas court, “The statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife,” and so it was consistent with *Obergefell*. Not so, argued the dissenters, writing that under *Obergefell* “a same-sex married couple is entitled to a birth certificate on the same basis as an opposite-sex married couple.”

The majority of the U.S. Supreme Court agreed with the dissenters, finding this case so clear that it simultaneously granted the petition for review and issued a summary decision, without waiting for briefing on the merits or oral argument. The decision was issued *per curiam*.

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The state’s Health Department argued that this was compelled by a state statute that provides that when a married woman gives birth, her husband will be listed on the birth certificate. (This is frequently referred to as the parental presumption.) This is so even if the woman conceives through donor insemination and her husband is not the biological father of the child, or even if some other man got the wife pregnant.
When Gorsuch was nominated, it was predicted that he would be as bad for LGBT rights as his predecessor, Justice Antonin Scalia, if not worse. His dissent here vindicated that view.

certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, the Court continued, “Arkansas may not, consistent with Obergefell, deny married same-sex couples that recognition.” The case was sent back to the Arkansas courts for “further proceedings not inconsistent with this opinion.”

The majority of the Court included all of the justices who had voted in the majority in Obergefell plus, possibly, Chief Justice John Roberts, who was the principal dissenter in the marriage case. Roberts’ failure to join the dissent in this case is notable, given the vehemence of his dissent in Obergefell, but perhaps, accepting that Obergefell is now a precedent and that there are not five votes on the Court to overturn it, Roberts was willing to agree that the law in question is not “settled and stable.” He did not deem it clear that Obergefell would invalidate state laws restricting who could be listed on a birth certificate, when justified by a policy of recording biological ties.

He took a narrow view of Obergefell, as some lower courts have done in birth certificate litigation around the country, arguing that “nothing in Obergefell spoke (let alone clearly) to the question whether [the Arkansas statute], or a state supreme court decision upholding it, must go. The statute in question establishes a set of rules designed to ensure that the biological parents of a child are listed on the child’s birth certificate.” This is, of course, incorrect, as the per curiam opinion demonstrated. The state’s rules, requiring that the husband of a woman who conceives through donor insemination be listed as the child’s father, clearly do not “ensure” that the biological parents of a child are listed on the certificate. Indeed, as the Court noted in passing in its opinion, the “rules” in Arkansas even provide that if the birth mother, her husband, and the actual biological father of the child all agree in sworn statements, the actual father can be listed instead of the husband, but otherwise the husband would be listed despite his lack of biological connection to the child. Clearly, listing people on birth certificates in Arkansas under current statutes is not all about biological relationships.

Gorsuch misrepresented the Obergefell opinion when he said that nothing in Obergefell “spoke to the question” in this case. As the Court’s opinion pointed out, the Obergefell opinion specifically mentioned birth certificates and some of the plaintiffs in that case had specifically confronted the refusal of states to place their names on birth certificates as one of the ways in which states had unconstitutionally refused to recognize their marriages and accord them the same rights associated with different-sex marriages. Gorsuch’s comment is, at least, disingenuous, and at worst, dishonest.

Also a bit odd was his citation of Michael H. v. Gerald D., 491 U. S. 110, 124-125 (1989), for the proposition that “a birth registration regime based on biology” does not offend the 14th Amendment. In Michael H., Justice Scalia wrote for the Court that California had not violated the due process rights of the biological father of a child of a married women with whom he was having an affair by refusing to allow the man to seek parental rights. Under California law, the mother’s husband would be treated as the legal father unless he sought to disclaim parenthood and was vindicated by genetic testing proving he was not the father. The default position under the California statute was that the husband would be deemed the child’s legal parent, regardless of lack of biological connection, even when the married couple were living thousands of miles
Health Department insisted that any other situation would require further clarification from the courts, and some of the state’s supreme court justices had already expressed a preference for legislative clarification.

The Supreme Court’s decision will likely affect pending litigation elsewhere. In Arizona, the state’s intermediate court of appeals ruled on June 22 in Turner v. Steiner, 2017 WL 2687680, that a lesbian co-parent was not entitled to be listed on a birth certificate, conflicting with a ruling by another panel of the court of appeals, McLaughlin v. Jones, 382 P.3d 118 (2016), which was recently granted review by the Arizona Supreme Court. McLaughlin held that Obergefell governed; Turner, anticipating Gorsuch’s position, insisted that Obergefell simply involved the right to marry and to have out-of-state marriages recognized and did not address the birth certificate issue — a position now repudiated by the Supreme Court. Ironically, the oral argument before the Arizona Supreme Court in McLaughlin was held the day after the Pavan decision was announced. The Turner decision cited the Arkansas Supreme Court’s ruling in Pavan, as well as a Wisconsin Supreme Court ruling from 2015, In re P.L.L. — R., 876 N.W.2d 147. Plaintiffs in the Wisconsin case should be able to file a new suit based on Pavan, if necessary, but perhaps Pavan v. Smith will encourage state officials to drop their obstructions and accord equal treatment to same-sex married couples through administrative changes or new legislation. The Pavan ruling could also affect litigation in Texas about whether Obergefell requires the state to extend spousal benefits eligibility to same-sex spouses of public employees.

The Pavan ruling could also affect litigation in Texas about whether Obergefell requires the state to extend spousal benefits eligibility to same-sex spouses of public employees.
Supreme Court Will Consider Religious and Free Speech Exemptions to Anti-Discrimination Law in Colorado Wedding Cake Case; Asked to Take Up Florist Case As Well

On June 26, the United States Supreme Court granted a petition filed by Alliance Defending Freedom (ADF), the anti-gay “religious” law firm, on behalf of Jack Phillips and his business, Masterpiece Cakeshop, to determine whether the Colorado Court of Appeals correctly denied Phillips’ claim that he is privileged under the 1st Amendment to refuse an order to bake a wedding cake for a same-sex couple. Masterpiece Cakeshop v. Colorado Civil Rights Commission, 370 P.3d 272 (Colo. App. 2015), cert. granted, 2017 WL 2722428 (June 26, 2017). Following up quickly on this sign that the issue had caught the Court’s attention, ADF filed a Petition for Certiorari on July 14, seeking review of the Washington Supreme Court’s unanimous rejection of a 1st Amendment appeal by a florist who declined to provide flowers for a same-sex wedding. State of Washington v. Arlene’s Flowers, Inc., 389 P.3d 543 ( Wash. Feb. 16, 2017), petition for certiorari filed, Arlene’s Flowers, Inc. v. State of Washington (July 14).

In April, Justice Anthony Kennedy, responsible for motions from cases within the geographical boundary of the 9th Circuit, had granted a motion by ADF for an extension of time to file a petition. The filing took place shortly before the extension would expire.

The Masterpiece Cakeshop petition was filed last July 22, and had been listed for discussion during the Court’s conferences more than a dozen times. The addition of Donald Trump’s nominee, Neil Gorsuch, to fill a vacancy on the Court was likely the catalyst for a decision to grant review, although the ultimate disposition of the case could heavily depend on the views of Justice Kennedy, the “swing justice” on the Court in cases involving LGBT issues. However, in an interesting twist, one of the main precedents that stands in the way of a victory for Phillips and Masterpiece Cakeshop is an opinion written in 1990 by Justice Antonin Scalia, whose death led to Gorsuch’s appointment.

The Petition asked the Court, in effect, to reverse or narrow its longstanding precedent, Employment Division v. Smith, 494 U.S. 872, in which Justice Antonin Scalia wrote that individuals do not have a constitutional right based on their religious beliefs to refuse to comply with “neutral” state laws of general application. Neutral state laws are those that do not directly concern religious beliefs or practices, but whose application may incidentally affect them. In response to this decision, both Congress and many state governments have passed statutes allowing persons to claim religious exemptions from complying with statutes under certain circumstances.

The question which the Court will consider, as phrased by ADF in its petition, is: “Whether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment?”

The Court has addressed the free speech aspects of this issue in the past. In Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), the Court ruled that a state’s public accommodation law would have to give way to the 1st Amendment expressive association rights of the organizers of Boston’s St. Patrick’s Day Parade, who refused to allow an LGBT group to march under its own banner in the parade. The Court ruled unanimously, in an opinion by Justice David Souter, that a parade is a quintessential expressive activity, and the organizers of the parade have a right to exclude groups whose presence would convey a message that the parade organizers do not wish to convey.

By a bare 5-4 majority, the Court extended that ruling in Boy Scouts of America v. Dale, 530 US 640 (2000), in which Chief Justice William Rehnquist wrote for the Court, holding that the Boy Scouts of America, like the Boston parade organizers, is an expressive association and could refuse to allow an openly gay man to serve as an assistant scoutmaster because this would communicate to its members and the public a view as to homosexuality that the BSA did not want to communicate. The ruling sparked two dissenting opinions, sharply contesting the majority’s weighing of rights in allowing the Boy Scouts to discriminate and challenging the view that BSA could be characterized as an “expressive association.” Interestingly, the winning parties in both of these cases have over time come to see the wisdom of allowing at least some LGBT people to participate in their activities. The Boston parade organizers have allowed some LGBT groups to participate in their parade in recent years and BSA voted to allow its local troops to permit participation by LGBT people as members and adult leaders, although troops sponsored by religious organizations have continued to exclude LGBT people in some places.

The Court has yet to return to the religious objection aspect of this case. A few years ago, it refused to review a decision by the New Mexico Supreme Court, Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53 (2013), holding that a wedding photographer did not have a 1st Amendment right to refuse to provide her services to a lesbian couple seeking photographic documentation of their commitment ceremony. Since then, courts in several other states have rejected religious exemption claims by various businesses that provide wedding-related services, including a recent New York ruling refusing a religious exemption to a farm that had hosted and catered weddings. See Gifford v. McCarthy, 23 N.Y.S.3d 422

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The more recent Supreme Court *Hobby Lobby* case, in which the Court held that a closely-held corporation could refuse on religious grounds to cover certain contraceptive methods under its health care plan, was litigated in terms of a statutory exemption provided by the federal Religious Freedom Restoration Act, and thus was not grounded on a constitutional claim.

A recent appellate ruling by a Kentucky court, however, upheld the right of a company that makes custom t-shirts to refuse an order from a gay organization for shirts to publicize the organization’s Gay Pride festival. See *Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, 2017 Ky. App. Unpub. LEXIS 371, 2017 WL 2211381 (May 12, 2017). The 2-1 ruling was premised on the court’s conclusion that the denial of services was not based on the sexual orientation of anybody, but the concurring judge also cited the state’s Religious Freedom Restoration Act, while the dissenter found a clear violation of the municipality’s anti-discrimination law and no right to a religious exemption.

In the case granted review by the Supreme Court, Charlie Craig and David Mullins were planning to go out-of-state to marry, because in 2012, Colorado did not yet allow same-sex marriages. However, they planned to follow up with a celebration near their home in order to more easily involve their family and friends, and went to Masterpiece Cakeshop to order a cake for the occasion. The owner, Jack Phillips, declined their order, citing his religious objection to same-sex marriage. When Craig and Mullins publicized this refusal, they were offered a free wedding cake by another bakery which they accepted, but they also decided to file a charge of sexual orientation discrimination with the Colorado Civil Rights Division. The Division ruled in their favor, approving an administrative law judge’s decision that rejected Phillips’s 1st Amendment defenses of free exercise of religion and freedom of speech and found that Phillips had violated the state’s statutory ban on sexual orientation discrimination by businesses.

ADF appealed the administrative ruling to the Colorado Court of Appeals, which rejected both of Phillips’ constitutional arguments. The court held that baking and decorating a wedding cake is not speech or artistic expression, as Phillips had argued, and that the Commission’s order “merely requires that [Phillips] not discriminate against potential customers in violation of [the Colorado Anti-Discrimination Act] and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.” The court deemed the Act to be a “neutral law of generally applicability,” and thus within the scope of the Supreme Court’s Employment Division v. Smith precedent. Colorado does not have a Religious Freedom Restoration Act that could arguably create a statutory exemption to the anti-discrimination statute.

Because the Supreme Court granted review on both the free speech and religious exercise claims, the result might be a split decision by the Court. If it wants to adhere to a broad view of Employment Division v. Smith, it can easily follow the route taken by various state courts that have refused to allow businesses to claim a constitutional religious exemption from complying with anti-discrimination laws. Or, it could use this case to back away from the Employment Division holding or narrow it in some way.

The Court is unlikely to rule for Phillips on the free speech argument if it sticks with its precedents, since the recognized constitutional exception is for organizations or activities that have a primary or significant expressive purpose. Both *Hurley* and *Dale* involved non-profit organizations, not businesses, that were engaged in activities that the Court found (by only a narrow margin in the case of the Boy Scouts) to have strong expressive association claims. It is unlikely that a business whose primary activity is selling cakes could make a similar claim. But the Supreme Court can be full of surprises, and there have been significant changes in its membership since these cases were decided. The Court might bow to the argument by ADF that people of strong religious convictions who wish to incorporate those convictions into their businesses have a right not to be compelled by the government to undertake activities that would express a view contrary to their religious beliefs.
Giacomini of Denver-based Reilly Pozner LLP, filed an amicus brief in response to the petition. Given the wide-ranging interest in the issues underlying this case, it is likely that the Court will receive a mountain of amicus briefs. Oral argument will be held sometime next winter.

ADF’s Petition filed in the Arlene’s Flowers case poses two questions: (1) “Whether the creation and sale of custom floral arrangements to celebrate a wedding ceremony is artistic expression, and if so, whether compelling their creation violates the Free Speech Clause; and (2) Whether the compelled creation and sale of custom floral arrangements to celebrate a wedding and attendance of that wedding against one’s religious beliefs violates the Free Exercise Clause.” Washington State, like Colorado, has a statute that bans sexual orientation discrimination by businesses selling goods and services to the public. The Washington Supreme Court had rejected ADF’s argument that designing flower arrangements is the kind of “expressive” conduct that enjoys 1st Amendment protection in this context. ADF contends that the state court’s reasoning “conflicts with the precedent of this Court and the Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.” It also argues that there is no sexual orientation discrimination by the Petitioner, asserting that it “hires LGBT employees and serves LGBT clients on a regular basis” and had a “warm and friendly” relationship with one of the men, Robert Ingersoll, going back many years, but that the proprietor, Barronelle Stutzman, has a strong religious objection to same-sex marriages and resists being compelled to design and install floral arrangements for them. The ACLU of Washington has been representing Ingersoll and his husband Curt Freed in this case, which was actually initiated by the state attorney general in response to press reports about the florist’s refusal of their business. The court levied a substantial fine, and the Petition claims that the question of whether the business can continue turns on the outcome of this appeal.

11th Circuit Denies En Banc Review in Evans, Setting Up Supreme Court Appeal

The 11th Circuit Court of Appeals denied a petition for rehearing en banc on July 6 in Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017), in which a three-judge panel comprised of two circuit judges and a district court judge ruled that binding circuit precedent (from the old 5th Circuit) precluded the panel from reconsidering the question of whether Title VII’s ban on sex discrimination includes sexual orientation discrimination.

Plaintiff Jameka K. Evans, represented by Lambda Legal, had urged the Circuit to reconsider the issue en banc, noting that the 7th Circuit had recently become the first federal circuit court to construe Title VII to apply to such claims, in Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. en banc 2017), and that the 2nd Circuit has granted en banc review of the same question in Zarda v. Altitude Express, 855 F.3d 76 (2nd Cir. 2017), to be argued in September.

Lambda Legal promptly announced that it would be filing a petition for certiorari with the Supreme Court, en banc review of the same question in Evans v. Georgia Regional Hospital, which would be due to be filed by the middle of the first week in October, just as the Court is beginning its October 2017 Term. A brief in opposition to the Petition seems unlikely, as Georgia Regional Hospital did not appear to argue before the 11th Circuit panel, but one could be filed up to 30 days after the Petition for Certiorari is filed. Thus, it seems likely that the Supreme Court would not start discussing the petition in a cert conference until late October or November if the parties use their full allotted time under the Supreme Court rules to draft and submit their papers to the Court.

Surprisingly, according to the terse announcement issued by the 11th Circuit, “no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are Denied.” In light of the recent circuit split opened up by the 7th Circuit’s decision and the impending 2nd Circuit rehearing, one would have thought that at least one judge of the 11th Circuit, perhaps the partial dissenter from the panel, Judge Robin Rosenbaum, would have at least have called for a poll. But then, perhaps she didn’t because she knew it would not carry a majority of the very conservative 11th Circuit judges. Furthermore, the fact that the appellee didn’t even bother to put in an appearance for the panel argument may have given the judges pause. Besides, they must have considered that if they decided the case against the plaintiff, she would petition the Supreme Court in any event, so why take on the burden of an en banc argument and drafting a new opinion if the case was Supreme Court-bound in any event?

Although some hopes had been expressed that this question of Title VII coverage of sexual orientation claims might be resolved through an emerging consensus in the courts of appeals, in most circuits that would require en banc reconsideration in light of older panel decisions, and in the end it was always likely that it would have to be resolved through a Supreme Court ruling or new federal legislation. This denial of review by the 11th Circuit seals the matter: a consensus will not be achieved through court of appeals rulings. The pending Equality Act, of course, would amend Title VII to add sexual orientation and gender identity or expression to the existing list of forbidden grounds of discrimination. Although recently reintroduced in Congress, it lacked Republican co-sponsors on introduction and was not expected to move in the Republican-controlled Congress.
The timing of a cert petition would raise interesting questions concerning the 2nd Circuit’s impending en banc argument in Zarda. The argument is scheduled for September 26, shortly before the due date for the Evans cert petition, which might well be filed earlier than the deadline if Lambda Legal wants to push things for an early cert grant. Assuming that the 2nd Circuit would not postpone the argument when the Supreme Court had not yet announced whether it would review Evans, it is possible that the 2nd Circuit would add to the weight of the circuit split by following the lead of the 7th Circuit and issuing a decision either before or shortly after the Supreme Court announces whether it will accept Evans for review. Alternatively, if the Supreme Court does announce a cert grant shortly after the Zarda argument, it is possible that the 2nd Circuit will stay its hand and wait to see what the Supreme Court does with Evans before deciding Zarda. This would track the experience of some courts of appeals during 2015, which delayed proceeding with arguments or acting after arguments during the almost-six-month period between the cert grant in Obergefell v. Hodges and the Court’s announcement of its decision.

In any event, were the Supreme Court to add Evans to its argument docket for the October 2017 Term, it would immediately make the Term particularly significant for LGBT rights, as the Court announced on June 26 that it would review the Colorado Court of Appeals’ decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission, 370 P.3d 272 (Colo. App. 2015), cert. granted, 2017 WL 2722428 (June 26, 2017), to determine whether a baker has a 1st Amendment right to decline an order for a wedding cake from a same-sex couple in a state whose public accommodations law specifically prohibits discrimination because of sexual orientation. Furthermore, on July 14, counsel from ADF filed a cert petition in the Washington state florist case presenting the same issues...
and – unlike the Fifth Circuit in DeLeon – it did not hold that the Texas DOMAs are unconstitutional.” DeLeon refers to DeLeon v. Abbott, 791 F.3d 619 (5th Cir. 2015), the Texas marriage equality decision that was issued by the U.S. Court of Appeals for the 5th Circuit a few days after Obergefell, holding that the Texas ban on same-sex marriage was unconstitutional in light of Obergefell.

Instead of cutting through procedural complications and saving everybody involved lots of wasted time and money through prolonged litigation, the Texas court has now repeated the error of the Arkansas Supreme Court by insisting that Obergefell does not clearly require “the same” rights, benefits and responsibilities, and, incredibly, cited in support of this point the Supreme Court’s decision on June 26 to grant a stay to a Colorado Court of Appeals ruling, Masterpiece Cakeshop v. Colorado Human Rights Commission, 370 P.3d 272 (Colo. App. 2015), cert. granted, 2017 WL 2722428 (June 26, 2017), which concerns a totally different question: Whether a baker has a 1st Amendment right to discriminate against a same-sex couple by refusing an order for a wedding cake in violation of a state anti-discrimination law. The Supreme Court did not address in Obergefell the question of reconciling a potential clash between state anti-discrimination laws and the federal constitutional rights of free exercise of religion and freedom of speech enjoyed by non-governmental entities and individuals in their dealings with the state. But the Court most emphatically did address the issue that governmental actors, bound by the 14th Amendment, must accord the same rights to all married couples, whether same-sex or different-sex, and it reiterated that point in Pavan by quoting from Obergefell.

The Texas case dates back to 2013, when Houston’s Mayor Annise Parker, an out lesbian, reacted to U.S. v. Windsor, 133 S. Ct. 2675, by extending benefits to the same-sex spouses of Houston city employees who had gone out of state to get married. At the time, Texas had both a state Defense of Marriage Act and a similar constitutional amendment, and Houston had a charter provision limiting municipal employee benefits to legal spouses and children of employees. Relying on an advisory opinion from the city attorney, Parker concluded that after Windsor it was unconstitutional to refuse to recognize those out-of-state marriages.

Jack Pidgeon and Larry Hicks, Houston taxpayers who identified themselves as devout Christians who did not want their tax money going to subsidize same-sex marriages, filed a lawsuit challenging the benefits extension in December 2013, and refiled in October 2014 after the first case was dismissed for “want of prosecution” while the parties were wrangling about the city’s attempt to remove the case to federal court. Pidgeon and Hicks claimed, based on state and city law, that the benefits extension was “expending significant public funds on an illegal activity.” They persuaded a local trial judge to issue a preliminary injunction against continued payment of the benefits while the case was pending, and the city appealed.

The Texas Court of Appeals sat on the appeal while marriage equality litigation proceeded both in the federal courts in Texas – the DeLeon case – and nationally. Shortly after the Supreme Court ruled in Obergefell on June 26, 2015, the 5th Circuit, affirming a federal district court ruling, held in DeLeon that the Texas laws banning same-sex marriage were unconstitutional.

Then the Texas Court of Appeals reversed the trial court’s preliminary injunction in the Pidgeon case and sent the case back to the trial court with instructions to decide the case “consistent with DeLeon.” Pidgeon and Hicks sought to appeal this ruling to the Texas Supreme Court, but were initially turned down by that court. Then, the top Republican elected officials in the state – the governor, lieutenant governor, and attorney general – and a bunch of other non-parties filed papers with the Supreme Court urging it to change its mind and allow the appeal, which the court eventually agreed to do.

In its June 30 ruling, the court buried itself in procedural complications. Based on its incorrect conclusion that the Obergefell decision, as amplified by the Pavan ruling, does not decide the merits of this case, and further giving credence to the plaintiffs’ argument that Obergefell cannot be construed to have any retroactive effect because “the Supreme Court acknowledged that it was attributing a new meaning to the Fourteenth Amendment based on ‘new insights and societal understandings,’” the court opined that Pidgeon and Hicks should have an opportunity to “develop” their argument before the trial court. This contention on retroactivity is not the view that has been taken by other courts, including some that have retroactively applied Obergefell to find that cohabiting same-sex couples in states that still recognize common law marriage can be held to have been legally married prior to that ruling. Indeed, the federal government even gave Windsor retroactive application, allowing same-sex couples to file for tax refunds for earlier years on the basis that the Internal Revenue Service’s refusal to recognize their state-law marriages under DOMA had been unconstitutional.

The Texas Supreme Court agreed with Pidgeon that the Texas Court of Appeals should not have directed the trial court to rule “consistent with DeLeon” because, technically, the state trial courts are not bound by constitutional rulings of the federal courts of appeals, only by U.S. Supreme Court rulings on questions of federal law. DeLeon could be a “persuasive” precedent, but not a “binding” precedent. This merits a big “so what?” After all, the real question in this case is whether Obergefell requires that married same-sex couples are entitled to the “same benefits” as different-sex couples from their municipal employer, and the answer to that could not be clearer, especially after Pavan v. Smith. (Indeed, Justice Gorsuch’s dissenting opinion in Pavan repeats the same mistaken assertion – that Obergefell does not clearly require the “same” rights and benefits, which the Court responds to by quoting from Obergefell to the opposite effect – and is just as disingenuous as Justice Boyle’s decision for the Texas court.)

Now the case goes back to the trial court in Houston, where the outcome should be dictated by Pavan and Obergefell and the court should dismiss this case. But, since this is taking place in Texas, where contempt for federal law is openly expressed by public officials, who knows how it will turn out? ■
A three-judge panel of the Houston-based U.S. Court of Appeals for the 5th Circuit dissolved a preliminary injunction and dismissed two lawsuits challenging the constitutionality of H.B. 1523, a Mississippi law that was enacted last year. *Barber v. Bryant*, 2017 Westlaw 2702075, 2017 U.S. App. LEXIS 11116 (June 22, 2017). The statute intended to assure that people who hold anti-gay or anti-transgender views cannot be subject to any adverse action from their state or local governments, and that public institutions can bar transgender people from using gender-labelled public facilities inconsistent with the sex indicated on their birth certificates. Counsel from Lambda Legal, the Mississippi Center for Justice, and the Campaign for Southern Equality filed petitions for rehearing en banc on July 6.

U.S. District Judge Carlton Reeves, finding that the plaintiffs were likely to prevail on their claim that the law violated their equal protection rights as well as the constitutional prohibition on establishment of religion, issued a preliminary injunction last June 30, so the law, which was to become effective last July 1, has not gone into effect. Ruling on June 22, the panel found that none of the plaintiffs had standing to bring this challenge to the law because, in the court’s opinion, none had suffered an individualized injury that would give them the right to challenge the law.

The court was careful to state that because it did not have jurisdiction over the case, it was not expressing an opinion about whether the law was constitutional.

Plaintiffs’ attorneys from the two cases announced that they would seek “en banc” review by the full 5th Circuit bench and, failing that, would petition the Supreme Court. The 5th Circuit is a notably conservative bench, however, with only four of the fourteen active judges having been appointed by Democratic presidents. The three-judge panel that issued this decision consisted entirely of Republican appointees.

Section 2 of the law identifies three “religious beliefs or moral convictions” and states that people who act in accord with those beliefs or convictions are protected from “discriminatory” action by the state, such as adverse tax rulings, benefit eligibility, employment decisions, imposition of fines or denial of occupational licenses. The “religious beliefs or moral convictions” are as follows: (a) Marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) male (man) or female (woman) refers to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”

The statute provides further that people who claim to have suffered some adverse action because they act on these beliefs have a right to sue state officials, and to use this law as a defense if they are sued by individuals.

Making its effect more concrete, the statute specifically protects religious organizations that want to discriminate against LGBTQ people in employment, housing, child placement, and marriages; it also protects parents who decide to “raise their foster or adoptive children in accordance” with one of the three listed beliefs. Businesses that provide wedding services are protected against liability for denying such services to LGBTQ people, as are medical and mental health care providers, except for emergency medical situations. For example, a health care provider cannot interfere with visitation with a patient by their designated representative (who may be a same-sex partner or spouse). State agencies that license professionals may not refuse to license somebody because they hold or articulate one of the listed beliefs.

The statute also specifically protects “any entity that establishes sex-specific standards for facilities such as locker rooms or restrooms,” and protects state employees who want to voice their beliefs as listed in the statute. It also specifically allows county clerks and judges to refuse to deal with same-sex couples seeking to marry, so long as arrangements are made to allow such marriages to take place without delay.

To sum up, the statute clearly sought to exempt religious organizations and individuals from having to treat LGBTQ people as equal with everybody else, providing “special rights” to discriminate against LGBTQ people and same-sex couples. Ironically, because Mississippi law does nothing to protect the civil rights of LGBTQ people, many of the applications of this statute are more symbolic than real, at least as far as state law goes. A Mississippi landlord incurs no state law penalty for refusing to rent a dwelling place to a same-sex couple, for example, and businesses in Mississippi are free to deny goods or services to people who are gay or transgender without incurring any state law penalty. Few local governments in Mississippi have adopted laws that would be affected, although some educational institutions would clearly be affected, especially by the facilities access provision.

The problem for the plaintiffs, in the eyes of the court of appeals, was that the judges could not see that any of the plaintiffs have the kind of particularized injury to give them standing to sue the state in federal court when this law had not even begun to operate. The plaintiffs had relied heavily on the argument that the law imposed a stigma, signaling second-class citizenship, and sought to enshrine by statute particular religious views, but the court rejected these arguments as insufficient.

The plaintiffs pointed to cases in which courts had ruled that plaintiffs offended by government-sponsored religious displays had been allowed to challenge them under the 1st Amendment in federal court, but Judge Jerry E. Smith, writing for the panel, rejected this analogy. The court also rejected taxpayer standing, finding that H.B. 1523 did not authorize expenditures in support of religion. The court found that by protecting both “religious beliefs and moral convictions,” the legislature
had avoided privileging religion, since persons whose anti-gay beliefs were not religiously motivated would be protected from adverse government treatment under this act. An atheist who believes same-sex marriage is wrong or that sex is immutable would be protected, even if these beliefs had no religious basis.

One plaintiff who based his standing on his intention to marry in the future was rejected by the court, which pointed out that he did not specify when or where he intended to marry. “He does not allege that he was seeking wedding-related services from a business that would deny him or that he was seeking a marriage license or solemnization from a clerk or judge who would refuse to be involved in such a ceremony, or even that he intended to get married in Mississippi,” wrote Judge Smith.

The court made clear that if anybody actually suffers a concrete injury after the law goes into effect, they could file a new lawsuit and raise their challenge.

Plaintiffs’ Petition for Rehearing En Banc relied on cases from other circuits, as well as the 5th Circuit, to argue that there is clear circuit court authority for finding standing in situations such as this. Indeed, it quoted Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), to the effect that “illegitimate unequal treatment is an injury unto itself.” The “unequal treatment” of sexual minorities under H.B. 1523 is too clear to miss.

One of the lawsuits, brought on behalf of a wide variety of plaintiffs, was spearheaded by Lambda Legal’s Atlanta office. The other, with Campaign for Southern Equality as lead plaintiff, was filed by Roberta Kaplan, who represented that organization in Mississippi’s marriage equality (also decided by Judge Reeves) and adoption lawsuits. Also participating in the challenge is the Mississippi Center for Justice. Individual counsel listed on the second Petition for Rehearing En Banc include local counsel Robert B. McDuff of Jackson, MS, Susan L. Sommer of Lambda Legal’s New York headquarters office, Beth L. Olansky of the Mississippi Center, and Elizabeth Littrell from Lambda Legal’s Southeast Regional Office in Atlanta.

Nevada Supreme Court Affirms Parental Rights for Former Gay Partner of Adoptive Dad

The Nevada Supreme Court has unanimously affirmed a District Court decision granting a gay man paternity over a child adopted by his former partner. Four members of the court based their June 22 ruling on the concept of “equitable adoption,” while the other three based their ruling on an interpretation of the state’s “presumption of paternity” under Nevada’s parentage statute. NRS 126.041. The case is Nguyen v. Boynes, 2017 Nev. Adv. Rep. 32, 2017 Nev. LEXIS 45, 2017 WL 2733779. Justice Ron D. Parraguirre wrote the opinion for the majority of the court, and Justice Lidia S. Stiglich wrote for the concurring justices.

Ken Nguyen and Rob Boynes began dating in November 2009. “At some time during the relationship,” wrote Justice Parraguirre, “a decision was made to adopt a child.” They approached Catholic Charities of Southern Nevada, but that organization would not arrange joint adoptions for same-sex couples, so the men agreed that Ken would adopt the child and then Rob would later initiate a second-parent adoption. They went through Catholic Charities’ procedure beginning in July 2012, and in February 2013, Catholic Charities notified Ken that it was placing a newborn child with him for adoption. Both men “were present to receive the newborn child,” and both participated as parents after the placement.

When Ken’s co-workers arranged a baby shower, it was held at Rob’s house. The child was baptized at the Desert Spring United Methodist Church, with both men standing in as fathers and listed on the baptism certificate. However, shortly after that they ended their relationship. “Rob asked Ken to add his name to the child’s birth certificate, and Ken refused,” wrote Justice Parraguirre. The formal adoption by Ken was finalized in October 2013. “Both parties sat at the plaintiff’s table during the adoption hearing, and Ken reiterated once again that he would not place Rob’s name on the child’s birth certificate, nor would he allow a second-parent adoption.”

Despite Ken’s position on the legal issues, the men continued to share parental duties, as they had done from the outset. Indeed, “Since the child’s first day of placement with Ken, he has primarily been under Rob’s care.”

“The child stayed overnight at Rob’s house during the first night of placement and continued to do so for more than a month,” after which he spent weekends at Ken’s house. After two months of placement, Ken decided to hire a neighbor as a full-time babysitter, but after several weeks they reverted back to their previous arrangement of the child staying with Rob during the week until Ken enrolled the child in daycare in May.

Four members of the court based their June 22 ruling on the concept of “equitable adoption,” while the other three based their ruling on an interpretation of the state’s “presumption of paternity” under Nevada’s parentage statute.
2014. “Rob primarily took the child for doctor visits and provided most of the baby supplies,” wrote Parraguirre.

Additionally, in November 2013, Rob took the child to North Carolina to visit Rob’s sister during Thanksgiving.

Rob filed a petition for paternity and custody in the Clark County Family Court Division in May 2014. After a full hearing, Judge Bill Henderson decided that Rob was entitled to a “presumption of paternity” under the Nevada parentage statute, and held that the men were to have joint legal and physical custody. Judge Henderson also referred to the “equitable adoption” theory in reaching his decision. Ken appealed the order.

The Supreme Court explained that equitable adoption is “an equitable remedy to enforce an adoption agreement under circumstances where there is a promise to adopt, and in reasonable, foreseeable reliance on that promise a child is placed in a position where harm will result if repudiation is permitted.”

“This case concerns whether there was an agreement by the parties to adopt the child together that was formed at the beginning of the adoption process, and whether accompanying that agreement was an intent and promise by Ken to allow Rob to adopt the child second due to Catholic Charities’ policy disallowing joint adoptions for same-sex couples,” wrote Justice Parraguirre. “The parties do not dispute their non-biological relations with the child,” he continued, so “Nevada’s Uniform Parentage Act is not implicated. We thus conclude that the equitable adoption doctrine is applicable to enforce an adoption agreement under the unique factual circumstances of this case.”

The Supreme Court agreed with District Judge Henderson that Rob had satisfied the four element test set forth in Nevada’s case law: Intent to adopt, promise to adopt, justifiable reliance, and harm resulting from repudiation. The Family Court’s decision would be reviewed under the “abuse of discretion” standard, so Judge Henderson’s decision to recognize Rob as a father would be upheld if substantial evidence supports it.

The court found evidence supporting every aspect of the four-element test: that the parties intended that both would ultimately be adoptive fathers of the child, that Ken had promised Rob to facilitate his adoption second, and that Rob was an integral factor in the adoption process and was “intimately involved.” Indeed, there was testimony at the Family Court hearing by officials from Catholic Charities that both men participated in the process, “including the background check, post-placement visits, orientation, and adoption classes.”

Furthermore, from the commencement of the placement of the child with Ken, Ken treated Rob as a second parent and Rob took on parental responsibilities. Furthermore, Rob was regarded as a father to the child by others, who testified at the hearing. In a footnote, Parraguirre mentioned that “the district court found that the deterioration of Ken and Rob’s relationship during the summer of 2013 seemed to be the driving factor in Ken’s decision to not follow through with the second adoption for Rob.”

The court also found plenty of evidentiary support for Rob’s reliance on Ken’s promise. “Rob dedicated a substantial amount of his time to the adoption process. Moreover, Rob primarily cared for the child post-placement.” Rob provided the baby supplies and “made substantial changes to his house and lifestyle to accommodate the child’s needs, which included changing one of the rooms in his house to a nursery.” The court found that Ken’s repudiation of the promise produced harm: “the deprivation of Rob’s emotional and financial support to the child.” Since letting Ken repudiate his promise would be to the child’s detriment, “equity cannot allow such a result,” insisted Justice Parraguirre.

The court upheld the grant of joint legal and physical custody, finding that the Judge Henderson had not abused his discretion in light of the trial record, and rejecting Ken’s allegations of disqualifying misconduct by Rob.

The court also rejected Ken’s argument that the parentage and custody award violated his constitutional rights as an adoptive parent. He argued that the district court’s ruling was unprecedented, and had treated the men differently than it would have treated an unmarried heterosexual couple. “Here,” wrote the court, “Ken does not challenge the constitutionality of a particular statute; rather, he alleges generally that the district court treated the parties differently than it would have a heterosexual couple. However, ‘child custody determinations are by necessity made on a case-by-case basis,’ and, here, ‘there is nothing to indicate that the ultimate decision of the district court turned on [the couple’s sexual orientation].’”

Justice Stiglich, writing for herself and two others, contended that “the Nevada Parentage Act provides a more appropriate analysis in this case than the doctrine of equitable adoption.” She pointed out that in a prior case, St. Mary v. Damon, 309 P.3d 1027 (2013), the court had “clearly concluded that Nevada law does not preclude a child from having two mothers under the Nevada Parentage Act,” stating in that opinion that “the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents.

Consequently, she wrote, “Pursuant to St. Mary, if a presumption of parentage can apply to a woman in a same-sex relationship, there appears no reason why the provision of [the parentage statute] cannot apply to a man in a same-sex relationship. Because Rob submitted ample evidence to support the presumption of parentage under [the statute], I concur with the majority’s holding affirming the decision of the district court, but on different grounds.”

Rob is represented by the Pecos Law Group and Bruce I. Shapiro and Jack W. Fleeman, of Henderson, Nevada. Ken is represented by McFarling Law Group and name-partner Emily M. McFarling of Las Vegas.
Massachusetts High Court Gives OK to Non-Governmental Needle Exchange Programs

Giving a very close reading to Massachusetts statutes regulating the sale of hypodermic needles and authorizing the Public Health Department to set up needle exchange programs, the Massachusetts Supreme Judicial Court unanimously ruled on June 14 that there was no legal impediment to a private, non-profit group setting up a free needle-exchange program without the specific approval of local government authorities. The ruling came in response to an attempt by the Town of Barnstable to shut down a free needle exchange program in Hyannis, on Cape Cod, started by the AIDS Support Group of Cape Cod, referred to throughout Justice Barbara Lenk’s opinion for the Court as ASGCC. AIDS Support Group of Cape Cod, Inc. v. Town of Barnstable, SJC-12224, 2017 Mass. LEXIS 391, 2017 WL 2582663 (June 14, 2017).

ASGCC started its “free hypodermic needle access program” in 2009, which it has been operating in Hyannis, Provincetown, and Falmouth. The program is intended to help reduce the spread of HIV and hepatitis C by making sure that injectable drug users have clean needles and no need to share used needles. ASGCC made no attempt to get approval for their program by the local town government, probably anticipating that it would be controversial and likely denied.

According to Justice Lenk’s opinion, “ASGCC seeks to ensure that its clients use a clean needle every time they inject opiates or other drugs. ASGCC therefore conducts an initial assessment of each person who requests needles or other services and provides only as many needles as staff believe will be necessary so that the client will be able to use a clean needle for each injection. ASGCC provides a collection receptacle for the return of used needles at its facility, encourages clients to return needles, and gives each client an individual ‘sharps container’ for storing used needles before they are returned, but does not require a return of the same number of needles distributed in order to provide additional needles.”

ASGCC also provide other free services such as medical case management, peer support groups, housing, nutritional programs, testing for HIV and other blood-borne conditions, and risk reduction strategies.

The current lawsuit got under way when town authorities claim to have discovered “improperly discarded hypodermic needles in public places” and determined that some of them came from ASGCC’s distribution activities. The town police hand-delivered a “warning” letter to ASGCC’s facility on September 22, 2015, and the town’s director of public health mailed a “cease and desist” order on September 23, 2015, threatening action against ASGCC if it continued to distribute needles.

ASGCC obtained assistance from GLBTQ Legal Advocates & Defenders (GLAD), a Boston-based public interest law firm, which filed suit on their behalf in the Massachusetts Superior Court. GLAD attorney Bennett Klein argued that the town’s order was not authorized by law and sought an injunction against enforcement of the town’s cease and desist order. Superior Court Judge Raymond P. Veary, Jr., issued a preliminary injunction and the case was certified for a quick appeal, eventually bypassing the Appeals Court and going directly to the Supreme Judicial Court due to the urgency of resolving the issue.

Massachusetts, like many other states, outlawed the sale, distribution and private possession of hypodermic needles except for those sold by licensed pharmacists to fill a prescription by a licensed physician. However, in 2006, in response to intense lobbying by HIV prevention groups and public health officials, the legislature amended the statute to regulate only sales, removing criminal penalties for possession, and authorizing the Department of Public Health to operate non-sale needle exchange programs with local approval.

In defending against ASGCC’s lawsuit, the town argued that under the statute needles can only be legally obtained in Massachusetts either from a licensed pharmacist filling a prescription or from the needle exchange program operated by the Department of Public Health with local government approval.

The Court agreed with GLAD’s argument that this is not what the statutes provide. For one thing, the criminal penalties for sale by anyone other than a licensed pharmacist do not logically apply to ASGCC’s programs, because they are not selling the needles. They distribute them for free to those who qualify to participate in the program. Furthermore, the only free needle distribution programs that require local government approval under the statute are those operated by the state Department of Public Health.

“The statutory language is clear that programs such as ASGCC’s are not prohibited,” wrote Justice Lenk, “the legislative history does not evidence an intent to the contrary, and interpreting the two statutes to allow private entities to operate non-sale needle exchange programs does not give rise to an absurd result,” contrary to the town’s arguments.
On the contrary, what the Court would consider to be “absurd” was the town’s argument that the statutes restricting sale of hypodermic needles apply to ASGCC’s free-distribution program, or that by authorizing the Department of Public Health to set up needle exchange programs, the legislature was somehow, without saying so, making those programs the only venue for free distribution of needles. Indeed, one could argue that by decriminalizing private possession of needles and restricting sales to licensed pharmacists, the legislature was leaving unregulated the free distribution of needles. But the Court did not have to go that far, merely to find that there was no applicable statutory restriction that would support the town’s cease and desist order.

The town argued that the legislature had “anointed” the pharmacists as the “gatekeepers” of “sale and distribution” of hypodermic needles. But the statute does not forbid non-sale distribution by those who are not pharmacists. The town pointed to failed legislative proposals that would have specifically allowed non-profit groups like ASGCC to distribute needles, and argued that the legislature’s intent to ban such programs could be inferred from the failure to pass such bills. The Court refused to go down the road of reading an affirmative legislative prohibition into the failure of the body to pass a bill.

The possibility that an adverse ruling in this case could spell the end of free needle distribution programs in Massachusetts drew wide attention to the case. The Court receiving a joint amicus brief from a wide array of HIV, LGBT, and professional public health organizations arguing against the town’s position. Despite evidence that needle exchange programs administered by non-governmental community based groups have been effective at reducing the rate of HIV transmission through shared hypodermic paraphernalia, such programs are still controversial in many parts of the country. Although the Court’s opinion did not explicitly review policy arguments supporting such programs, the opinion may add support to efforts elsewhere to establish such programs where they don’t presently exist.

9th Circuit Remands Ethiopian Gay Torture Claim for Further Consideration

A panel of the U.S. Court of Appeals for the 9th Circuit has remanded a gay Ethiopian’s Convention against Torture (CAT) claim to the Board of Immigration Appeals (BIA) to consider the evidence he submitted establishing that country conditions have worsened for homosexuals since the time the Board denied him relief in 2007, in Agonafer v. Sessions, 2017 WL 2698257, 2017 U.S. App. LEXIS 11190 (9th Cir., June 23, 2017).

Petitioner has lived in the United States since 1980, and he had been a lawful permanent resident since 1990. Following a series of criminal convictions, he was placed in removal proceedings. He was initially granted relief; however, after several appeals by the Department of Homeland Security, the BIA denied his applications for relief in 2007, including his claim that he would be tortured if returned to Ethiopia as a homosexual man. (Persons who are removable because of criminal activity in the U.S. may still seek to remain in the country under the CAT treaty by showing that they would be subject to torture or serious harm in their home country.) In 2013, the Petitioner filed a motion to reopen his CAT claim based upon evidence changed country conditions. He submitted substantial documentation relating to the worsened treatment of homosexuals in Ethiopia after 2007. The BIA found that “the evidence reflects ongoing and substantially similar treatment of homosexuals that existed at the time of respondent’s hearing” and that Petitioner had not “alleged receiving any specific threat,” refusing to reconsider his claim.

Petitioner sought review by the federal court. District Judge Paul C. Hack (S.D. Fla.), sitting as a member of the panel by designation, writing the opinion, finding that despite certain jurisdiction-stripping provisions of the Immigration and Nationality Act relating to persons convicted of crimes, the court retained jurisdiction to review Petitioner’s case under the CAT because the court was “called upon to apply the legal standard for prevailing on a motion to reopen based on changed country conditions to the established facts of the case.” Judge Hack set forth the standard of review: that the BIA’s decision could be reversed only if the Board had abused its discretion in denying the motion to reopen.

Judge Hack described in detail numerous precedent decisions relating to motions to reopen for changed country conditions which warranted reopening, stating that a motion can be successful if Petitioner proves: 1) conditions have changed in the country of removal; 2) the evidence submitted was material to the case; 3) the evidence was not previously available; and 4) that the new evidence and record evidence combined establish prima facie eligibility for relief.

Here, Judge Hack found the evidence did not show “ongoing and substantially similar treatment of homosexuals” at the time of Respondent’s hearing, as the BIA had stated, but rather that “his new evidence shows a stark deterioration in conditions for homosexuals since June 2007.” Judge Hack summarized the evidence and concluded that the BIA abused its discretion “because it clearly disregarded or failed to give credit to the post-2007 evidence.” Judge Hack further rejected the government’s argument that Petitioner failed to submit evidence of “individual relevancy,” stating “it is undisputed that [Petitioner] is a homosexual male. Given [Petitioner’s] sexual orientation and the evidence of the treatment of homosexuals in Ethiopia, there is sufficient evidence that, if proved, would establish his prima facie eligibility for deferral of removal under the CAT.” Accordingly, the court granted the Petition for Review and remanded the case to the BIA with instructions to reopen the CAT claim to consider the changed country conditions evidence. – Bryan Johnson-Xenitelis
New York’s Highest Court Unanimously Revives Strict Giuliani-Era Zoning Regulations for NYC Porn Shops and Strip Clubs

In the last round, the Appellate Division, First Department affirmed that the 2001 zoning amendments targeting 60/40 adult establishments offended the First Amendment, stressing that the city failed to show the adult businesses retained a “predominant sexual focus.”

In the adult entertainment constitutional challenge equivalent of Dickens’s Jarndyce and Jarndyce, the New York Court of Appeals may have finally ended decades of litigation over restrictions on the location of adult businesses in New York City. The state’s highest court, albeit with one vacancy and Chief Judge Janet DiFiore not participating, unanimously reversed a divided panel of the Manhattan-based Appellate Division, concluding that the 2001 amendments, passed by the City Council to close loopholes in an earlier zoning scheme, did not violate the First Amendment. For the People Theatres of N.Y. Inc. v. City of New York, 2017 WL 2427295 (N.Y. June 6, 2017). Notably, the three-judge majority overturned below included Justice, now-Judge, Paul Feinman. The week after this ruling, Governor Andrew Cuomo nominated Feinman to fill the vacancy on the Court of Appeals and the State Senate swiftly confirmed him on June 22; he is the first openly gay jurist to rise to that bench.

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

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

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

The case has gone up and down the New York State court system several times in the last 15 years, with both sides notching wins along the way. In the last round, the Appellate Division, First Department affirmed that the 2001 zoning amendments targeting 60/40 adult establishments offended the First Amendment, stressing that the city failed to show the adult businesses retained a “predominant sexual focus,” based on what the Court of Appeals would later describe as “a rigidly mechanical” consideration of four factors identified in an earlier round of the litigation. For The People Theaters of N.Y. Inc. v. City of New York, 131 A.D.3d 279 (1st Dep’t July 21, 2015). Justice Barbara Kapnick wrote for the majority, joined by Justices Angela Mazzarelli and Feinman; Justice
Third Circuit Denies Homosexual
Guyanese Torture Claim

The U.S. Court of Appeals for the Third Circuit has denied a gay man’s petition for review of ruling by the Board of Immigration Appeals (BIA), which denied his request for protection under the Convention Against Torture (CAT), in Lancaster v. Attorney General, 2017 WL 2378197, 2017 U.S. App. LEXIS 9651 (3rd Cir. May 11, 2017).

Petitioner was admitted to the United States at the age of six in 1985. He never became a U.S. citizen. In 2004, he was convicted of several bank robbery offenses and sentenced to 161 months imprisonment. He was placed in removal proceedings, where his only possible relief was deferral of removal under the Convention Against Torture (CAT). Petitioner submitted three letters in support of his claim that he would be tortured in Guyana because he is homosexual: letters from an aunt and cousin who lived in Guyana, and a letter from a cousin in the United States. Petitioner testified that his family informed him that if he returned to Guyana that he would be killed because of his sexual orientation. The Immigration Judge (IJ) asked the Petitioner whether he could avoid harm by relocating within Guyana, or whether he could avoid harm by concealing his sexual orientation or not having sex with other men. The IJ stated that she gave “less weight” to the family letters, because their writers were not available for examination in court, and denied the CAT claim. The BIA affirmed the denial, stating that the IJ had properly given less weight to the family letters.

Petitioner sought review, and was appointed pro bono counsel on appeal: Michael S. Doluisio and Ryan M. Moore from Dechert LLP (Philadelphia), and a student from the University of Pennsylvania Law School, Kimberly Cullen, who argued the appeal.

Petitioner argued that the Board misapplied precedent regarding the weight given to his family’s letters, and further that the IJ denied him due process of law, charging that she was biased against him because of his sexual orientation.

Writing for the panel, Circuit Judge Luis F. Restrepo noted that jurisdiction-stripping provisions of the Immigration and Nationality Act limit the court’s review to constitutional claims or questions of law. With respect to the letters, Judge Restrepo held that the BIA’s analysis of the letters correctly went to the content of the letters rather than the authors of the letters, in line with Board precedent, but noted that the Board’s “explanation of this precedent could have been more robust.”

With respect to Petitioner’s due process claims regarding the IJ’s question whether the Petitioner could avoid harm in Guyana by concealing his sexual orientation or not having sex with men, Judge Restrepo stated that “we do not condone these questions or suggest that they could never give rise to a due process violation,” citing Lawrence v. Texas and Obergefell v. Hodges for the “liberty protected by the Constitution that allows homosexual persons to make this choice” and that “sexual orientation is both a normal expression of human sexuality and immutable.” Judge Restrepo held that although the IJ did ask questions that suggested “problematic generalized assertions of her own,” “in the context of the record as a whole there is insufficient evidence to conclude that the overall proceedings were based in violation of [Petitioner’s] right to due process.” Accordingly, the petition for review was denied.

Judge Restrepo did, however, in a footnote, state that “we also express our gratitude to pro bono counsel for their excellent briefing and argument in this matter.” Michael S. Doluisio and Ryan M. Moore of Dechert LLP in Philadelphia PA, and law student Kimberly Cullen of University of Pennsylvania School of Law. – Bryan Johnson-Xenitelis
The Idaho Supreme Court rejected a lesbian co-parent’s custody and visitation claims in Doe v. Doe, 2017 WL 2461382, 2017 Ida. LEXIS 167 (June 7, 2017). Finding that the state legislature had not provided any legal rights for unmarried same-sex partners of birth mothers, the court affirmed a ruling against parental rights by Magistrate Judge Diane Walker (4th Jud. Dist., Ada County), and reversed Walker’s award of visitation rights.

The opinion by Justice Robyn Brody refers to the parties a Mother (the child’s birth mother) and Partner (the mother’s former same-sex partner). Mother and Partner commenced their relationship in 2006. “The two did not marry because Mother did not want the legal commitment to Partner,” wrote Justice Brody. (Of course, during the entire course of this relationship, which ended in 2012, same-sex marriage was not available in Idaho, but they could have gone to one of a handful of states or Canada if they wished to have a legal marriage that would not be recognized in Idaho.) “They jointly agreed to start a family using an anonymous sperm donor,” wrote Brody, continuing: “Mother planned to have a child regardless of whether Partner was the biological parent, and that Partner had no legal rights to the child.”

Partner sued in the Ada County Magistrate’s Court, filing a petition to establish parentage, custody and visitation. Magistrate Walker denied the parentage and custody claims, but granted visitation rights, basing her ruling on Stockwell v. Stockwell, 775 P.2d 611 (1989), in which the Idaho Supreme Court upheld the award of visitation rights to a stepfather in the context of a divorce and guardianship proceeding involving two girls, one of whom was born prior to the marriage (and was not biologically related to the father). Partner appealed the parentage and custody ruling, and Mother cross-appealed the grant of visitation.

The Supreme Court rejected Magistrate Walker’s reliance on Stockwell. Justice Brody wrote: “This Court’s decision in Stockwell is not a key to the courthouse for non-parents seeking custody of minor children. The Stockwell decision was made in the context of divorce and guardianship proceedings and cannot be used as a toe-hold for an independent custody action brought by a non-parent. This Court understands that family structures are changing, but it is not the role of this Court to create new legal relations. That is the business of the Idaho legislature.” Thus, the court reversed the award of visitation rights to Partner.

Partner had also argued that the state’s Artificial Insemination Act should be construed to give her standing to seek custody and visitation. She argued that because she consented to her partner’s insemination and should be treated the same as a husband who consents to his wife’s insemination and thus deemed to be a parent of the resulting child. The court was not persuaded, stating, “The plain language of the statute simply does not address a situation like at issue here where a child is conceived through artificial insemination by an unmarried couple. The magistrate court dismissed Partner’s claim of parentage based on this statute because Mother and Partner were not married.”

“Partner contends that section 39-5405(3) as applied to her and Child violates the Equal Protection Clause of the United States Constitution by discrimination against non-marital children. We find Partner does not have standing to raise Child’s claim.” The court concluded that Partner did not have “a sufficiently close relationship to the party whose rights she is asserting.”
a criterion that had been adopted in prior Idaho cases for determining standing of one person to pursue the rights of another person in a legal proceeding. “Partner does not have a legally recognized, protected relationship with Child. She is not related to Child by blood or by marriage. She did not adopt Child at the time of her birth, and Mother has since refused to consent to the adoption. She is not the guardian of Child, and there is no Idaho statute which authorizes Partner to direct the care, custody or control of Child in any way. The whole purpose of Partner’s constitutional challenge is to obtain the legal status that would enable her to raise Child’s claim in the first place. Without first having a legally recognized, protected relationship, she cannot assert Child’s constitutional claim.” The court emphasized that allowing Partner to bring this claim would “be undermining Mother’s constitutional rights. This we will not do.”

The court rejected Partner’s reliance on Stanley v. Illinois, 405 U.S. 645 (1972), in which the U.S. Supreme Court recognized the right of an unmarried biological father to a due process determination of best interest of the child when he sought to retain custody of his children after the death of their mother, his unmarried life partner. “Partner’s reliance on Stanley is misplaced,” wrote Justice Brody. “Peter [Stanley]’s equal protection claim was based on the state’s failure to grant him equal protection of the laws – not the children. In this case, the equal protection claim has been framed as discrimination against Child. To the extent such a claim exists, it belongs to Child and the only proper party who can raise that claim at this time is Mother.”

The case was remanded to Magistrate Walker “to vacate the temporary visitation order that was entered.” Partner is represented by Stanley Welsh of Cosho Humphrey LLP, Boise. Mother is represented by The Law Offices of J. Scott Escujuri, PLLC, Boise; Emily Haan of San Francisco; and Ferguson Durham PLLC, Boise. Ms. Haan argued the appeal.

### European Human Rights Court Rules Against Russia on “Homosexual Propaganda” Laws

A seven-member chamber of the European Court of Human Rights in Strasbourg issued a judgment on June 20 in the case of Bayev & Others v. Russia, Applications nos. 67667/09 and 2 others, holding that local and national laws in Russia making it an administrative offense for somebody to “promote homosexuality among minors” or to promote “non-traditional sexual relations” violates the free speech and equality provisions of the European Convention on Human Rights. The Parliament of the Russian Federation ratified the Convention in 1998, during the period of liberalization in that country, but in 2015 the Parliament approved a draft law endorsed by President Vladimir Putin authorizing Russia to ignore rulings of the European Court of Human Rights when they were inconsistent with the Russian Constitution. Despite their proclaimed purpose of protecting minors, the laws have been aggressively enforced to prevent public demonstrations in support of LGBT rights.

The Bayev case consolidated applications to the court by three Russian gay rights advocates, Nikolay Bayev, Aleksey Kiselev, and Nikolay Alekseyev, each of whom had been prosecuted under either the local laws or the federal law, all of which made it an administrative offense, punishable by a fine, to “promote homosexuality” or “non-traditional relationships” to minors. These applicants had demonstrated with banners asserting the normality of homosexuality, in two cases in places where children were likely to see them (schools, libraries) and in one case in front of a government building. Each of them was fined, and their appeals were rejected by the constitutional courts in Russia.

In defending the laws, the Russian government insisted that they were within its authority, and consistent with the European Convention, to protect the morals of youth and the demographic and health concerns of the nation by prohibiting such “promotion.” The government pointed to the severe demographic challenge faced by Russia, which has suffered a declining population, as well as the risks of HIV transmission through homosexual activity and the need to channel Russian youth into traditional heterosexual family relationships to produce more children.

The applicants pointed to the protection for freedom of expression and equality under Articles 10 and 14 of the Convention, contending that the government had not provided adequate justification for censoring the applicants’ messages.

The seven-member chamber, whose judgment will be appealed by Russia to a larger “Grand Chamber” of the court, included judges from Sweden, Spain, Switzerland, Slovakia, Cyprus and the Netherlands, as well as a Russian judge, who was the lone dissenter from the judgment.

The court thoroughly rejected the Russian government’s argument in support of the laws. The government admitted that the laws restricted freedom of expression, but claimed that the restriction fell within the “margin of appreciation” for justified restrictions. While noting the government’s argument that the “margin of appreciation” is wide “where the subject matter may be linked to sensitive moral or ethical issues” as to which there is no European consensus, in this case, the court said, “there is a clear European consensus about the recognition of individuals’ right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms,” citing to its earlier judgment in a case brought...
by Mr. Alexeyev in opposition to the earliest local enactment of a similar law. Seeking to justify its position, the government alleged the “incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality,” but the court was not convinced. “The Court sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of ‘family life’ and the acknowledgement of the need for their legal recognition and protection.”

After noting the strong trend in Europe towards recognition for same-sex relationships, and suggesting that the court’s jurisprudence had to move with the times, the court also noted differential treatment, any more than similar negative attitudes towards those of a different race, origin or color.” The court found that the challenged Russian laws are “an example of such predisposed bias,” and rejected the idea that because the majority of Russians strongly oppose homosexuality, that would justify the government in abridging the freedom of expression of gay people seeking to protect their rights. Thus, the Court rejected the government’s argument that “regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.”

The court also rejected the government’s argument that the laws could be justified as public health measures or as a means to address the country’s demographic problems. In the strong desire of same-sex couples to form families and raise children. Furthermore, said the court, “The Government failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing ‘traditional families’ or would compromise their future.”

“The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority,” said the court. “It held that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the fact, the court pointed out, ignorance about homosexuality would be counterproductive as a public health measure, and there was no evidence that suppressing all discussion of homosexuality that could come to the attention of minors would contribute to growth of the Russian population. “Population growth depends on a multitude of conditions, economic prosperity, social-security rights and accessibility of childcare being the most obvious factors among those susceptible to State influence,” wrote the court. “Suppression of information about same-sex relationships is not a method by which a negative demographic trend may be reversed. Moreover, a hypothetical general benefit would in any event have to be weighed against the concrete rights of LGBT individuals who are adversely affected by the impugned restrictions. It is sufficient to observe that social approval of heterosexual couples is not conditional on their intention or ability to have children.”

The court also found that the laws could not be justified as a measure to “protect the rights of others,” such as minors themselves or their parents. The laws did not prevent parents from instructing their children or promoting traditional heterosexual relationships to their children. Furthermore, the laws as interpreted by the Russian courts and applied to the applicants in these cases were clearly both vague and overly broad, extending to activities that were hardly likely to undermine parental authority or to harm children.

The court found that the biased views underlying the laws also supported the applicants’ arguments that the laws violate Article 14 of the Covenant, which guarantees equality.

As a remedy, the court ordered that the Russian government refund to the applicants the fines they had been ordered to pay, and also awarded them monetary damages to compensate for expenses incurred in connection with this litigation. Also, wrote the court, “it considers that the applicants suffered stress and anxiety as a result of the application of the discriminatory legal provisions against them. It also notes that the impugned legal provisions have not been repealed and remain in force, and thus the effects of the harm already sustained by the applicants have not been mitigated,” so it awarded additional damages as compensation. The amounts awarded were relatively trivial.

The Russian judge on the panel, Dmitry Dedov, submitted a dissenting opinion that channeled the arguments of the Russian government, particularly as they were articulated by the constitutional court in rejecting the appeals in these cases. The government contended that the challenged measures are non-
discriminatory, do not impose criminal sanctions for homosexual conduct and do not single out homosexuals for suppression of their expression, but rather focus on socially harmful messages that everybody, whether gay or straight, are prohibited from sending to minors. Dedov contended that the court erred by focusing on a “conflict of rights” rather than on the government’s “legitimate aim” in promoting the morals and health of minors and Russian society. He contended that what the local governments and the Federal government had done was well within their appropriate role to promote social welfare, and particularly the well-being of vulnerable minors, and that the court was mistaken in treating this as a case about discrimination.

“Needless to say,” he wrote, “sexual identification, as well as sexual orientation, is a very intimate process, albeit influenced by social life and social relations. The international instruments, including the CRC, recognize that children should primarily consult their parents or close members of the family, rather than obtaining information about sex from the applicants’ posters in the street.” He argued that it was for the government to determine how to educate minors about their social roles, contending that “it is commonly recognized that sex education is a very sensitive area where the dissemination of information should be carried out very carefully.”

The Russian news agency, Tass, quickly reported that the Russian Justice Ministry would appeal the decision and contest the remedy, which totaled about 49,000 euros. The statement from the Ministry reiterated Judge Dedov’s main point, arguing that “the provisions of a number of regional laws banning LGBT propaganda among minors do not contradict international practices and are aimed exclusively at protection of children’s morality and health.”

The full text of the opinion in English is available on the court’s website, as well as a press release summarizing the decision.

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**N.J. Appellate Division Sets Two-Year Statue of Limitations in Personal Injury Suit on Unauthorized Disclosure of Patient’s HIV-Positive Status by Doctor**

In a case of first impression for the state, a panel of the New Jersey Appellate Division found that an HIV-positive man’s claim against his doctor for unauthorized disclosure of the patient’s HIV-positive status in the presence of a third party was subject to a two-year statute of limitations, Smith v. Datla, 2017 N.J. Super. LEXIS 95, 2017 WL 2960677 (July 12, 2017).

The plaintiff is identified by the fictitious name of “John Smith.” He was a patient of Dr. Arvind Datla, a board-certified nephrologist, who was treating him for acute kidney failure. During a bedside consultation in Doe’s private hospital room on July 25, 2013, during which another person (unidentified) was present in the room, Datla discussed the patient’s medical condition, mentioning his HIV-positive status. Smith alleges that this constituted a disclosure to a third person without Smith’s consent. Smith filed suit against Datla just short of two years later. He claimed that the disclosure by Datla was negligent, careless, reckless, willful and wanton, and that it had caused him to endure pain and suffering, emotional distress, and other emotional injuries and insult, and permanent injury with physiological consequences. Datla claimed the suit was untimely under a one-year statute of limitations.

Smith alleged invasion of privacy, violation of patient confidentiality rules under HIPAA, and medical malpractice. The defendant’s dismissal motion focused in on each of the separate legal claims, but the court found that where there was no express statutory limitations period for specific claims, an appropriate statute of limitations would depend on the “nature of the injury,” that is “not to be subjected to a complaint-specific inquiry. The ‘nature of the injury’ is used to determine the ‘nature of the cause of action’ or the general characterization of that class of claims in the aggregate. That analysis precedes resolution of the question of which statute of limitations applies to a type of cause of action, and does not contemplate an analysis of the specific complaint and the injuries it happens to allege.” Quoting from McGrogan v. Till, 167 N.J. 414 (2001). In this case, affirming the trial judge, the Appellate Division found that Smith was asserting a personal injury case of the type that would normally carry a two-year statute of limitations.

Datla had tried to analogize the wrongful disclosure claim to a defamation claim, which would have a one-year statute of limitations in New Jersey, but the court rejected this categorization. Judge Richard Geiger wrote, “We find that claims for unauthorized disclosure of a person’s HIV-positive status align more closely with discrimination claims based on improper disclosure of an individual’s HIV/AIDS status brought under [the Law Against Discrimination], [the New Jersey Civil Rights Act], and Section [42 U.S.C.] 1983, all of which are subject to a two-year statute of limitations. We further find that claims for unauthorized disclosure of a person’s HIV-positive status also more closely align to an intrusion on plaintiff’s solitude or seclusion than defamation or invasion of privacy by placing plaintiff in a false light. In that regard, we note that a false light claim involves the publication of misleading information and is akin to defamation. Defendants’ conduct did not involve publishing false or misleading statements about the plaintiff.”

As to the HIPAA claim, the court said, “The Act provides for a private right of action and a wide-range of relief for the improper disclosure of a person’s HIV-positive status” but, unfortunately, does not contain a statute of limitations. Once again, the court rejected Dr. Datla’s attempt to analogize
to a defamation case, stating, “in contrast to a defamation claim where a lawsuit provides the opportunity for the defamed person to vindicate his or her reputation, the profound damage that can result from an unauthorized disclosure of an individual's HIV-positive status cannot be adequately remedied by ordinary damages for reputational harm recoverable in a defamation lawsuit. Thus, the Act provides for the right to recover actual damages, equitable relief, punitive damages, and attorney’s fees. Moreover, the interest protected by the Act is not the reputation of the HIV-positive individual, but instead the person’s right to control access to his or her private medical information.” This, said the court, was more analogous to an invasion of privacy claim than a defamation claim, thus again invoking the two-year statute of limitations.

Finally, as to the medical malpractice claim, the particular malpractice alleged here was unauthorized revelation of confidential patient information to a third party, violating the doctor’s “common law duty to maintain the confidentiality of patient records and information,” for the protection of the patient. New Jersey has a two-year statute of limitations for malpractice claims, subject to the discovery rule. In this case, the court said, the breach of duty “is a deviation from the standard of care, giving rise to a personal injury claim based upon negligence, not defamation or placing the plaintiff in a false light. In addition, plaintiff’s claim for medical malpractice is most analogous to the category of invasion of privacy claims that are grounded on an allegation that defendant improperly disclosed private facts concerning the plaintiff to a third party. For these reasons, we hold that plaintiff’s medical malpractice claim . . . is subject to the two-year statute of limitations imposed by N.J.S.A. 2A:14-2.”

Thus, the court affirmed the trial court’s decision rejecting the statute of limitations defense. The plaintiff is represented by Szaferman, Lakind, Blumstein & Blader, PC, with Craig J. Hubert arguing in response to the appeal and Keith L. Hovey and Brandon C. Simmons on the brief.

### Michigan Court of Appeals Rejects Claims Against Planet Fitness’s Pro-Transgender Locker Room Policy


Yvette Cormier, the plaintiff-appellant, filed her complaint after Planet Fitness terminated her membership in 2015, due to her conduct after being advised of the gym’s locker room policy. Since then, the case has received coverage from FOX, MSNBC, and CBS due to its relevance to transgender legislation. Writing for the court, Judge Colleen A. O’Brien rejected Cormier’s claims of sexual harassment and retaliation in violation of the Elliot Larsen Civil Rights Act (ELCRA), invasion of privacy, intentional infliction of emotional distress, breach of contract, and violation of the Michigan Consumer Protection Act (MCPA).

Yvette Cormier started her gym membership at Midland’s Planet Fitness on January 28, 2015. One month later, she observed Carlotta Sklodowska, a transgender woman, inside the women’s locker room. Judge O’Brien did not go much further into the event, but Sklodowska revealed to the Daily Mail in 2015 that she had only used the locker room twice to hang her purse and coat. Furthermore, Cormier never saw Sklodowska in a state of undress, suggesting that the former judged the latter for her non-stereotypical figure. Cormier then complained to the front desk, where she was advised of the gym’s policy that allows members to use the locker room with which they self-identify. Over the next four days, Cormier continued using the locker room and warned other women about the gym’s policy. Because of this, Planet Fitness terminated her membership on March 4, 2015.

Judge O’Brien first affirmed the trial court’s order of summary judgment against Cormier’s claims of sexual harassment and retaliation under the ELCRA. Under Michigan law, sexual harassment is defined as a form of sex discrimination that occurs when someone is subjected to sexual conduct or communication that substantially interferes with his or her use of a place of public accommodation. Such conduct includes unwelcome sexual advances and requests for sexual favors. Judge O’Brien stated that Cormier merely complained that she was subjected to the opportunity for sexual harassment, rather than an actual incident. In fact, neither the opinion nor news coverage suggests that Cormier and Sklodowska interacted with each other. Because none of Cormier’s ELCRA rights were violated, she did not engage in the protected conduct required to raise a valid retaliation claim against Planet Fitness. Moreover, this author notes that Cormier’s speculation reflects the ongoing and unfair misconception that transgender women are predatory men in disguise. (Interestingly, Judge O’Brien referred to Sklodowska as a “man who identified as a woman” and referred to her as male throughout the opinion in summarizing Cormier’s allegations.)

Next, Judge O’Brien addressed Cormier’s claim of invasion of privacy. Michigan common law provides that an invasion of privacy includes the intrusion upon a plaintiff’s seclusion or solitude. In order to show that an invasion took place, a plaintiff must provide evidence showing: (i) the existence of a private subject matter; (ii) the plaintiff’s right to keep that subject matter private; and (iii) the information about that subject matter was obtained through an objectionable method. *Doe v. Mills*, 212 Mich. App. 73, 536 N.W.2d 824 (1995). While the naked body is a private subject matter, the court agreed with defendants that a person has a reduced expectation of privacy in a locker room.

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Furthermore, Judge O’Brien wrote that even if Cormier had a right to keep exposure of her naked body away from members of the opposite sex in a locker room, she was not in a situation where she undressed or showered in the presence of a male. Again, Sklodowska is a transgender woman.

Before discussing the court’s review of Cormier’s claim of intentional infliction of emotional distress, it is worth noting that the court affirmed that Planet Fitness did not breach its contract with Cormier, nor did it engage in unfair, unconscionable, or deceptive methods violating the MCPA. The contract between the parties explicitly stated that Cormier agreed to comply with the gym’s policies that may be verbally communicated time to time, and that Planet Fitness reserved the right to terminate her membership if she violated those policies. Furthermore, Cormier failed to cite any particular subsection of the MCPA and simply stated that the gym’s locker room policy is a material fact that should have been disclosed.

Lastly, the court affirmed that Cormier failed to sufficiently allege a claim of intentional infliction of emotional distress because she did not demonstrate that Planet Fitness engaged in extreme and outrageous conduct. Judge O’Brien wrote that although “transgender rights and policies are polarizing issues,” the gym’s pro-transgender policy neither goes beyond all possible decency nor could be regard as atrocious and utterly impossible in a civilized society. The discussion could have ended there, but goes on to erroneously cite Haverbush v. Powelson, which stated that one clothed encounter with a biological male in a women’s locker room does not constitute distress that no reasonable person could be expected to endure. Haverbush, 217 Mich. App. 228, 551 N.W.2d 206 (1996).

Judge O’Brien recounted that Cormier continued to visit the gym and check the women’s locker room for a biological male.

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Federal Magistrate Refuses to Accept Limitations of California’s Inmate Transgender Rules as Satisfying Eighth Amendment

There are three basic inmate rights to health care under the Eighth Amendment: the right to access to care, and right to care that is ordered, and the right to a professional medical judgment. Virtually all cases that have followed Estelle v. Gamble, 429 U.S. 97 (1976), and its standard of “deliberate indifference to serious medical needs,” have addressed one of these three questions. As new treatment challenges emerge – HIV, hepatitis-C, organ transplants, transgender patients – one can trace the evolution of the law through each basic right: Is there a doctor in the joint who knows anything about the problem? Are the doctor’s orders being followed? Is correctional administration interfering with the exercise of the doctor’s medical judgment?

Cases under the first two rights (access to a doctor and receipt of ordered care) are the easiest to win. Early cases that rationed professional judgment were also generally successful (for example, restricting the medical department to 4 emergency trips per month when there were 8 genuine emergencies). For transgender inmates, the earliest victories dealt with the first two rights. As the defense has become more sophisticated, corrections defendants have tried to move the question to the more difficult one of medical judgment. There is always some quack who makes a living insisting that “homosexuality is treatable” or that sexual identity is a “life choice.” Legalisms aside, this is why Michelle Kosilek lost her claim for sex reassignment surgery in the 3/2 en banc decision of the First Circuit in Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014).

The Ninth Circuit came close to charting a different course after Kosilek, but the state paroled one plaintiff (Norsworthy) and changed its regulations to try to control exercise of medical judgment by moving it from treating providers to a series of committees. A second patient (Quine) managed to navigate the labyrinth, however, and she had SRS surgery. Settlement of her case resulted in new “committee” regulations. See Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1120-21 (N.D. Cal.), appeal dismissed and remanded, 802 F.3d 1090 (9th Cir. 2015), and its progeny; see also Quine litigation, discussed repeatedly in Law Notes, e.g., “Prisoner Receives Sex Reassignment Surgery in California,” reported in Law Notes (February 2017 at page 61), and “California Adopts Guidelines for Prisoner Requests for Sex Reassignment Surgery,” reported in Law Notes (November 2015 at page 489).

Now, in Denegal v. Farrell, 2017 U.S. Dist. LEXIS 83373, 2017 WL 2363699 (E.D. Calif., May 31, 2017), U.S. Magistrate Judge Michael J. Seng (who has not previously been particularly sympathetic to LGBT issues) has ruled that the case for pro se inmate Dwayne Denegal (a/k/a Fatima Shabazz) for transgender treatment can go forward, despite a motion to dismiss based primarily on California’s new transgender regulations. Denegal alleges that “prison officials interfered with her treatment, delayed providing her feminizing hormones, and denied her requests for sex reassignment surgery (including, specifically, vaginoplasty), which Plaintiff believes is medically necessary to treat her gender dysphoria.” She brings her challenge under the Eighth Amendment and the new regulations and under the Equal Protection Clause. Judge Seng allows her to proceed, seeking only injunctive and declaratory relief.

California defendants first argued that Denegal’s case for hormones and feminizing treatments is moot because she is now receiving these treatments under the new regulations. Judge Seng finds that Denegal’s treatments were delayed by interference with professional judgment. Because Judge Seng’s ruling goes to the heart of the third basic right, it bears quoting at some length: “Defendants mischaracterize Plaintiff’s requested relief. Plaintiff does not seek an injunction requiring hormone therapy . . . , but rather seeks injunctive relief ‘enjoining Defendants from interfering with the discretion of the mental health and other medical professionals involved in Plaintiff’s care . . . . ’ Such relief is grounded in Plaintiff’s allegations that Defendants delaying providing her what she alleges is medically necessary care (including hormone therapy), that such delay interfered with her care, and that such delay (as well as denial of certain procedures) constitutes an Eighth Amendment violation. Defendants present no claims, much less facts, to suggest that [they] will no longer interfere with her care. The fact that Plaintiff now receives hormone therapy does not protect against that risk. And Plaintiff’s alleged facts support her claim that such interference is continuing and will continue. Such allegations are sufficient to state a claim on which relief may be granted. Plaintiff’s claim is not, therefore, moot.” Judge Seng specifically refers to the 12-month waiting period under the new regulations and the need for multiple levels of approvals for each step in reaching treatment decisions.

On SRS, Denegal claims that, notwithstanding the new regulations [note: and Quine’s surgery], vaginoplasty is basically foreclosed completely by
the regulations because of multiple hurdles, committees, approvals, and the like – and by the limitations in the regulations that refer to vaginoplasty for conditions affecting cisgender birth women but not transgender women. Judge Seng notes that Denegal seeks a “complete transition” from male to female gender identity, claiming a right to such “necessary procedures” as facial feminization, breast augmentation, vocal modification, hair removal, rhinoplasty, brow lift, and forehead lift. He does not resolve the medical issues at this stage, merely holding that defendants have failed to show that the case is moot, because it is unclear whether the state really “offers” SRS and other transitional procedures, as opposed to “arbitrarily” interfering with what procedures can be ordered. A declaratory judgment may still be needed under Skysign Int’l, Inc. v. City and County of Honolulu, 276 F.3d 1109, 1114 (9th Cir. 2002).

On the Equal Protection claim, Judge Seng finds that the regulations provide one standard for vaginoplasty for cisgender women (basically correction of irregularities in existing vaginal wall, such as cystocele or rectocele) and a different standard (no vaginoplasty) for transgender women born without a vagina. Judge Seng found a Fourteenth Amendment claim stated based on Norworth. California’s reliance solely on “policy changes” without showing that non-discriminatory medically necessary treatment is available in fact is insufficient at this stage for dismissal. Judge Seng does not elaborate on the level of Equal Protection scrutiny applied.

This is the first case this writer has seen that has looked behind prison regulations on medical judgment for transgender care that allows a transgnder plaintiff to challenge the impediments to exercise of professional judgment. Counsel needs to become involved to take full advantage of this opening. – 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.

New York Family Court Judge Takes Co-Parent Rights a Step Further in Filiation Case

Rockland County Family Court Judge Rachel E. Tanguay, ruling on a question of first impression under New York Law, decided that when a lesbian couple had children together and raised them together as a family for several years before splitting up, the co-parent was entitled to an Order of Filiation recognizing her parental status for all purposes. Judge Tanguay’s ruling in A.F. v. K.H., 2017 N.Y. Slip Op. 27196, 2017 WL 2541877 (Fam. Ct., Rockland Co., May 25, 2017), takes New York law one step further than the Court of Appeals’ landmark 2016 decision in Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, which had overruled a 25-year-old precedent to hold that a co-parent can seek custody and visitation in such a situation.

A.F. and K.H. became registered domestic partners on August 25, 2005, according to the findings of a Family Court Attorney Referee at an earlier stage of this case, and they decided to have children, with K.H. becoming pregnant through donor insemination with sperm from an anonymous donor. The women had two children whom they raised together until separating in July 2011, ironically right around the time that the New York Marriage Equality Law went into effect. There was no dispute that they considered each other to be “parents” of both children. In fact, when the children were born they were given A.F.’s surname. But after the break-up, K.H. resisted A.F.’s assertion of parental rights and even took the step of getting the court to change the children’s surname to hers. A.F. sued to preserve her contact with the children.

At that time, the binding precedent in New York courts was Alison D. v. Virginia M., 77 N.Y.2d 651, a Court of Appeals ruling from 1991, which had been recently reaffirmed by the court in 2010, under which a person in the position of A.F. was deemed to be a “legal stranger” to the children who did not have standing under the Domestic Relations Law to seek custody or visitation. As a result, A.F.’s lawsuit was unsuccessful, with the Appellate Division affirming the trial court’s dismissal of her case in 2014. From that point forward, A.F. had no contact with the children until her new lawsuit got underway.

After the Court of Appeals decided Brooke S.B., A.F. decided to try again.

After the Court of Appeals decided Brooke S.B., overruling Alison D. and providing that under certain circumstances a lesbian co-parent would have standing to seek custody and/or visitation with children she had been raising with her former partner, A.F. decided to try again. In her new custody case, she also sought a formal Order of Filiation from the court that would confer on her full parental rights for all legal purposes, not just custody and visitation. This ultimately was the sticking point in the case, because after it was clear that the Family Court was going to apply Brooke S.B. to allow A.F. to revive her custody and visitation claims, K.H. agreed to a negotiated settlement about custody and visitation.

That left the Order of Filiation as the only issue for Judge Tanguay to decide. K.H., and the attorney appointed by the court to represent the children’s interest,
continued to strongly oppose such an order. Under an Order of Filiation, A.F. would have equal rights to participate in all significant parenting decisions, extending to such matters as education, medical care, inheritance and other circumstances where parental status may be significant, and she could also object to any adoption of the children by a new partner or spouse of K.H.

In *Brooke S.B.*, the court carefully acknowledged “limited circumstances in which such a person has standing as a ‘parent’ under Section 70” of the Domestic Relations Law. “Specifically,” wrote Tanguay, “the Court rejected ‘a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital ‘parents’ who are raising children.” Instead, in a cautious way, the court narrowed its decision to the precise facts of the case before it, and wrote, “We stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation.” Seizing upon this language, K.H. argued that the Court of Appeals had not ruled that a person in A.F.’s position was entitled to be recognized as a parent for all purposes.

“At first blush,” wrote Tanguay, “it would appear that the Court of Appeals in *Brooke* was attempting to limit its holding to conferring standing to a party only.” But, she pointed out, the court reached this point by “broadening the definition of ‘parent’ to include a non-biological, non-legal ‘parent’ under certain circumstances.” And the court got there by tracing the evolution of case law and statutes, including, of course the 2011 Marriage Equality Act. Indeed, the *Brooke S.B.* decision came more than a year after the U.S. Supreme Court ruled that same-sex couples have a constitutional right to marry, in an opinion that stressed the importance to children being raised by same-sex couples of having two legally recognized parents.

In *Brooke*, itself, Judge Eugene Pigott, concurring with the court, wrote, “Today, a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple’s sexual orientation.” So the issue in this case was whether to bring that one step further to cover same-sex couples who had their children and split up before marriage equality was available in New York. Although A.F. and K.H. were registered domestic partners, that status under local law did not import any legal parental rights, which are a matter of state law. Ultimately, Judge Tanguay concluded, the lack of a modern statutory scheme that would explicitly handle this situation is “manifestly unfair not only to the non-biological parent, but to the children who deserve to have a two-parent family when same was intended at their conception.” The best interests of the children should be the overriding factor.

“The majority in *Brooke* concluded its opinion by stating, ‘We will no longer engage in the deft legal maneuvering necessary to read fairness into an overly-restrictive definition of parent that sets too high a bar for reaching a child’s best interest and does not take into account equitable principles,’” wrote Tanguay, who continued: “This court will not allow legal maneuvering that permits A.F. to be a ‘parent’ for purposes of custody, visitation and child support, but without more. It is simply inequitable, and not consistent with prevailing common law as set for herein.”

She granted A.F.’s petition and decreed that the court “issue an Order of Filiation for each child listing A.F. as their legal parent forthwith.”

A.F. is represented by Sherri Donovan of New York City. K.H. is represented by Adrienne J. Orbach of White Plains. Shiza Khan of New City, N.Y., served as appointed Attorney for the Children. K.H. was given 30 days to take an appeal from this decision, which was issued on May 25. An appeal would not delay A.F.’s contact with the children, since the parties had stipulated an agreed-upon arrangement, so the only issue on appeal would be whether A.F. will be accorded all parental rights through the Orders of Filiation.
The 9th District Court of Appeals of Ohio affirmed a felonious assault conviction and five-year prison sentence for Jeffrey A. Boatright, a gay man who was convicted by a jury of violating the section of the state’s felonious assault statute pertaining to HIV-positive individuals who fail to disclose their status prior to engaging in sex. State of Ohio v. Boatright, 2017-Ohio-5794, 2017 Ohio App. LEXIS 2854, 2017 WL 2979147 (July 12, 2017).

The jury heard conflicting stories about how and when Boatright learned that he was HIV-positive and decided to believe the prosecution’s witnesses, who directly contradicted Boatright’s claim that he did not know he was HIV-positive when he had sex with the victim, a gay man identified in the opinion by Presiding Judge Diana Carr as “M.H.”

Summarizing the trial record, Judge Carr wrote that “prior to November 13, 2014, M.H. and Boatright were just friends and would text each other often. Because M.H. was having problems with his boyfriend and wanted to have ‘fun,’ he contacted Boatright and went over to his house around 11 p.m. on November 13, 2014. The two had a few alcoholic drinks and watched TV. Boatright then asked M.H. to give him a massage. M.H. declined because he knew Boatright had a boyfriend. However, M.H. came to discover that Boatright and his boyfriend were having problems. Shortly thereafter, M.H. left and went downtown, but, before long, returned to Boatright’s house. Boatright began to make sexual advances and M.H. began to ask Boatright about his sexual history. Boatright indicated that he last had sex with someone in September 2014, was tested for sexually transmitted diseases, including HIV, shortly thereafter, and that the result ‘was negative.’ After that discussion, the two engaged in unprotected, consensual anal and oral intercourse; Boatright penetrated M.H. orally and anally. Afterwards, M.H. went home and the two never engaged in sex again. M.H. testified that, prior to that night, M.H.’s last HIV test was the summer of 2013, and it was negative. Approximately a week and a half after M.H. and Boatright had sex, M.H. began to develop flu-like symptoms. About a week after that, M.H. presented to an emergency room as he was still suffering from flu-like symptoms. Based upon his history and symptoms, doctors ordered an HIV test. Both the preliminary and confirmatory tests came back positive.”

Continued Carr, “M.H. contacted Boatright while M.H. was waiting for his test results and told Boatright there was a possibility he gave M.H. HIV. Boatright again stated he was HIV negative and said he was sorry M.H. had to go through the situation. After M.H. got his results, he again spoke to Boatright. Boatright kept saying how sorry he was but never stated that he had been deceptive about his HIV status. However, at the end of their conversation, M.H. testified that Boatright stated, ‘I’m sorry, man. I lied.’ After M.H. received his test results, he kept stating that he did not want to live life having HIV. In light of those statements, as a precaution, M.H. was admitted to a psychiatric unit for observation.”

The prosecution presented evidence that Boatright had been an occasional compensated plasma donor at CSL Plasma, during which he filled out intake forms in which he failed to disclose, as required by the questions, that he was a man who had sex with other men, which would have caused him to be deferred as a donor. CSL, as required by regulations, tested all donations for HIV. Boatright made a donation on August 22, 2011, that tested positive for HIV. CSL sent him a certified letter, but it was returned by the post office for wrong address. They also called and left a voicemail for him to call back, but received no response.

Shortly thereafter, as required by public health regulations, CSL reported this HIV-positive test result to the Ohio Disease Reporting System, and Health Department employees attempted to contact Boatright, leaving a voicemail on September 2, 2011, and sending a letter on September 6, 2011. The letter was returned. Two appointments were made for Boatright to come to the Health Department, but he failed to show up. Following standard procedure, the case was closed. However, Boatright showed up at CSL Plasma on December 12, 2012, to make another donation. Bonnie Chapman, a registered nurse who worked there, testified that at that time she counseled Boatright about his prior test result and gave him literature, and documented the session in an electronic record. She confirmed that she told him on December 12, 2012, that he was HIV-positive, and she gave him the appropriate forms. “Ms. Chapman testified that, from her recollection, when she told Boatright he had tested positive for HIV, she was expecting a reaction but did not get one. Instead, he said, ‘Okay; and he left.’”

Another witness, a registered nurse at the Health Department referred to in the opinion as “Mr. Osco,” testified that Boatright came to the Health Department in December 2014 requesting HIV testing “because he was informed that one of his sexual
contacts was hospitalized with an HIV diagnosis, and because the home test Boartright took thereafter was positive. Mr. Osco indicated that both Boartright’s preliminary and confirmatory HIV tests were positive. Mr. Osco also discovered the prior 2011 positive test result while researching Boartright in the Ohio Disease Reporting System. When Mr. Osco informed Boartright of the results in early 2015, Boartright became emotional and seemed very sincere. Boartright told Mr. Osco that he had been in a relationship for two years and the only other person he had sexual contact with was M.H. Boartright declined to name his partner, but indicated that he had told the partner about the possibility Boartright had HIV and his partner had thereafter tested negative. Mr. Osco testified that he informed Boartright of the prior positive result, and Boartright maintained that he was never contacted by anyone about it.

However, during his own testimony, Boartright basically admitted that he had lied to Mr. Osco. He testified that “his partner, who he was dating at the time he engaged in sexual conduct with M.H., testified positive for HIV in March 2013. The parties also entered into a stipulation with respect to this fact. Boartright stated that, after he learned of the diagnosis, the two men waited to have sex until after his boyfriend’s viral load was undetectable and also used condoms. Boartright acknowledged that he lied to Mr. Osco when Boartright told Mr. Osco that his partner was negative for HIV.”

As for the sex with M.H., Boartright admitted that they engaged in unprotected sex. “He stated that he did not use a condom because he thought he was HIV-negative. He acknowledged that he and M.H. discussed their respective HIV statuses that night,” and he essentially confirmed M.H.’s testimony about his contacting Boartright, which had prompted Boartright to test himself and then seek testing from the Health Department.

The statute under which Boartright was tried, R.C. 2903.11(B)(1), states that “no person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct.” Another section of the statute states that “a person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

The major point of contention in the case, of course, was whether Boartright could be charged with criminal liability based on his state of knowledge about his HIV status at the time he had sex with M.H. on November 13, 2014. He had tested positive in 2011 when donating plasma, but he claimed he had never been notified. He also made much of the fact that he either worked for or volunteered at the Akron AIDS Collective beginning in 2008, in which role he was an AIDS outreach worker involved in counseling about prevention and detection of HIV, and he claimed that in that connection he was regularly tested for HIV and had tested negative. He was aware that the man he was dating tested positive in March 2013, but he asserted that they did not resume having sex until his partner’s HIV load was undetectable and they used condoms. His case depended on his testimony that he genuinely thought he was HIV-negative as of November 13, 2014, and that he first learned he was positive when M.H. contact him, leading to his home test followed by the Health Department test. Set against this was the testimony by Nurse Chapman, that she had counseled Boartright about his HIV status on December 12, 2012, which Boartright denied in court, and Mr. Osco’s testimony confirming that a record of Boartright’s 2011 positive test result was in the Ohio reporting database.

In appealing his conviction and sentence, Boartright argued first that the statute was unconstitutional, but his attorney had not raised a constitutionality objection during the trial, so the appeals court found this argument to have been waived. Boartright contended that the trial judge should have dismissed the case rather than sending it to the jury, on grounds of insufficient evidence for a conviction, but the appeals court rejected this out of hand, finding that in sorting through the contradictory evidence, the jury could reasonably have reached the conclusion that Boartright knew about his HIV-positive status and lied to M.H. before they had sex. The court emphasized that Boartright even admitted during his testimony to having lied more than once, including when he filled out plasma donation forms and failed to disclose that he was a sexually active gay man who should have been deferred as a donor. He claimed he did this because he was opposed to the categorical exclusion of gay men as donors, and that he was altruistically donating because “he wanted to help people and did not think that his sexual orientation should prevent him from donating.”

“After a thorough, independent review of the record,” wrote Judge Carr, “we conclude that the jury did not lose its way in finding Boartright guilty of felonious assault. The jury was presented with two competing views of the evidence. Ms. Chapman clearly testified that she informed Boartright in 2012 that he had tested positive for HIV. Boartright denied that he ever received that information and averred that he had no knowledge that he had tested positive for HIV prior to engaging in sexual conduct with M.H. Boartright testified about his work in the community to prevent and educate people about HIV and AIDS and about his knowledge of the importance of testing and receiving prompt treatment. He also presented Mr. Osco’s testimony which, if believed, could evidence that Boartright was surprised by the HIV diagnosis in 2015. However, the jury also heard about the multiple instances in which Boartright lied. He lied on the CSL Plasma questionnaires and to Mr. Osco about Boartright’s partner’s HIV status. Additionally, M.H. testified that, following his diagnosis, Boartright apologized for lying.” The court refused to overturn the jury’s verdict “on a manifest weight of the evidence challenge merely because the trier of fact opted to believe the testimony of a particular witness,” wrote Carr. “Under these circumstances, and in light of the argument made on appeal, we cannot
say that the trier of fact lost its way and committed a manifest miscarriage of justice in finding Boatright guilty of felonious assault.”

The court also rejected Boatright’s challenge to the jury instructions on the issue of knowledge, finding that the trial judge’s charge paraphrasing the statute did not constitute “reversible error,” even if the statute was less than ideally phrased. The court also rejected Boatright’s challenge to the length of his sentence, observing that the range provided by the statute was between two and eight years, so a five-year sentence was comfortably within the range. The court also pointed out that Boatright had failed to present a full record in support of his argument that the sentence was excessive, noting that “the presentence investigation report, the statements by Boatright’s friends, and the victim impact statement, which the trial court considered in sentencing Boatright, have not been included in the record on appeal.” It is the appellant’s responsibility to provide this kind of information to the appeals court. “This Court has consistently held that, where the appellant has failed to provide a complete record to facilitate appellate review, we are compelled to presume regularity in the proceedings below and affirm the trial court’s judgment.” The court also rejected Boatright’s argument that his trial attorney had presented an ineffective defense by failing to raise a constitutional objection to the statute, pointing out that another district of the court of appeals had recently rejected a constitutional argument attack on the statute. Given the strong presumption of constitutionality accorded to statutes, and the lack of any legal authority cited by Boatright to support the claim that it was viable argument, the court was unwilling to fault his trial attorney for failing to raise such an objection. Similarly, the court was unwilling to credit the argument that the attorney was ineffective for failing to object to the length of his sentence at the time it was imposed, again because Boatright did not support documentation to the appeals court that could be the basis for a review of the sentence.

Boatright’s appellate counsel is James K. Reed. ■

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**New Jersey Court Finds it in Minor Transgender Child’s Best Interest to Grant Name Change**

On March 17, 2017, New Jersey Superior Court Justice Marcia Silva ruled that it was in the best interest of a minor, transgender child to grant his mother’s petition to change his name from Veronica Betts to Trevor Betts. Sacklow v. Betts, 2017 WL 2797437, 2017 N.J. Super. LEXIS 85 (N.J. Superior Ct., Chancery Division). The opinion was not authorized for publication until June 28.

The petition was brought by the child’s mother, Janet Sacklow, when Trevor was sixteen years old. In the petition, she certified that the proposed name change was in Trevor’s best interests because Trevor, identified as female at birth, is transgender, identifies as male, and has been undergoing treatment for gender dysphoria. Richard Betts, the father and ex-husband Sacklow, initially opposed the proposed name change. After hearing testimony from and conducting cross-examination of his son, father changed his position and consented to the name change.

Judge Silva wrote that the matter before the court was one of first impression in New Jersey. The question to be answered was whether to grant the name change application and, if so, what standard to apply and what factors to consider. The court found the appropriate standard to be the best interest of the child standard and laid out a seven factor analysis to aid a court in such a case. Judge Silva looked to New Jersey precedent on the surname change of a minor child, specifically Gubernat v. Deremer, 140 N.J. 120 (1995), and Emma v. Evans, 215 N.J. 197 (2013), to decide the standard and develop the factors.

The factors to be relied upon, wrote Judge Silva, are (1) the age of the child; (2) the length of time the child has used the preferred name; (3) any potential anxiety, embarrassment or discomfort that may result from the child having a name he or she believes does not match his or her outward appearance and gender identity; (4) the history of any medical or mental health counseling the child has received; (5) the name the child is known by in his or her family, school and community; (6) the child’s preference and motivations for seeking the name change; (7) whether both parents consent to the name change, and if consent is not given, the reason for withholding consent.

In this case, the court gave great weight to Trevor’s preference, as he was sixteen years old when the petition was filed and seventeen years old at the time of decision. Trevor had been using his preferred name for five years, which further militated in favor of the requested name change. The court called the third factor the most compelling in Trevor’s case and laid out a number of ways in which not granting the name change would subject him to bullying and harassment. Trevor was receiving medical treatment and mental health counseling and the court found he had a deep understanding and appreciation of his gender identity. As to motivation, the court found the petition was motivated only by personal considerations; neither Trevor nor his mother was seeking to defraud creditors or avoid personal prosecution. In this connection, the court noted that granting the name change would obviate the chastisement Trevor sometimes endures when he corrects substitute teachers as to his correct name. The change will also make obtaining appropriate identity and travel documents easier for Trevor in the near future. Finally, consent was given by both parents after Trevor’s testimony.

The court’s opinion also traced some history of decisional law relating to transgender name changes, looked to other jurisdictions’ laws on minor transgender name change, and considered public policy considerations.
The opinion recognized that “transgender people have experienced, for some time, difficulty changing their names for any reason” and pointed to at least one 2003 case in New York - In re Guido, 771 N.Y.S.2d 489 (N.Y. City Civ. Ct. 2003) - in which a transgender individual could not change their name absent proof of gender reassignment surgery. Judge Silva also cited to a New Jersey appellate court decision, Matter of Eck, 245 N.J. Super. 220 (App. Div. 1991), in which the appellate court reversed a trial court’s denial of an individual’s application for name change determining, “[a]bsent fraud or other improper purpose a person has a right to a name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditional ‘male’ first name to one traditionally ‘female’ or vice versa.”

The court noted that in California and Indiana, consent of both parents is all that is required for a minor to change their name, while Ohio, Virginia, Vermont, South Carolina, and New York all employ a best interest standard in such cases. As for public policy, Judge Silva quoted New Jersey statutory authority for the proposition that New Jersey “has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth.” Judge Silva wrote “[r]ecognizing the importance of a name change is one of the ways to help protect the well-being of a transgender minor child.”

The court used the full names of the parties and the child. In a footnote, Judge Silva explains that this was done at Trevor’s request and that of the parties, Janet Sacklow and Richard Betts. This may explain another oddity of the opinion, namely that the decision was rendered in March but not released until late June of this year.

I n a June 5, 2017, decision, U.S. District Judge Michael A. Ponsor (D. Mass.) found that Pastor Scott Lively violated international law. Specifically, Lively acted “in aiding and abetting efforts to demonize, intimidate, and injure LGBTI people in Uganda.” However, Judge Ponsor felt bound by precedent to grant Lively’s motion for summary judgment on jurisdictional grounds. Sexual Minorities Uganda v. Lively, 2017 U.S. Dist. LEXIS 85836; 2017 WL 2435285.

The suit dates back to 2012 when the organization Sexual Minorities Uganda, referred to as SMUG, sued Lively, a pastor based in Massachusetts who is well known for homophobic views and teachings in Uganda. Judge Ponsor found that Lively, an American citizen, “aided and abetted a vicious and frightening campaign of repression against LGBTQI persons in Uganda.” Among others, Baher Azmy and Pamalee Spees of the Center for Constitutional Rights and Jeena Shah of the International Human Rights Clinic at Rutgers Law School in Newark represented SMUG; Liberty Counsel represented Lively.

SMUG brought suit against Lively under the Alien Tort Statute (ATS). Their suit sought monetary damages and injunctive relief based on a theory that Lively committed crimes against humanity in Uganda. Judge Ponsor was faced with the question of whether the court had jurisdiction under the ATS based on “limited actions taken by Defendant on American soil in pursuit” of his “odious” campaign against gays in Uganda.

Lively believes that “homosexual activism” is a “very fast-growing social cancer” that has harmed America. In his book, The Pink Swastika, Lively argues that a “fascistic and violent gay movement in pre-war Germany propelled the rise of Nazism.” He has commended the Russian government for its anti-gay policies.

Lively traveled to Uganda twice during 2002 to participate in a conference, give speeches, and to make media appearances all in furtherance of his view that homosexuality is evil. SMUG’s opposition papers described Lively’s 2002 visit as “coordination with his Ugandan counterparts, Stephen Langa, a prominent and extremist anti-gay community leader and pastor, and Martin Ssempa, also an anti-gay extremist activist and minister, to implement his strategies to dehumanize, demonize, silence and further criminalize the LGBTI community.”

Between 2002 and 2009, negligible evidence existed of “actions taken by [Lively] from the territory of the United States directed specifically at Uganda or the LGBTI community there.” In their opposition, SMUG implicitly attributed Lively’s lack of contact in Uganda during this period to the effectiveness of his 2002 repressive activities. Then, in 2008, the Ugandan High Court awarded monetary damages to victims of police violence that took place at the home of SMUG’s founder. SMUG’s counsel alleges this 2008 decision alarmed SMUG’s opposition papers described Lively’s 2002 visit as “coordination with his Ugandan counterparts, Stephen Langa, a prominent and extremist anti-gay community leader and pastor, and Martin Ssempa, also an anti-gay extremist activist and minister, to implement his strategies to dehumanize, demonize, silence and further criminalize the LGBTI community.”

In all, the court found that between 2009-2014 Lively sent a dozen or so substantive emails “discussing ways to

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move the AHB forward, draft modified legislation aimed at repressing LGBTI people in Uganda, and deter advocacy on behalf of LGBTI people.” Further the actions of Lively “touched and concerned” the territory of the United States in that “Defendant is a citizen of the United States living in Massachusetts, that he traveled from the United States to Uganda twice in 2002 and once in 2009, that he sent copies of writings and other material to Uganda on a few occasions, and that over twelve ears he transmitted emails, probably from the United States, to various people in Uganda.”

The court conducted its analysis through the lens of the Supreme Court’s 2013 Kiobel v. Royal Dutch Petroleum Co. decision, 133 S. Ct. 1659. Judge Ponsor had earlier denied Lively’s threshold motion to dismiss, in which Lively argued that Kiobel’s central holding deprived the court of jurisdiction where the claimed crime against humanity occurred solely in Uganda. In that earlier opinion, the court emphasized that it had only before it the facts as stated in the complaint, and under a more fully-developed record Lively might prevail.

In Kiobel, Nigerian residents sued Royal Dutch Petroleum and Shell Transport under the ATS in the Southern District of New York. Royal Dutch and Shell are Netherlands and U.K corporations respectively, and for two years they aided and abetted Nigerian military and police to violently suppress opposition to oil exploration and production there. Chief Justice Roberts wrote the Kiobel opinion, which held “there was no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.” As such, a mere corporate presence in the U.S. was insufficient to provide a jurisdictional basis under the ATS.

Judge Ponsor noted that the case at bar presented a stronger case for extraterritorial application of the ATS than did Kiobel. Lively is a U.S. citizen and, further, Lively committed acts in the United States directed at Uganda. But, because of a canon of statutory interpretation known as the presumption against extraterritorial application, for jurisdiction to obtain under the ATS Lively’s conduct in the United States had to do more than simply “touch and concern” the territory; it had to have “sufficient force to displace the presumption against extraterritorial application.”

The court found that Lively’s “sporadic emails sent . . . from the United States offering encouragement, guidance, and advice to a cohort of Ugandans prosecuting a campaign of repression against the LGBTI community in their country” did not constitute the sort of forceful contact with the United States that would overcome the presumption against extraterritoriality.

Despite the dismissal, the press release issued by the Center for Constitutional Rights appeared to treat the decision as a victory. The release quotes SMUG Executive Director Frank Mugisha as saying “[t]his case is a win for SMUG. The court’s ruling recognized the dangers resulting from the hatred that Scott Lively and other Extremist Christians from the U.S. have exported to my country. By having a court recognize that persecution of LGBTI people amounts to a crime against humanity, we have already been able to hold Lively to account and reduce his dangerous influence in Uganda.”

In Lively’s own press release he “thank[ed] God for His deliverance from this outrageous and malicious litigation, designed solely to silence my voice . . . against the ‘gay’ agenda.” Despite his “deliverance,” Lively has nevertheless appealed the dismissal of the lawsuit against him to the First Circuit Court of Appeals. Lively claims doing so is necessary to “purge the prejudicial ruling of Judge Ponsor’s false and subjective assertion” that Lively’s actions amounted to crimes against humanity. – Matthew Goodwin

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

Still, this writer recounts that Sklodowska is a transgender woman. Thus, the scenario described in Haverbush is distinguishable from the case at hand.

Despite the court’s inconsistent treatment of Sklodowska as a transgender woman, the decision remains a victory for transgender rights regarding public accommodations such as locker rooms. Cormier’s attorney, David Kallman, told the media that he planned to seek leave to appeal to the Michigan Supreme Court. Kallman is a notorious proponent for religious liberty, and regularly seeks out cases to challenge LGBT ordinances. As for Cormier, one can assume that she continues to stay in shape by jumping to conclusions. – Timothy Ramos (NYLS class of 2019)
U.S. COURT OF APPEALS, 2ND CIRCUIT – June 26 was the deadline for the appellants’ merits brief and supporting amicus briefs in Zarda v. Altitude Express, Inc., No. 15-3755, in which the 2nd Circuit has agreed to an en banc rehearing of a three-judge panel decision rejecting a sexual orientation discrimination claim under Title VII. The issue for the court is whether to abandon the 2nd Circuit’s almost twenty-year-old precedent, Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000), and to accept the claim that discrimination because of sexual orientation is a form of sex discrimination actionable under Title VII. The case brought numerous amicus briefs, including one from the Equal Employment Opportunity Commission, which has been granted argument time at the hearing in September. The American Civil Liberties Union, another amicus (which has its own en banc petition on file seeking review of an adverse district court decision presenting the same question) has also sought argument time. A brief drafted by attorneys from Quinn Emanuel Urquhart & Sullivan by was filed on behalf of fifty corporate employers, another by the LGBT Bar Association of Greater New York on behalf of numerous bar associations and community organizations, and yet another on behalf of the National Education Association, emphasizing how the lack of protection against discrimination has been particularly harmful to teachers and their students. New York attorney Gregory Antollino will be presenting the argument on behalf of the appellants, the Independent Co-Executors of the Estate of Donald Zarda, who was discharged from working as a skydiving instructor by Altitude Express (d/b/a Skydive Long Island) after he came out as gay to a customer. On June 28, the 2nd Circuit issued an order denying a petition for rehearing en banc in Christiansen v. Omnicom Group, Inc., No. 16-748, another case presenting the Title VII sexual orientation question. In that case, however, the three-judge panel had remanded the case for possible retrial on a sexual stereotyping theory, with two members concurring in an opinion urging that the Circuit take up the Title VII issue in “an appropriate case.”

U.S. COURT OF APPEALS, 2ND CIRCUIT – Reversing a decision dismissing a retaliation complaint for failure to state claim by N.Y. Western District Judge David G. Larimer, the 2nd Circuit ruled in Irrera v. Humpherys, 859 F.2d 196 (June 15, 2017), that Dr. Joseph Irrera, a 2014 recipient of a Doctor of Musical Arts degree from the Eastman School of Music of Rochester University, could maintain a sexual harassment and retaliation claim against the chair of the piano department at the school, Dr. Douglas Humpherys as well as the school itself. Irrera alleged that Humpherys made sexual advances to him and subjected him to unwanted touching and flirting, and that after he had rejected all these advances, Humpherys prevailed on panels to flunk Irrera on two mandatory solo recitals. He alleged that another professor told him that Humpherys, “walking into the recital, had told her that ‘it will not go well,’” and, after the recital, this professor told Irrera he “had played well enough to pass.” Irrera alleged that he had never previously flunked a solo recital, and that a few months after “failing” the second recital, he won the American Protégé International Competition and performed at Carnegie Hall. After he complained about Humpherys actions, he was assigned another member of the piano faculty as his teacher, successfully passed his remaining recitals and graduated with the degree. He also alleged that Humpherys threatened him – in a conversation that was recorded – that he “would never get a university professor job” and threatened to “make his life a living hell” if he made any written report about sexual harassment. Even though Irrera naturally omitted Humpherys from his list of references in his subsequent job applications, he was advised by an Eastman administrator that future employers would call Humpherys anyway because he was Irrera’s teacher “for so long.” In the event, Irrera applied to twenty-eight colleges and universities and received not a single invitation for an interview, which he described as an extraordinary result, as “practically all of the DMA students at Eastmen in the same year have found a job shortly after they graduated and some even while they were still completing the DMA degree.” The district court dismissed his retaliation complaint, accepting defendant’s argument that Irrera had no evidence that Humpherys gave any of his potential employers a reference, “let alone a negative reference.” The court of appeals, applying the “plausibility” standard established by the Supreme Court in the Twombly and Iqbal cases, concluded that the district court had been too demanding. “Although it is not impossible that all twenty-eight schools to which he applied for open teaching positions deemed his credentials insufficient to warrant an interview,” wrote Circuit Judge Jon O. Newman, “it is plausible that these schools received negative references from the chairman of Eastman’s piano department, who had been Irrera’s teaching. It is also plausible that a teacher who warned his student that he would make his life a ‘living hell’ if he made a written report of the teacher’s sexual advances would give that student a negative reference, even if the student later complained to a school dean only orally. And it is also plausible that, since such a teacher is the chair of a department, he would be contacted by schools to which Irrera applied even though he was understandably not listed as a reference.” The court pointed out that court-ordered discovery should be available to uncover adverse references.

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If nothing turns up, the defendants can file a summary judgment motion. The district court had also rejected Irrera’s claim that Eastman retaliated against him by not allowing him to continue in Summer 2014 as an intern at the Eastman Community Music School, purportedly because there were no post-graduate internships. But Irrera amended his complaint to include that names of similarly situated recent DMA graduates who were allowed to serve as interns, as well as a faculty handbook provision that supports his claim. The court decided he had plausible pled a retaliation claim as to the internship, and also directed the district judge to reconsider his decision declining to exercise supplemental jurisdiction over Irrera’s supplemental state statutory and common law claims.

U.S. COURT OF APPEALS, 4TH CIRCUIT – The 4th Circuit has affirmed a ruling by U.S. District Judge Max O. Cogburn, Jr., that three same-sex couples residing in North Carolina lacked Article III standing to bring an action challenging North Carolina’s Senate Bill 2 as violating the 1st Amendment’s Establishment Clause. Ansley v. Warren, 2017 U.S. App. LEXIS 11511 (June 28, 2017). The statute was passed by the North Carolina legislature over a veto by then-Governor Pat McCrory shortly after a federal district judge ruled that same-sex couples in North Carolina were entitled to marry, in General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014). Responding to the pleas of some magistrate judges who did not want to be obligated to perform same-sex marriages due to their religious beliefs, the legislature overwhelming approved a measure under which magistrates could recuse themselves from performing such ceremonies, although the consequence would be that they would be disempowered from performing any weddings for a period of six months. At the same time, the legislature assured that if all the magistrates in a county recused themselves, the court system would reassign magistrates from other counties to ensure that it would be possible for same-sex couples to have civil weddings in their county of residence. The plaintiffs in this case seized upon the likely expenses of reassigning magistrates as a “hook” to establish taxpayer standing to challenge the measure, but neither Judge Cogburn nor the 4th Circuit panel would accept that argument. Writing for the panel, Circuit Judge J. Harvie Wilkinson found that none of the plaintiffs had suffered the kind of individualized injury that would confer standing, and that the U.S. Supreme Court’s recognition of “taxpayer” standing was narrowly restricted to cases in which challenged legislation directly authorized financial assistance for religious activities. In this case, the court found, any incidental financial support for religion in a general sense in order to accommodate the religious objections of magistrate judges did not fall within the narrow range of cases that would support taxpayer standing.

U.S. COURT OF APPEALS, 7TH CIRCUIT – Sharif Hamzah, representing himself, filed suit after his discharge from employment, alleging discrimination because of sexual orientation, age and race. Hamzah v. Woodman’s Food Market, Inc., 2017 WL 2493523, 2017 U.S. App. LEXIS 10299 (7th Cir. June 9, 2017). Because it was a pro se case with a motion to proceed in forma pauperis, U.S. District Judge William M. Conley (W.D. Wisconsin) subject it to screening before requiring the defendant to respond, and screened out the sexual orientation discrimination claim, relying on 7th Circuit precedent. Hamzah, self-identifying as heterosexual, claims that he was discharged because he is not gay! He alleged that immediately before he was fired, his supervisor said “this is a gay thing” and that, at their store, “non gays or bisexuals aren’t welcome for long.” Hamzah also alleged that another supervisor had commented about his heterosexual orientation. Conley also screened out the age discrimination claim, but found that the race discrimination claim could proceed to trial. Judge Conley appointed a lawyer to represent Hamzah at trial, but the result was a jury verdict against him. On appeal, Hamzah argues, among other things, that the sexual orientation claim should not have been screened out. The 7th Circuit panel agreed, of course, that after Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017), sexual orientation claims should not be automatically dismissed. However, it seems that when Hamzah filed his EEOC complaint as prerequisite to suing, he did not check the box marked sex as a ground of discrimination, and first stated his sexual orientation discrimination theory in his district court complaint. Thus, he failed to exhaust administrative remedies as required by Title VII. “Hamzah’s sexual orientation claim is not reasonably related to his EEOC charge, and thus he could not raise it for the first time in federal court,” wrote the court in its unsigned order rejecting the appeal.

U.S. COURT OF APPEALS, 8TH CIRCUIT – The 8th Circuit announced on July 6 that it has denied a petition for rehearing en banc in Tovar v. Essentia Health, 2017 U.S. App. LEXIS 9009, 2017 WL 2259632 (8th Cir. May 24, 2017), petition for rehearing en banc denied, 2017 U.S. App. LEXIS 12171 (8th Cir. July 6, 2017). The three-judge panel held that a woman who was denied coverage under an employee benefits plan for her son’s transitioning medical expenses could not sue for employment discrimination, because her son was not an employee. The
benefits plan specifically excluded coverage for transitioning expenses, evidently deeming such procedures to be “cosmetic,” an outmoded view that has been rejected by many courts as well as the U.S. Tax Court. However, reversing the district court, the panel held that the plaintiff did have standing to pursue a benefits discrimination claim under the Affordable Care Act, and remanded for that purpose. Brittany Tovar is represented by Christy L. Hall and Lisa C. Stratton of Gender Justice, Saint Paul, MN. They had amicus support from the Transgender Legal Defense and Education Fund, Whitman Walker Health, and World Professional Association for Transgender Health.

**U.S. COURT OF APPEALS, 9TH CIRCUIT** – A gay man from Honduras won a new opportunity to litigate on withholding of removal or protection under the Convention against Torture (CAT) in *Mejia v. Sessions*, 2017 U.S. App. LEXIS 9924, 2017 WL 2418250 (9th Cir. June 5, 2017). Mejia first arrived in the U.S. in 1999 at age 23 but did not file an asylum application until 2011. The court affirmed the Board of Immigration Appeals’ determination that the petition was time-barred, finding that Mejia’s contention that he was the victim of “immigration consultant fraud” in 1999 was insufficient to excuse a twelve-year delay in filing. However, the court said, he was still entitled to seek withholding of removal and possible CAT protection. The court found that the standard used by the Immigration Judge to determine the withholding issue applied an inappropriately demanding standard. Mejia credibly testified about being raped and beaten repeatedly by two men in Honduras while he was a teenager. “The BIA affirmed the IJ’s findings that Mejia ‘did not present evidence or testimony sufficient to demonstrate that his sexual orientation was at least one central reason motivating his attackers.’ Subsequent to the IJ ruling, the 9th Circuit decided *Bajaras-Romero v. Lynch*, 846 F.2d 351 (9th Cir. 2017), in which it held that “while an asylum seeker must demonstrate that his membership in a particular social group is ‘one central reason’ for his persecution, Congress did not intend for the ‘one central reason’ standard to apply to withholding of removal claims.” Explained the court, “For withholding, an applicant need only demonstrate that his membership in a particular social group is a reason, which includes weaker motives than one central reason.” Thus, this case must be sent back for reconsideration by the BIA in light of *Bajaras-Romero*. The court also referred the BIA to its recent decision in *Bringas-Rodriguez v. Sessions*, 850 F. 3d 1051 (9th Cir. en banc 2017), which dealt with circumstances where assault by private parties could be held to come within the statute, which focuses on persecution by the government or forces the government is unable or unwilling to control. Furthermore, the court pointed out, “The BIA failed to analyze whether Mejia’s sexual orientation or HIV-positive status established eligibility under CAT,” so remand was also necessary, said the court; “the issue of CAT is remanded for reconsideration, on an open record.”

**U.S. COURT OF APPEALS, 9TH CIRCUIT** – A 9th Circuit panel has unanimously affirmed a decision by U.S. District Judge Richard Seeborg (N.D. Cal.), that an insurance company is not obligated under its homeowner liability insurance policy to defend an insured man who was accused by a girlfriend of having unprotected sex with other women, thus placing her in fear of contracting HIV and hepatitis. *Travelers Commercial Insurance Co. v. Jennifer A.*, 2017 WL 2684120, 2017 U.S. App. LEXIS 10996 (9th Cir. June 21, 2017) (not published in F.3d). When Jeffrey W., the boyfriend, sought to have Travelers provide a defense against Jennifer’s claim, Travelers filed a declaratory judgment motion, asking the district court to absolve it of any responsibility. The insurance policy provides “a duty to defend or indemnify claims for bodily injury caused by an ‘occurrence,’ which is defined as ‘an accident.’” The court’s memorandum decision says that “the issues are whether Jeffrey’s conduct triggers a duty to indemnify or defend Jeffrey, and whether an alleged ambiguity affirmative defense precluded judgment on the pleadings.” As to the first issue, the court said, “Jeffrey’s acts of unprotected sex with women, the conduct for which liability was imposed, were deliberate acts and therefore were not accidents within the meaning of the policy,” so Travelers had no duty to indemnify and, as the facts pleaded in Jennifer’s complaint “create no potential for coverage,” no duty to defend. Jennifer argued on appeal that her affirmative defense that the policy language was ambiguous should have precluded judgment on the pleadings, but the court of appeals disagreed, stating, “Because contractual ambiguity is a question of law for the court to decide, and because the term ‘accident’ is not ambiguous under California law, the district court appropriately granted judgment on the pleadings.” The opinion does not identify counsel for the parties. (We got a chuckle reading the court’s statement about the term “accident” not being ambiguous, since there is a line of California decisions on contract interpretation, widely taught in first-year Contracts courses, that has been construed to hold that all language is inherently ambiguous, and thus parol evidence is freely admissible on issues of contract interpretation to show that parties intended a meaning other than what a trial judge might believe to be the “plain meaning” of language. See *Pacific Gas & Electric Co. v. G.W.*
Thomas Drayage & Rigging Co., 69 Cal.2d 33 (1968), in which the issue was interpretation of an indemnity clause in a casualty liability contract! However, there is some suggestion in more recent case law that the California Supreme Court has narrowed the application of Pacific Gas in response to complaints, mainly from federal courts, that the decision allows too much frivolous and wasteful litigation about the meaning of standard contract language that appears to the court to be reasonably well established.

UNITED STATES COURT OF APPEALS, 9TH CIRCUIT – The 9th Circuit affirmed a summary judgment by District Judge Edward M. Chen (N.D. Cal.), rejecting Loudesia Flanagan’s allegation that her constitutional and statutory rights were violated when she was discharged from her employment in the Richmond, California, Police Department. (This is California, folks!) Flanagan v. City of Richmond, 2017 WL 2629106, 2017 U.S. App. LEXIS 10782 (June 19, 2017). In a Memorandum opinion, the court concisely reports: “Defendants contended that they fired Flanagan because she had discriminated against a lesbian volunteer, made homophobic remarks about that volunteer and others, had lied about both during an internal investigation. Flanagan has not presented triable issues that might lead a reasonable jury to find Defendants’ explanation unbelievable or that unlawful discrimination was the more likely reason for her firing. She has only denied in her affidavit that she made such statements or acted as the investigative report describes. This is insufficient. Flanagan’s case is largely circumstantial and therefore she was required to ‘present ‘specific’ and ‘substantial’ facts showing that there is a genuine issue for trial.’” She claimed that she was “targeted” and then dismissed based on her Christian faith and, particularly, her disapproval of homosexuality. Her claim that the discharge violated her freedom of religious speech was dismissed by the court on the ground that although as a private citizen she would have a right to free speech, “Flanagan’s freedom to express such views, in the particular circumstances of this case, gives way in the workplace. We hold that Defendants’ interest in maintaining a discrimination- and harassment-free work environment outweighed any First Amendment interest Flanagan had in expressing her religious views.” The court also found no Free Exercise violation, and no support for her contention that the proffered reason for her discharge was a pretext for unlawful discrimination.

CALIFORNIA – Although there are exceptions, they tend to prove the rule: discharged employees probably should not file employment discrimination suits pro se! Given the general availability of attorneys’ fee awards for prevailing parties under employment discrimination statutes, if a discharged worker can’t find a lawyer who is willing to take his or her case, it is probably not worth filing. Bollinger v. Wolfgang Puck Catering, 2017 Cal. App. Unpub. Lexis 3916, 2017 WL 2472570 (Cal. 2nd Dist. Ct. App June 8, 2017), is a good illustration. Robert Bollinger, an openly gay man, worked as a manager for WPC/Compass, which had catering contracts at major entertainment companies. The Human Resources director of the company who hired him in 2005 is also an openly gay man. Bollinger was an at-will employee and was promoted several times, eventually reaching the position of Regional Director of Operations, in which he was issued a corporate credit card (P-Card). He signed off on the instructions for use of the card, which provided that it was strictly to be used for purchases related to the business, and not for personal uses. When the company auditor questioned a charge on the monthly statement, Bollinger reacted with hostility and claimed he was being harassed when his explanation for the charge did not stop the inquiries. Bollinger did not seem to understand that one person you don’t want to alienate is the company auditor. The company’s Loss Prevention Department instituted an investigation of Bollinger’s card use, which showed “that Bollinger had used his P-Card and corporate charge account over the course of several months to do the following: (1) purchase flowers for his mother ($351.35), which he reported in a misleading manner; (2) rent an 18-passenger limousine ($1,825) for his partner and two of his partner’s clients, asking the limousine company not to report the rental as a limousine ride – he listed this rental on a P-Card report as ‘Espresso Machine repairs,’ and never provided a receipt to WPC/Compass; (3) charge over $800 of prescription ‘recreational drugs’ for his personal use to WPC/Compass, while describing them on the reconciliation report as a ‘workmen’s comp’ charge; (4) pay $2,777.26 for his personal condominium homeowner’s association dues and not indicate the nature of this charge on his reconciliation report; (5) buy a $313.20 plane ticket from Los Angeles to New York City for his partner; (6) pay $5,099 for ‘Paypal Antiques’ without prior approval. (Bollinger denied he made this purchase but did not provide any explanation for how it appeared among his P-Card charges.)” Of course, he was fired in a memorandum that stated “it has been determined that you have violated the Company Policy and Procedures.” He filed a complaint under the California Fair Employment and Housing Act, asserting claims for harassment, discrimination and wrongful termination because of his sexual orientation, and claiming that the stated reason – improperly charging personal expenses to his

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company credit card – was pretextual. The trial court granted the defendants’ motion for summary judgment. This appeal followed, focusing on the trial judge’s refusal to let Bollinger add four more counts in an amended complaint after he failed to comply with the court’s condition that he compensate defendants’ counsel for the costs of deposing him a second time on the proposed additional counts, and a claim that the trial judge had not properly applied the summary judgment standard in reaching her decision. He was pretty much laughed out of court. “The arguments which Bollinger makes on appeal are simply inapposite,” wrote the court; “none of his arguments meets his burden of establishing error in the trial court’s rulings. In the absence of such a showing, we presume the trial court’s judgment is correct.”

CALIFORNIA – In a complex ruling on motions to dismiss a multi-count complaint filed by two lesbian police detectives (who are married to each other) against the City of Imperial and various police department officials, U.S. District Judge Thomas J. Whelan sorting through the counts, disposing of some conditionally and refusing to dismiss others. Orff v. City of Imperial, 2017 U.S. Dist. LEXIS 90104, 2017 WL 2537250 (S.D. Cal. June 12, 2017). Kali Orff is a detective with the Brawley Police Department, and her wife, Michelle Kristol, is a detective with the Ventura County Sheriff’s Office. Orff was attending a birthday party at a friend’s home when, she alleges, she was sexually assaulted by Andrew Smithson, a U.S. Customs and Border Protection Agent who was also a guest at the party. She had been sleeping when she was awakened to Smithson assaulting her, “punched her attacker in the face, called 911, and reported the sexual battery to the responding officers” of the Imperial Police Department. Smithson confessed, but the complaint alleges that the Imperial Police Department didn’t conduct a proper investigation, failed to gather relevant evidence, and then stalled on submitting the case to the District Attorney’s office for over 3 months. Then the D.A. declined to prosecute, partly due to lack of evidence. Despite his confession, Smith was not charged with any crime and continues to work for U.S. Customs. The complaint alleges that Chief Michael Colon of the Imperial Police Department “made an active effort to interfere with the case” by, among other things, calling “Detective Orff’s boss at the Brawley Police Department” and giving him “the details of Orff’s sexual assault.” The complaint alleges that during this phone call Chief Colon “blamed Orff for being victimized” and “accurately accused Orff of being immoral because of her sexual orientation.” When Kristol called the Imperial Police Department to try to find out why Orff’s case was not moving, the complaint alleges, Chief Colon called Kristol’s boss and divulged details of the assault to him, while attacking Orff’s character and fitness as an officer. The complaint stated eleven causes of action, including statutory and constitutional due process and discrimination claims as well as tort claims, naming as defendants the City, Smithson, Chief Colon and the Police Department. Most of the dismissals on motion were with leave to amend. Judge Whalen found standing problems for Kristol as a plaintiff on the constitutional claims, but found that plaintiff’s adequately alleged emotional distress tort claims by Kristol against Chief Colon for his phone calls. The court found that the complaint did not allege viable constitutional claims against Chief Colon for “alleged interference with either the investigation or the prosecution of Detective Orff’s case.” However, Whalen rejected defendants’ argument that Colon’s conduct did not amount to a privacy violation. “The allegation that Chief Colon directed his disclosure at supervisors of the victim and her spouse gives rise to an implication of malice,” wrote Whalen, “changing the character of the conduct alleged from isolated indiscretions to an ‘aggravated abuse of authority,’ so the violation of privacy claim was not dismissed. The claims against the City were dismissed for lack of sufficient allegations for municipal liability. The action under the state’s public accommodations law was dismissed on the ground that the Police Department is not a “business establishment” to which that law would apply. The court also rejected the claim, based on the factual allegations, that Chief Colon had compelled “a free agent by physical, moral, or economic force or threat of physical force” when he allegedly acted to stall any prosecution. The court finely parsed the various tort allegations, finding that governmental immunity applied to some and not others. The court rejected defendants’ prayer that the demand for punitive damages be dismissed. The bottom line seems to be that a significant part of the case survives the motion to dismiss, although plaintiffs will have to replead with greater factual specificity to keep some of their claims alive. Plaintiffs are represented by Mark J. Geragos of Geragos & Geragos, Los Angeles.

CALIFORNIA – The 2nd District Court of Appeal reversed a summary judgment that had been entered against Joseph Husman, a gay man who is challenging his discharge from a high management position at Toyota Financial Services U.S.A. Husman v. Toyota Motor Credit Corporation, 2017 Cal. App. LEXIS 568, 2017 WL 2665191 (June 21, 2017). Superior Court Judge Holly E. Kindig (Los Angeles County) had granted summary judgment on Husman’s sexual orientation discrimination and retaliation claims under California’s Fair Employment and Housing Act, finding that Toyota demonstrated that
it had non-discriminatory reasons for discharging Husman, whose immediate supervisor became increasingly disenchanted with his absences from work and his resistance to counseling on improving his relationships with other employees. Writing for the Court of Appeal panel, Judge Dennis M. Perluss found that this should be analyzed as a dual motive case, in which Husman should not suffer summary judgment if he had introduced factual allegations sufficient to create a material fact issue on the question whether his sexual orientation was a substantial factor in his discharge. The unanimous panel concluded that Husman met this test as to the discrimination claim, but that his retaliation claim was properly dismissed. Perluss characterized this as a “close case” because Toyota actually has a rather good record when it comes to LGBT rights, having extended benefits to same-sex partners before it was legally obligated to do so and having been out front among corporations providing coverage for gender transition, among other things. Furthermore, when Husman was discharged his job functions were divided among two people, one of whom is an openly-gay man. The chief executive of the company, George Borst, an enthusiastic LGBT-rights advocate who initially approved the selection of the openly-gay Husman as Toyota Financial Service’s first national manager for diversity and inclusion, was ultimately the executive responsible for deciding years later that it was time for Husman to go. In its defense of the discrimination charge, Toyota made much of the “same actor” theory, arguing with success in support of its s.j. motion that Borst, of all people, who had hired the openly-gay Husman, could not have been motivated by Husman’s sexual orientation when deciding to fire him. But Judge Perluss threw cold water on that theory in a lengthy discussion that emphasized that in large corporations it is rare that

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a single individual unilaterally makes important personnel decisions, like discharging a high level management official, and in this case there was evidence that many executives contributed to the decision, including one as to whom Husman credibly asserted animus against him, invoking a “cat’s paw” theory. “In the case at bar,” wrote Perluss, “the evidence asserted by Toyota to support the same-actor inference is also susceptible to reasonable inferences favorable to Husman that must be credited on summary judgment. Notwithstanding Borst’s plain sway over his subordinate executives, hiring, promotion and firing decisions at TFS were made by consultation with members of a management committee, thereby offering substantial opportunity for other executives to influence Borst’s perceptions . . . Indeed, Borst’s claim he made the decision unilaterally is incompatible with the record’s depiction of how management operated at Toyota.” Husman alleged that when he was informed of his discharge, he was told that “he was being terminated because he had ‘excluded the majority,’ meaning he had failed to obtain the buy-in of ‘the majority,’ Toyota’s non-diverse employees. Husman understood this to mean he had focused too much on LGBT issues, a reasonable interpretation (although not the only interpretation of the remark).” Also, Husman had been told by one executive that another executive “had it out for him.” At bottom, Husman’s claim is that although there was a level of acceptance of gay people at Toyota, he was being discharged for being “too gay” for the comfort of some executives, placing more emphasis on LGBT rights than some executives were willing to tolerate. The court reversed the summary judgment, holding that Husman is entitled to a trial of his discrimination claim. Husman is represented by Barrera & Associates and Patricio T.D. Barrera.

CALIFORNIA – In case where the mother of a high school student who committed suicide seeks to hold the school district and various individual school employees liable under the constitution and various federal statutes, Chief U.S. District Judge Lawrence J. O’Neill (E.D. Cal.), dismissed some named defendants from the case (although some may be brought back if an amended complaint makes adequate factual allegations linking them to specific claims) and found factual allegations insufficient to ground some of the claims (although again this might be cured in a Second Amended complaint), but did allow a significant part of the case to go forward. Neil v. Modesto City Schools District, 2017 WL 2911578, 2017 U.S. Dist. LEXIS 105510 (July 6, 2017). Although the complaint did not refer to sexual orientation as an issue in the case, the plaintiffs’ response to defendants’ motions to dismiss suggests that something was missing from the complaint. “Plaintiff also appears to argue for the first time in her opposition that Plaintiff was discriminated against as a member of ‘a limited and specifically definable group of gay High School students.’” The court found that because sexual orientation was not mentioned earlier in the case, and particularly not in the First Amended Complaint that was the subject of this motion, “Plaintiff cannot make new allegations in the opposition. The Court may only draw factual allegations from the operative complaint on a motion to dismiss.” Thus, at this stage in the proceeding, the action proceeds against certain school officials in their individual capacities, on a claim that they violated the child’s constitutional and statutory rights in their responses to a series of incidents that led to the student’s expulsion and ultimate suicide, with a particular focus on race as the reason for discrimination. The early Westlaw and Lexis prints of the opinion do not identify counsel for the parties.
CALIFORNIA – A man who quit his job as a Starbucks barista in Auburn, California, after two month because, he alleges, he “was forced to endure an openly hostile work environment based on his sexual orientation and/or his perceived sexual orientation,” suffered dismissal of his state court law suit under the California Fair Employment and Housing Act because of an arbitration agreement he signed during the hiring process. Hornes v. Starbucks Corporation, 2017 U.S. Dist. LEXIS 101498, 2017 WL 2813170 (E.D. Cal. June 29, 2017). Chad Horne submitted an online application for employment on May 1, 2016, and was “expressly notified” of the arbitration agreement, which he was “required to electronically sign” as a condition of employment. Horne, represented by Roman Otkepman of Woodland Hills, argued that the arbitration agreement, which clearly applies to the claims he is making, is unenforceable because of the limits it places on discovery. U.S. District Judge Morrison C. England, Jr., noted that another federal court in a different California district had recently enforced the identical Starbucks arbitration agreement, and that the agreement allowed for plenty of discovery, especially in light of the fact that Horne had worked for Starbucks only a few months. (It appeared that Horne or his counsel misconstrued the provision. They alleged that it limited Horne to two depositions, when actually, quoting from the provision, it allowed for “a maximum of two eight-hour days of depositions of witnesses.” The court pointed out that one can depose more than two witnesses over the course of two eight-hour days.) Further, the judge noted, the agreement provided that the arbitrator could authorize additional discovery “upon a showing of substantial need by either party or upon a showing of an inability to pursue or defend certain claims.” It was clear that this agreement was drafted by somebody who was informed about California case law on grounds for refusing to enforce arbitration agreements and had taken steps to anticipate any challenge on the discovery limitations.

CALIFORNIA – In a lengthy, detailed opinion too complicated to explicate here, U.S. Magistrate Judge Andrew J. Wistrich dealt with an appeal by a gay man from El Salvador of a decision by the Social Security Commissioner to deny supplemental security benefits based on an ALJ’s decision that the plaintiffs could perform some “alternative jobs” that exist in the national economy in significant numbers. Iglesias v. Berryhill, 2017 U.S. Dist. LEXIS 105341 (C.D. Wash. July 7, 2017). We generally have stopped reporting on routine Social Security cases denying disability benefits to persons with HIV, but this one is different, not an HIV case, where the central issue is whether a gay man who suffered severe physical and sexual abuse as a child, has limited command of English, is homeless and socially isolated, from at least one doctor’s description, is probably not particularly employable due to severe depression and other mental problems, should be denied disability benefits. One has to read the decision to understand the magnitude of the problem. Judge Wistrich decided that the ALJ and Commissioner had given insufficient consideration to treating and examining health care professionals’ assessments of the situation, failing to explain in sufficient detail why they were not crediting the testimony.

COLORADO – Responding to a motion filed by Lambda Legal to reopen a case in which the district court last November ordered the State Department to reconsider its refusal to grant a gender-neutral passport to Lambda’s client, an intersex Navy veteran who does not identify as either male or female, U.S. District Judge R. Brooke Jackson granted Lambda’s unopposed motion to reopen the case on June 27. According to a Reuters report on June 28, “After conducting its court-ordered review, the State Department last month against denied Dana Zzyym’s application.” According to the Reuters report, “Zzymm, born in 1958 . . . was raised as a boy and underwent several irreversible, painful and medically unnecessary surgeries before joining the U.S. Navy as a male. It was only after returning to civilian life after six years in the military that Zzyym realized there were others who did not fit into traditional gender categories.” The court’s prior decision is reported as Zzyym v. Kenny, 220 F.Supp.3d 1106 (D. Colo. 2016). A large team of attorneys has been representing Zzyym in the litigation: Brian Leo Lynch, Thomas George Hackney, Trina Kisel Taylor, Faegre Baker Daniels LLP, Jessica Marie Kunevicius, Kristin Ann Petri, The Law Office of Jessica Kunevicius LLC, Denver, CO, Camilla Bronwen Taylor, Lambda Legal Defense & Education Fund, Chicago, IL, Demoya Renee Gordon, Hayley Jill Gorenberg, M. Dru Levasseur, Lambda Legal Defense & Education Fund, New York, NY, Emily Elizabeth Chow, Michael Allen Ponto, Faegre Baker Daniels LLP, Minneapolis, MN, Paul David Castillo, Lambda Legal Defense & Education Fund, Dallas, TX, are all listed as counsel in the district court’s November ruling.

CONNECTICUT – Reuters reported on June 27 that Yale University has sued the state of Connecticut for blocking the school’s attempt to accommodate transgender students by increasing the number of single-occupancy restroom facilities designated as open to all genders in its aged law school building. The school wants to designate all single-occupant restrooms on the law school campus as gender-neutral, facilitating
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ease of access for all students, but the state insists that the building must have at least a certain number of restrooms designated solely for male or female use in order to comply with building code requirements giving the authorized occupancy level of the building. According to the Reuters report, “The state code would require Yale to build more bathrooms to be in compliance with rules about the number of restrooms for men and women. The school said it would be impractical and unnecessary in its century-old law school building.” The case was filed June 23 in Superior Court in New Haven. It sounds to us like a case of bureaucratic inflexibility that should be easily settled, now that the filing of the suit confronts state officials with the silliness of their position. After all, Connecticut is generally known as an LGBT-friendly jurisdiction in which state law forbids gender identity discrimination and marriage equality was achieved through state court litigation and legislative amendments that were completed years before that issue was finally decided by the U.S. Supreme Court.

DISTRICT OF COLUMBIA – The EEOC announced that the federal district court approved a consent decree on July 6 to settle the case of EEOC v. Capital Restaurant Concepts, Ltd., No. 16-2477, in which the agency asserted harassment and constructive discharge allegations on behalf of a young gay man, Alejandro Hernandez, who had worked as a waiter at the respondent’s restaurant, Paolo’s Ristorante in the Georgetown section of the District of Columbia. According to the complaint, Hernandez was subjected to co-workers’ homophobic epithets and taunts, was told by managers that he was “too sensitive” when he complained, and eventually quit when co-workers ostracized him for complaining. Because of the settlement, the court did not have to rule on whether sexual orientation-related harassment and discrimination violates Title VII, a question as to which there is no recent circuit authority in D.C. The company denies any discrimination and said it settled the case to “avoid further litigation.” The case was settled for $50,000 and a requirement that the respondent revise its anti-harassment policy and complaint procedures and train its workers and managers about their responsibilities under Title VII. This report was sourced from Bloomberg/BNA’s Daily Labor Report, 129 DLR 11 (July 7, 2017).

ILLINOIS – In a logical extension of the 7th Circuit’s decision in Hively v. Ivy Tech Community College, 853 F.3d 339 (en banc 2017), that sexual orientation discrimination claims are actionable as sex discrimination claims under Title VII, U.S. District Judge John J. Tharp, Jr., ruled on July 6 that a Title VII plaintiff could allege sex discrimination based on perceived sexual orientation, in Trahanas v. Northwestern University, 2017 U.S. Dist. LEXIS 104098, 2017 WL 2880879 (N.D. Ill.). Judge Tharp’s opinion does not mention whether Diane Trahanas identifies as a lesbian, but recites her factual allegations that her male boss “apparently believed Trahanas was a lesbian, regularly calling her one in front of her coworkers, calling her a ‘softball player’ because ‘all softball players are lesbians,’ asserting all basketball players are ‘lesbians,’ and calling her manly. He also stated that he hoped his daughter would be like Trahanas so that he would not have to worry about her getting pregnant. These comments made Trahanas visibly uncomfortable, causing her to turn away or make a face.” The multi-count complaint asserts claims under the Americans with Disabilities Act, Title VII, and Family and Medical Leave Act, and various Illinois common law tort claims. Defendants moved to dismiss all claims, arguing in particular as to the Title VII hostile environment claim that “sexual orientation is not protected under Title VII.” Judge Tharp noted that the motion was briefed before the 7th Circuit issued Hively, but in light of Hively, that argument “is no longer viable.” He also rejected as “grossly off the mark” the defendants’ contention that “the alleged derisive comments about her sexual orientation” were merely “an undisclosed number of innocuous comments,” and the judge asserted, “although none of those remarks were physically threatening, remarks about sexual orientation certainly have the capacity to offend, humiliate, and intimidate their targets.” He found the allegations “adequate to plausibly state a claim for a hostile work environment at the motion to dismiss stage.” However, the court dismissed a Title VII retaliation claim, finding that the complaint made no allegation that Trahanas had ever “complained about the treatment based on her perceived sexual orientation to her superiors or human resources,” and thus had not engaged in the kind of “protected conduct” necessary to underlie a retaliation claim under Title VII. However, the court refused to dismiss retaliation claims under the FMLA and the ADA. Trahanas is represented by John P. DeRose of Hinsdale, IL.

ILLINOIS – The Appellate Court of Illinois has denied a motion for reconsideration and dismissed an appeal by Jim Walder, owner of TimberCreek Bed & Breakfast in Paxton, Illinois (d/b/a Walder Vacuflo, Inc.) of a ruling by the Illinois Human Rights Commission that Walder violated the state’s Human Rights Law when he refused to allow Mark and Todd Wathen to hold their civil union ceremony at his establishment in 2011, after the state’s Civil Union Law first went into effect. Walder Vacuflo, Inc. v. Illinois Human Rights Commission, No. 4-16-0939 (May 30, 2017). In an email responding
to their request to hold the event at Walder’s establishment, which regularly hosted marriage ceremonies, Walder wrote, “Homosexuality is immoral and unnatural.” Administrative Law Judge Michael R. Robinson issued a recommended liability determination against Walder on September 15, 2015, and the Commission declined further review and adopted the Recommended Order and Decision on November, 18, 2016. The Order awards damages of $30,000 to the complainants and attorneys’ fees of $50,000 to their counsel. The Appellate Court did not issue an opinion explaining its Order. According to Huffington Post (March 30, 2016), Walder had released a statement condemning the ruling, stating: “We may be out of step with an increasingly anti-Christian culture, but we are in compliance with God’s design and that is what ultimately matters.”

ILLINOIS – U.S. District Judge Manish S. Shah denied some motions to dismiss and granted others in a lawsuit against the City of Chicago, several police officers, a technology contractor to the city, and the owner of a nearby business, brought by a gay African-American man who claims to have been “framed” by the police and suffered a fractured arm due to excessive force by a police officer during an arrest. Mederich v. City of Chicago, 2017 WL 2880881, 2017 U.S. Dist. LEXIS 104097 (N.D. Ill. July 6, 2017). The opinion does not state when the incident occurred. According to the complaint, John Mederich and two friends were “standing in an alley when a marked squad car with Officers Nicholas Chrabot and Dennis Cochran, in full dress uniform, arrived. Mederich was holding a brown paper bag that contained an open twenty-five ounce alcoholic beverage.” Video cameras mounted on the squad car were aimed at Mederich and his friends. “Chrabot exited the squad car and said to Mederich, ‘Did you think I wasn’t going to see you?’ While writing Mederich a ticket, Chrabot asked Mederich if he knew why he was being stopped. Mederich answered that he was stopped because he was drinking in public, in violation of the law. Chrabot threatened to write Mederich up for ‘not cooperating,’ and told Mederich that he was under arrest and to put his hands on the squad car. Mederich followed Chrabot’s instruction. Chrabot warned Mederich that the dash camera was recording their interaction. Mederich’s friends told Chrabot that ‘Black lives matter’ and that Chrabot would not be treating Mederich the way Chrabot was if Mederich and his friends were ‘straight white guys.’ Chrabot demanded: ‘Why did you say that to me?’ Then, without cause or provocation, Chrabot twisted Mederich around and threw him to the ground, fracturing Mederich’s right arm. Before being transported to the police station, Mederich’s arm was placed in a cast at Norwegian American Hospital.” Sergeant Joseph Giambrone was assigned to investigate the arrest. According to the complaint, he found no excessive force but did not view any video or audio footage to reach his conclusion, even though “at the time of the arrest there were three squad cars with dash cameras” and two nearby local businesses had video surveillance cameras that were nearby. Neither did he interview any witnesses, other than the police officers and Mederich. The police department contended that the batteries had been drained from the cameras long before, although this was not indicated in Department logs, and the “individual log for a second police car indicated that its dash camera ‘was abruptly shut down’ during Mederich’s arrest.” Mederich contended that the owner of one of the local businesses conspired with the police to “destroy or allow to be destroyed” the video surveillance evidence. Mederich claims that the “investigation” was a “wall of silence” whitewash. He was arrested and convicted of various charges, apparently based entirely on the testimony of the police officers that he had resisted arrest. The court dismissed negligence claims against Coban Technologies, which has a contract with the CPD to maintain the dash cameras, finding that this contract did not create a duty of care running to members of the public. “Cameras may deter or document instances of police misconduct, but a contract to repair those cameras does not impose a tort duty on the repair company to protect people from the risks of police misconduct,” wrote Judge Shah. However, the court refused to dismiss claims against the City of Chicago for negligent repair of the dash cameras and negligent spoliation of evidence, rejecting the defense that these negligence claims are barred by the state’s Immunity Act protecting local government and local government employees, at least based on the allegations of the complaint, which are the only relevant factual allegations in deciding the motion to dismiss. As to the police officers, who sought dismissal of claims against them on grounds of immunity, the court refused to dismiss the count alleging misconduct with respect to the dash videos, but as to other claims, the the court found that allowing them to continue would contradict Mederich’s conviction. The court found that a state law precedent barred a suit against the officers for civil liability for their conduct during an arrest when the criminal court had already decided that Mederich was guilty of battery and resisting arrest and had admitted to drinking in public, as this would question the validity of his prior convictions. The court granted a motion to dismiss claims against a nearby business owner, who was charged with conspiring with the police to interfere with Mederich’s civil rights by destroying the video evidence from his surveillance cameras. The court found that the factual allegations on this claim failed to meet the pleading requirements for
IOWA – The Iowa Supreme Court has revived due process claims asserted by Christopher J. Godfrey, an openly-gay Iowa Workers’ Compensation Commissioner, against Governor Terry Branstad and several of his top staff members who he claims undertook various unlawful methods to get Godfrey to resign before the end of his term. Godfrey v. Branstad, 2017 WL 2825878, 2017 Iowa Sup. LEXIS 79 (June 30, 2017). Godfrey was appointed by Democratic Governor Chet Culver to a six-year term, becoming the first openly gay person to be appointed a state agency commissioner. Governors in Iowa have four-year terms. Republican Branstad was elected with years left to run on Godfrey’s term, and promptly demanded that Godfrey resign so that Branstad could appoint somebody else to the Commission. Godfrey insisted that the statutory scheme of six year terms were to enforce the political neutrality of agencies such as the Workers’ Compensation Commission, and he should not have to resign just because a governor of the opposite party was elected. When Godfrey refused to quit, he claims, Branstad and his staff pressured him retaliated against him by reducing his salary and undertaking other forms of retaliation. Godfrey filed suit in state court with a 15-count complaint, four of which related to Iowa constitutional due process and equal protection claims. The trial court dismissed the constitutional claims, accepting defendants’ argument that Iowa constitutional provisions are not self-executing and that the legislature has not authorized lawsuits to vindicate state constitutional claims. In this decision, a majority of the court holds that the due process and equal protection provisions of the state constitution are self-executing, and that individuals with such claims can assert them against the government in a lawsuit similar to a federal Bivens action. However, this determination was 4-3, and Chief Justice Mark Cady, while agreeing with the majority (opinion by Justice Brent R. Appel) that the provisions are self-executing, disagrees with the majority on whether Godfrey can being an equal protection claim of sexual orientation discrimination when the state’s civil rights statute already bans such discrimination. Justice Appel and two other justices assert that the constitutional equal protection claim should be allowed. Three justices, joining in a dissent by Justice Edward Mansfield, rely heavily on a constitutional provision that the legislature “shall” enact laws for enforcement of the constitution, to hold that the failure of the legislature to authorize such constitutional tort claims means that they can’t be brought. Cady says that the civil rights law provides a sufficiently “robust” remedy that it should be the exclusive mechanism for litigating a sexual orientation discrimination claim against the government. The bottom line: the trial court’s dismissal of the two due process counts is reversed and they can be added to the other counts under state law still pending. (Which may not be much, as Godfrey has agreed to drop many of the other counts in his complaint.)

KANSAS – Denying a motion for a new trial after a jury had ruled against plaintiffs in a Title VII sex discrimination and retaliation case, U.S. District Judge Kathryn H. Vratil rejected the argument that her failure to grant plaintiffs’ request to redact from email exhibits references to one of the of the plaintiffs’ sexual orientation was a prejudicial error. Boxum-Debolt v. McKay, 2017 WL 2807701, 2017 U.S. Dist. LEXIS 100670 (D. Kans. June 29, 2017). Plaintiffs Krystal L. Boxum-Debolt and Lisa Anne Moore, who were dismissed from their jobs by the former district attorney, Chadwick Taylor, sued under Title VII, claiming they were fired because of their gender and/or in retaliation for opposition to gender and race discrimination. The court found that substantial evidence supported the jury verdict. “Based on evidence presented at trial,” wrote Judge Vratil, “the jury could reasonably conclude that Taylor decided to fire plaintiffs based on their distasteful emails and Sue Murphy’s statements regarding plaintiffs’ contribution to dysfunction in the victim/witness unit, and not because of discriminatory and/or retaliatory intent.” In a footnote, the judge expanded a bit on the facts: “Defendant asserted that Taylor fired plaintiffs because of their negative work attitudes, including certain emails that they exchanged at work. In the emails, plaintiffs made derogatory comments about co-workers and discussed their own drunken conduct at local bars, including Moore’s love interests in other women. Plaintiffs sought to redact statements regarding Moore’s sexual orientation. The Court found that redacting the emails would change their character and substance and that knowledge of Moore’s sexual orientation would not unduly prejudice the jury.” Judge Vratil concluded that evidence regarding Moore’s sexual orientation “was relevant to the issues at hand and did not unduly prejudice plaintiffs.” The plaintiffs were represented by Athena M. Dickson, Eric W. Smith and Rik N. Siro of Siro Smith Dickson PC, Kansas City.

MAINE – After divorcing her husband, Carol Boardman filed a name change petition in the Cumberland County Probate Court, seeking to change her surname to Currier. Probate Judge Joseph R. Mazzotti asked her whether Currier was her maiden name. She said it was not; she had divorced and
wanted a fresh start and desired the last name of her current male partner. Judge Mazziotti denied the petition, opining that allowing her to assume her unmarried male friend’s last name would mislead the public into thinking she was married to him, and could result in defrauding creditors. She appealed, and the Maine Supreme Judicial Court unanimously reversed, in In re Boardman, 2017 Me. LEXIS 138, 2017 ME 131, 2017 WL 2773933 (June 2, 2017). The court received amicus curiae briefs from a similarly situated litigant and from several public interest groups, including GLAD, the ACLU of Maine, EqualityMaine (the state’s gay rights lobby group), and the Trans Youth Equality Foundation. The court’s per curiam opinion drives home the point that name changes are to be freely granted unless there is evidence of actual intent to defraud. The name-change statute “provides only two bases for denying a requested name change – when it is sought ‘for purposes of defrauding another person or entity’ or when it is sought ‘for purposes otherwise contrary to the public interest.’ As we have said, ‘the main purpose of the statute . . . is to provide petitioners with the certainty of a judicially-sanctioned name change, as long as the petition is not submitted with fraudulent intent and the change of name does not interfere with the rights of others.’” The court found no evidence of fraudulent intent here, and noted that the state’s ban on marital status discrimination meant that “by law, it cannot be marital status that dictates the availability of credit or leasing options – the transactions about which the Probate Court expressed concern.” Then the court waxed philosophical: “Moreover, as a practical matter, given the variety of naming conventions in modern society, having the same last name no more indicates that a couple is married than having a different last name indicates that a couple is unmarried.” The court noted that in 1975 it had reversed the refusal of a trial judge to allow a married woman to legally resume her maiden name although she and her husband had no desire to divorce. In that case, In re Ruben, 342 A.2d 688 (Me. 1975), the court held that the trial court’s refusal to grant the name change was an “abuse of discretion.” The court also cited rulings from other jurisdictions where appellate courts had overruled the refusal of trial judges to grant name changes because the court was unhappy about giving the same surnames to same-sex couples or to changing given names for transgender petitioners. “On this appeal,” the court said, “we conclude that a person’s potential misunderstanding of another person’s marital status, without more, does not qualify as a fraud that precludes the court’s discretion to allow name changes in the Probate Court.” The case was remanded with instructions to grant the petition. The petitioner was represented by James S. Mundy of Whitney, Mundy & Mundy, South Berwick.

MISSISSIPPI – U.S. District Judge Carlton W. Reeves has granted a motion by plaintiffs who are challenging being subjected to registration as sex offenders under Mississippi’s Sex Offender Registry to proceed anonymously. Doe v. Hood, 2017 U.S. Dist. LEXIS 84585, 2017 WL 2408196 (S.D. Miss., June 2, 2017). The plaintiffs allege that they are required to register “as a result of a prior conviction under Mississippi’s ‘Unnatural Intercourse’ statute or an equivalent out-of-state offense, i.e., the ‘ sodomy law.’” They claim that their conduct was constitutionally protected under the Due Process Clause, as held by the U.S. Supreme Court in 2003 in Lawrence v. Texas, so they should not be required to register as sex offenders. The sole issue before the court in this ruling was their request to be allowed to proceed as “John Doe” plaintiffs and to file redacted court papers or papers under seal in such a way as to preserve their anonymity. Allowing such procedures is within the district of the district court. Judge Reeves noted that the 5th Circuit has identified three factors “common to those exceptional cases in which the need for party anonymity overwhelms the presumption of disclosure”: (1) plaintiffs are “suing to challenge governmental activity; (2) prosecution of the suit compels plaintiffs to disclose information of the utmost intimacy;” and (3) plaintiffs are compelled to reveal their identities to the public safety of an individual’s safety. In this case, he accepted the argument that having to be public about their status could be harmful to the plaintiffs – especially to their safety, in light of studies cited by the court about the safety concerns of people listed on state sex offender registries. “Because these pleadings have the potential to invite ire in response to both homosexual conduct as well as plaintiffs’ inclusion on Mississippi’s sex offender registry,” wrote Reeves, “plaintiffs could reasonably expect ‘extensive harassment and perhaps even violent reprisals if their identities are disclosed.’” He also found that non-disclosure would not materially disadvantage defendants, because ultimately the question posed in this case is one of law, not fact-finding. “The State will be able to defend its position – that at least some portion of Mississippi’s Unnatural Intercourse statute was not invalidated by Lawrence, and that requiring sex offender registration for out-of-state equivalent offenses does not violate equal protection – without disclosing plaintiffs’ name to the public,” he concluded. Ruling that “none of plaintiffs’ personally identifying information shall be made public on the Court’s docket,” Reeves directed the plaintiffs to consult with the Magistrate
Judge concerning specific means of preserving plaintiffs’ anonymity. The named defendant is Mississippi Attorney General Jim Hood, whose department administers the registry. Plaintiffs are represented by the Center for Constitutional Rights with assistance of local counsel, and amici in the case include GLAD, the ACLU, Lambda Legal, DKT Liberty Project, and additional pro bono counsel from several firms.

**NEW JERSEY** – Bad timing? Mistake of judgement? Accident of fate? Either way, Rucksapol Kiwungkul, Executor and surviving registered domestic partner of Maurice R. Connolly, Jr., lost his bid for a spousal deduction from estate taxes because the men did not take advantage of the ability to form a New Jersey Civil Union or to marry before Connolly died. Jiwungkul v. Director, Division of Taxation, 2017 N.J. Super. LEXIS 62, 2017 WL 2332762 (N.J. App. Div., May 30, 2017), affirming Jiwungkul v. Director, 2016 N.J. Tax Unpub. LEXIS 28 (May 11, 2016). The men registered as domestic partners in 2004 when New Jersey passed the Domestic Partnership Act, which made available a short list of specified benefits that did not include the spousal deduction from estate taxes, but did allow surviving DPs an inheritance tax exemption. After the New Jersey Supreme Court ruled in 2006 that same-sex couples are entitled to enjoy the same benefits as married couples, the state passed a Civil Union Law, which specifically allowed the marital deduction for civil unions, but the plaintiff and his partner did not form a civil union, preferring to wait until full marriage became available. Marriage did become available in New Jersey in October 2013 when Governor Christie decided not to appeal a trial court marriage equality ruling after the state Supreme Court upheld the trial court’s denial of a stay in an opinion strongly signaling that the underlying decision was likely to be affirmed, see Garden State Equality v. Dow, 216 N.J. 314 (2013). This was in the midst of the post-Windsor marriage litigation activity in dozens of states that eventually culminated in the Obergefell decision in June 2015. When it became possible for same-sex couples to marry in New Jersey, Jiwungkul and Connolly began to plan for a wedding, but unfortunately Connolly passed away before their planned wedding could take place. As Executor, Jiwungkul filed New Jersey estate tax returns on behalf of the estate that were consist with their status as registered domestic partners. Because no spousal deduction was permitted for DPs under the New Jersey Estate Tax Law, he did not claim such a deduction for the estate, which paid $101,040.72 in estate tax. He subsequently filed an amended estate tax return claiming the marital deduction for the property that passed to him from Connolly and sought a refund of the estate tax, arguing that because the men had a constitutional right to equal marriage benefits, the DP Act’s failure to include the marital deduction was unconstitutional. He was turned down because the DP Act does not provide for a marital deduction and the men had filed to form a civil union or get married before Connolly died. Superior Court Judge Patrick DeAlmeida determined that because the men had not formed a civil union or married, the estate was limited to what was provided in the DP Act, and that did not include the marital deduction. After the N.J. Supreme Court ruled in Harris, the legislature cured the constitutional violation by first creating the Civil Union Act, which extended full state law tax benefits to civil union partners. “We agree with Judge DeAlmeida that the DPA should be applied as written and that, because same-sex couples can access all the rights and benefits of marriage through marriage or civil unions, there is no constitutional violation.” Perhaps Jiwungkul, who is represented by Robyne D. LaGrotta, will find better luck at the New Jersey Supreme Court. With over $100,000 at stake, a further appeal may be worth the effort.

**NEW JERSEY** – A two-judge panel of the New Jersey Appellate Division affirmed a decision by the Civil Service Commission to reduce a disciplinary suspension of an employee of the Ocean County Board of Civil Services who had violated confidentiality rules by posting the name of a Board client on the employee’s Facebook page. N.L. I v. Ocean County Board of Social Services, 2017 N.J. Super. Unpub. LEXIS 1514, 2017 WL 2705411 (June 23, 2017). N.L., a Human Services Specialist, was upset that individuals in the Board’s waiting room were ridiculing another client, because the client is transgender. “N.L. found the ridicule directed at the client abhorrent, and posted messages in support of the client on Facebook that evening. The postings revealed the ridiculed client’s nickname, and that N.L. worked for the Board. N.L. also made derogatory comments about the individuals in the waiting room. The posting were seen by N.L.’s Facebook ‘friends’ and by others, including an assistant administrator of social work employed by the Board, who was not N.L.’s Facebook ‘friend’” and who, evidently, turned her in for violating confidentiality. The Board imposed a 60-day suspension, which N.L. appealed to the Civil Service Commission. An administrative law judge found that N.L. had violated the rules, but not any other policy, and that various mitigating factors would justify reducing the suspension to 10 days. Among them were some lack of clarity in the rules, and the lack of training on confidentiality for staff. “Furthermore,” wrote the ALJ, “the implications of social media are novel to everyone.” The ALJ also noted that N.L. hadn’t sought to harm the client, and was actually...
speaking in the client’s defense. N.L. was a five-year employee with a clean disciplinary record. The Board filed exceptions with the ALJ’s decision, and the Commission, on review, upheld the suspension to 30 days. Not yet satisfied, the Board appealed to the Appellate Division, where it ran into good old fashioned administrative law: “Only if we find the Commission’s decision arbitrary, unreasonable or capricious, or unsupported by substantial, credible evidence in the record, can we reverse it,” wrote the court. “Our deference extends to sanctions imposed by the Commission. Our consideration is limited to whether the “punishment is so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one’s sense of fairness,” quoting In re Carter, 191 N.J. 474, 484 (2007). The court found that the reasons cited by the Commission for increasing the suspension imposed by the ALJ were “sound,” and similarly so for reducing the suspension imposed by the Board. “The Board cannot reasonably contend that progressive discipline is inappropriate in this case,” noting that, after all, the Board had not dismissed the employee. The court emphasized N.L.’s testimony that she thought that only her Facebook “friends” would have access to her comments.

NEW YORK — U.S. District Judge Andrew L. Carter, Jr., denied a motion by Bard College to dismiss sex and sexual orientation discrimination claims asserted by a lesbian professor, Barbara Luka, who was denied tenure. Luka v. Bard College, 2017 U.S. Dist. LEXIS 102173, 2017 WL 2839641 (S.D.N.Y., June 29, 2017). Luka first joined the faculty as a visiting professor in 2003, and then received a tenure-track appointment in the psychology department in 2005. She claims that things were going well for her, including a positive evaluation by the chair of the Psychology Department, but things soured when this individual, Prof. Frank Scalzo, learned that she was a lesbian. After that, she said, his attitude because “actively very hostile” and he made nasty remarks about her and her partner. She first came up for tenure consideration during the 2009-2010 academic year and despite good reviews of her teaching and publications, and an affirmative faculty committee vote, she was not granted tenure and alleges that Scalzo was actively working to defeat her application. Bard President Leon Botstein gave her a three-year extension on the tenure track. She claims that Botstein told her that her “sexual orientation was not an issue to him,” but that he “implied” that it was an issue for Scalzo. She came up for tenure consideration again in 2013, and claims that Scalzo poisoned the well and persuaded the other faculty in the psychology program to vote against her, calling her “crazy” and unstable. Despite favorable external reviews of her published work, she encountered a complaint internally that she had not published enough for a mid-career academic. She took this to be ageist, and Scalzo’s remarks to attribute mental disabilities to her. When she was denied tenure, she sued alleging age, disability and sexual orientation discrimination, invoking federal and state anti-discrimination laws, and eventually amended her complaint to add a sex discrimination claim, noting that since her tenure denial all the new hires in the psychology department had been men, substantially younger than her. Judge Carter granted the defendants’ motion to dismiss the age and disability claims, but not the sex and sexual orientation claims. Although the judge looked favorably on the argument that the remarks by Scalzo relating to age and mental disability were merely “stray remarks,” this was not true of the sexist and homophobic remarks quoted in the complaint, which the judge concluded were sufficient to make these claims plausible, the threshold set by federal civil pleading standards to survive a motion to dismiss. Carter rejected an argument that Luka had pleaded her gender discrimination claim “as a proxy” for her sexual orientation claim, asserting that “the two theories can co-exist,” and citing the recent 2nd Circuit ruling in Christiansen v. Omnicom Group, 852 F.3d 195 (2nd Cir. 2017), in which the court had clarified how to analyze a case where elements of sex discrimination and sexual orientation discrimination are both present in the plaintiff’s factual allegations. With the dismissals of the ADEA and ADA claims, federal jurisdiction hangs on the Title VII claim which, under existing circuit precedent, would not cover a sexual orientation claim. The 2nd Circuit is reconsidering that view en banc in the fall in another case. Luka is represented by Jeanne Ellen Mirer of New York City.

NEW YORK — Acting Justice Martha L. Luft of New York Supreme Court, Suffolk County, granted a motion for summary judgment by the North Patchogue Fire Department and Department Vice President Dennis Curry, dismissing a complaint by Theresa A. Hannigan alleging sexual orientation and disability discrimination and state law tort claims arising from the rejection of her application for reinstatement as an Emergency Medical Technician (EMT) with the Department. Hannigan v. North Patchogue Fire Department, 2017 N.Y. Misc. LEXIS 2126, 2017 NY Slip Op 31148(U) (May 26, 2017). Hannigan joined the Department as a volunteer EMT in 2002. At the time she was a paid EMT with the Central Islip-Hauppauge Volunteer Ambulance Corps. She had been married and divorced, and had been living with a same-sex partner since 1998, but was not “out” in the hiring process. She sustained a serious spinal injury in an auto accident in 2006, which led her to resign from the North Patchogue Fire
Department in 2008. In her deposition, she testified that a member of the
Department, one Brad Tygar, had stated that she was a “homosexual” sometime
in 2005, according to a statement to her by a co-worker. She also testified that
another member of the Department had told her that it was wrong of Hannigan
not to bring her partner to an installation dinner or to keep her sexual orientation
a secret, and that after 2005 she did bring her partner to firehouse functions
up until the time she resigned. She had formally complained to supervisory
officers about Tygar’s statement, but when they investigated, the co-worker
was unwilling to submit a statement, and Hannigan subsequently made no
further complaints. In 2010, she applied
for reinstatement as an EMT, but did not
provide any medical documentation to
show that she had recovered sufficiently
to perform essential job functions. Her application was denied by the
Membership Committee, half of whom
swear they did not know she was a
lesbian when they made the decision. She claims she was turned down because
of her sexual orientation, although she
admitted in her deposition that the
Membership Committee believed that
she was “unable to lift stretchers and
perform the physical aspects of being an
EMT.” At the time of her interview with
the committee she wore a leg brace and
was being treated for an autoimmune
condition, and she has been wheelchair-
bound since March 2011 (subsequent to
the committee interview). Justice Luft
easily found that the Department was
entitled to dismissal of her disability
discrimination claims, noting that being
unable physically to perform the job, a
finding she cannot contest, is a complete
defense. (Indeed, under a special
provision of the NY Human Rights
Law applicable to fire departments, Exec. Law Sec. 296(9), discrimination
because of disability is not included as
a prohibited ground of discrimination.) As to her Title VII and New York State
Human Rights Law sexual orientation
discrimination claims, Justice Luft
noted that as of now 2nd Circuit
precedent rejects sexual orientation
discrimination claims under Title VII,
and that although the New York Human
Rights Law (including the special
provision for Fire Departments) does
authorize sexual orientation claims,
once again, inability to do the job is a
defense. “Here, plaintiff belongs to the
protected class,” wrote Luft; “however,
defendants have established that she
was not qualified for the position for
which she reapplied.” Although she
had reapplied to be a volunteer EMT
in North Patchogue, she did not reapply
for the paid position with the Central
Islip-Hauppauge Volunteer Ambulance
Corps “because of her age and her belief
that she would not be able to handle the
physical aspects of the job. Plaintiff
also admits that after her motor vehicle
accident she was totally disabled.” Of the
letters Hannigan had submitted to the
court as medical documentation, Justice
Luft rejected one as not being submitted
under oath, and found the other to
be “speculative, unsubstantiated, and
conclusory.” The court also found no
factual basis for claims of hostile work
environment, intentional infliction of
emotional distress, or prima facie tort.
Hannigan is represented by Joseph C.
Stroble of Sayville.

NEW YORK – Partially reversing a
summary judgment for defendants, the
New York Appellate Division, 4th
Department, revived a discrimination
lawsuit by William J. Thygesen, former
member of the North Bailey Volunteer
Fire Department, who claimed that
defendant’s decision to expel him
from membership violated his civil
rights on grounds of sexual orientation.
Thygesen v. North Bailey Volunteer
LEXIS 4604, 2017 WL 2491451
(June 9, 2017). The court decided
that, contrary the ruling by the trial
judge, the plaintiff had managed to
raise a material fact issue concerning
whether his sexual orientation was a
factor in the vote to expel him, based
on hearsay and deposition testimony.
As is common with N.Y. Appellate
Division rulings, the opinion is a brief
memorandum which does not really go
into the facts very much, but it sounds
like plaintiff was the subject of rumors
about sexual misconduct with children
which may have contributed to, or
event stimulated, the vote to oust him
from the company.

NEW YORK – This case sounded
hauntingly familiar when we read it.
It refers back to a case we reported
last year, White v. City of New York,
2016 U.S. Dist. LEXIS 123140, 2016
WL 4750180 (S.D.N.Y. Sept. 12, 2016),
where the court rejected claims by
the plaintiff, a transgender man, that
city policy officers had wrongfully
refused to come to his assistance
against a neighbor who was bullying him. White had also sued the neighbor, as part of the suit, but that claim was withdrawn. In this new case, *Monroe v. White; Huffington Post, 2017 U.S. Dist. LEXIS 88385 (S.D.N.Y. June 7, 2017), it develops that Huffington Post published an article on-line about the prior case, including the name of the alleged bully, Mr. Monroe. We haven’t seen that article, but we imagine it sought to shine a light on the inadequacies of the NY City Police Department in dealing with the problems of transgender citizens. Wrote District Judge Colleen McMahon, “Plaintiff now asserts that a Huffington Post article that describes White’s lawsuit against the City, the NYPD officers, and Plaintiff continues to be accessible on Huffington Post’s website, despite the fact that Plaintiff ‘asked that it be removed.’ Plaintiff contends that the existence of the article is ‘ruining his life,’ and that he ‘lost 3 jobs due to profiling and discrimination.’ Plaintiff does not request any specific relief.” This is a familiar story to us. It seems that every few years we receive a communication from somebody who was involved as plaintiff, defendant, or major player in a case we reported in *Law Notes* and now, years later, wants us to “take their name off the internet.” News is news, accurate reporting is non-actionable, and the 1st Amendment stands in the way of anybody who would ask a court to compel any news medium to remove an accurate newsworthy story from reader accessibility. Compare the approach in Europe, now, with the idea that people who did not purposely thrust themselves into public controversies have a “right to be forgotten” and to have particular stories purged from the internet. At any rate, Judge McMahon concluded that there was no federal question or diversity in this case, so the court did not have jurisdiction. Mr. Monroe was representing himself. Perhaps with expert counsel he could actually state some sort of claim, but we doubt it. Any “right to be left alone” would have to be found in state tort law, and New York courts have been particularly stingy in recognizing privacy torts.

**OHIO** – The U.S. Department of Education’s Office of Civil Rights closed a discrimination case against the school district in Sparta, Ohio, and withdrew its earlier finding that a transgender student at the school had suffered unlawful discrimination in violation of Title IX. The letter to the girl’s lawyers provided “no reason or legal justification for withdrawing” the Department’s 2016 conclusion about restroom access or harassment in this case, but Candice Jackson, then-Acting Head of the Office of Civil Rights, said that the case was closed because the student had filed a lawsuit, leaving the matter to be settled in court. Since withdrawing its position in the Gavin Grimm case earlier in the year, the Department appears to be adhering to its professed agnosticism on the question whether Title IX bars gender identity discrimination, leaving the issue to be resolved by state and local government bodies and the courts. This action has been seen as part of a general move by the Trump Administration to step back from active civil rights enforcement efforts by the government. *Washington Post*, June 17.

**Pennsylvania** – A gay man’s discrimination suit under the Family & Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and the Philadelphia Fair Practices Ordinance (PFPO), largely survived the employer’s motion to dismiss in *Coleman v. AmeriHealth Caritas, 2017 U.S. Dist. LEXIS 85319, 2017 WL 2423794 (E.D. Pa., June 2, 2017)*. U.S. District Judge Jan E. DuBois found that the sexual orientation discrimination complaint was not viable under Title VII because 3rd Circuit precedent binding on the district court rejects such claims, while allowing gender stereotyping claims where it is not clear that the employer was acting because of the plaintiff’s sexual orientation. Judge DuBois took note of the evolving law: “While this Court is bound by Third Circuit precedent to dismiss Coleman’s claim for sexual orientation discrimination under Title VII with prejudice, it does so with the recognition that ‘the nature of injustice is that we may not always see it in our times,’ Obergefell, 135 S. Ct. at 2598. The Court dismisses Coleman’s gender stereotyping claim under Title VII without prejudice to his right to file and serve a second amended complaint in support of his gender stereotyping claim within twenty days if warranted by the facts and the applicable law set forth in this Memorandum.” The court’s summary of the factual allegations makes it clear that Coleman would be likely to win his sexual orientation suit, if only he gets to litigate it on the merits. As the court refused to dismiss the FMLA and ADA counts, Coleman will get to continue litigating on sexual orientation discrimination in any event, since preserving federal jurisdiction through those claims will allow him to proceed on a supplementary sexual orientation claim under the Philadelphia ordinance, regardless whether he files an amended complaint sufficient to ground a gender stereotyping claim under 3rd Circuit precedents. Coleman is represented by James A. Bell, IV of Bell & Bell, LLP, Philadelphia, together with Christopher A. Macey, Jr., of Bell’s firm.

**Pennsylvania** – Chief U.S. Magistrate Judge Maureen P. Kelly’s opinion in *Burnett v. Union Railroad Company, 2017 U.S. Dist. LEXIS 97825, 2017 WL 2731284 (W.D. Pa., June 26, 2017), shows the “3rd Circuit Workaround” in action. We refer to the handling of Title VII sexual
CIVIL LITIGATION

orientation claims, in a circuit that rejects simple sexual orientation claims under Title VII but will allow sex (or gender) stereotyping claims. In this case, Michael J. Burnett, who began working for the railroad in 2008, began to suffer harassment from co-workers and supervisors after a rumor about what he was gay. “Plaintiff’s co-workers and supervisors, the majority of which are male, began to harass Plaintiff with homophobic slurs such as ‘fag’ and ‘butthole Burnett,’ ‘hot butt hole Burnett,’ ‘hot anus,’ and ‘hot butt fagot,’ and by asking Plaintiff whether he ‘was taking it up the ass’ or whether he had ‘[taken] it up the ass lately.’ In addition, Plaintiff’s locker and at least thirty railcars were vandalized with derogatory graffiti of a similar nature.” When friends and co-workers called to tell Burnett that they had seen trains with the graffiti on them, he became concerned that his daughter might see them and went to his supervisor to complain. The supervisor said he would have the graffiti removed, as did a division manager, who said he would take care of the harassment. The manager did tell the co-workers to knock it off and threatened disciplinary suspensions, but after several weeks the graffiti had not been removed and the harassment continued. Plaintiff then took it to the next level, complaining to the Manager of Transportation Operations. Two days later, he was “removed from service pending an investigation.” A week later, he was told that he had been removed from service for “a minor rule violation” and was offered a “last chance agreement” by which he would admit a rule violation and waive his right to grieve under the union contract. He refused to sign this, believing it was a set-up to discharge him. He suffered from depression and that he took medication for it. “According to the complaint, Plaintiff was bullied, harassed, and teased on an almost daily basis in part because of his female-like appearance. She claims that J.R.’s classmates’ actions and name-calling questioned his sexuality and manhood. It is well-settled that offensive behavior in a Title IX case must be based on sex and not ‘tinged with offensive sexual connotations.’ Some federal courts, however, have found that verbal statements, even by middle and high school students, may constitute sexual harassment. Accepting her well-pleaded facts as true and viewing them in the light most favorable to her, as the Court must, Plaintiff has sufficiently alleged a consistent pattern of bullying, harassment, and teasing against J.R. by his classmates because of his failure to adhere to traditional gender stereotypes and his female-like appearance. She claims that J.R.’s classmates’ actions and name-calling questioned his sexuality and manhood.”

TEXAS – U.S. Magistrate Judge Irma Carrillo Ramirez denied a school district’s motion to dismiss a Title IX case brought by the mother of a high school student who committed suicide as the culmination of a horrific campaign of harassment and vilification by fellow students. Reed v. Kerens Independent School District, 2017 U.S. Dist. LEXIS 87024, 2017 WL 2463275 (N.D. Tex., Dallas Div., June 6, 2017). Although Judge Ramirez granted the dismissal motion as to claims under Title VI, the Rehabilitation Act, the Americans with Disabilities Act and 42 U.S.C. Sec. 1983, she found that the complaint had adequately alleged a sex discrimination claim, based on the gender stereotype theory. “Here, Plaintiff alleges that J.R. was bullied, harassed, and teased on an almost daily basis in part because of his female-like appearance. She claims that J.R.’s classmates’ actions and name-calling questioned his sexuality and manhood. It is well-settled that offensive behavior in a Title IX case must be based on sex and not ‘tinged with offensive sexual connotations.’ Some federal courts, however, have found that verbal statements, even by middle and high school students, may constitute sexual harassment. Accepting her well-pleaded facts as true and viewing them in the light most favorable to her, as the Court must, Plaintiff has sufficiently alleged a consistent pattern of bullying, harassment, and teasing against J.R. by his classmates because of his failure to adhere to traditional gender stereotypes and his female-like appearance. She claims that J.R.’s classmates’ actions and name-calling questioned his sexuality and manhood.”

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his suicide involved harsh reaction by administrators to his writing on the boy’s restroom at school: “In 3 days there will be a shooting – you have been warned.” When he was questioned, he told administrators that he had been hearing voices saying “You’re going to die, you’re going to die,” and he had recurring dreams in which a friend was shot and killed. His mother was summoned to school and they were informed that he would be subjected to a disciplinary hearing and would probably be sent to the “disciplinary alternative education program” for a month. He was also told by the chief of police that there would be a criminal proceeding against him. He killed himself later that day at home. Mrs. Reed and the estate of J.R. are represented by Martin J. Cirkiel, Round Rock, and Kenneth D. Carden, Dallas.

CRIMINAL LITIGATION NOTES

CALIFORNIA — The story of People v. Ritchie, 2017 WL 2609537, 217 Cal. App. Unpub. LEXIS 4129 (Cal. 2nd Dist. Ct. App., June 16, 2017), is so long and complicated that it can’t be set out in any detail here, but anybody seeking an interesting noir short story should seek it out on-line. It is an extended account of the deterioration of a same-sex relationship, which ended in the defendant being convicted by a jury on counts of stalking, criminal threats, and disobeying a court order. The key parties were Martin Labenz, Martin’s adult daughter, Audrey, and the defendant, Thomas Ritchie. Martin and Thomas met through an online dating site, became sexual partners, and eventually Thomas moved in with Martin. Audrey was also living at Martin’s home, attending college. Within a few years, all three moved to a new house that Martin bought, with Thomas investing $50,000 in the home and a car “that Martin eventually paid off.” There was eventually a falling out between Thomas and Audrey, things got nasty, and Martin asked Thomas to leave. Thomas did not want to leave and Martin and Audrey claims that Thomas made accelerating threats, including unwanted phone calls to Martin’s place of business (where Martin was not “out”). Ultimately, Martin obtained orders of protection requiring Thomas to abstain from contacting him or Audrey or coming to the house, but Thomas violated them with phone calls and emails and continued to contact Martin at his office. Thomas also countersued and lost. Court of Appeal Judge Elwood Lui (or his clerk) spins out the tale in great detail, and it makes engrossing reading. In appealing his conviction and sentence, Thomas futilely sought to have the court set aside the verdict by arguing the evidence, but the court found that there was plenty of evidence on the trial record to support the jury’s verdict on the various counts. There was some fussing at the end with the sentencing, but ultimately the appeal did not gain any benefit for Thomas, who was represented by counsel appointed by the Court of Appeal.

CALIFORNIA — This one is a cautionary tale about the dangers of street cruising . . . According to the victim’s testimony in People v. Perets, 2017 Cal. App. Unpub. LEXIS 4756, 2017 WL 2962902 (2nd Dist. Ct. App. July 12, 2017), the victim, a gay man, encountered the defendant, David Perets, outside a donut shop where the victim had been buying lunch. The victim thought the defendant was “cute” and approached him. After some conversation they exchanged phone numbers, and the defendant invited the victim to call him if he wanted to “hang out.” The victim texted the defendant after leaving work. They met in a McDonald’s parking lot in San Pedro. Defendant got into the front passenger seat of the victim’s car. He had a backpack which he placed in front of him on the car floor. The victim asked the defendant to show him around the area. The victim drove while defendant navigated, showing the victim the high school that defendant said he had attended, the local naval base and other “points of interest.” As they talked, the victim told the defendant he is gay and the defendant said he is bisexual. At the defendant’s suggestion they parked at Abalone Cove, overlooking the ocean. The victim offered to perform oral sex on the defendant, who said “Maybe later,” and then defendant asked lots of questions about the victim’s car. When Perets asked the victim to hand him the car key, the victim became uncomfortable, put the car in reverse and suggested they head back to town. Defendant reached into his backpack and pull out a handgun, pointed it at the victim’s face and asked where his wallet was. He searched the victim’s pockets and, finding nothing of value, again asked for his wallet. The victim told him that he did not have one (although, in fact, his wallet was in a compartment in the driver-side door). Defendant ripped the victim’s cell-phone and charger off the vent where they were hanging, took his keys and told him to get out of the car. The victim got out, grabbing his wallet as he left, and started running away, noticing that the defendant was driving his car away. The victim sought help at a nearby fire station, where firefighters called the police. A police detective spotted Perets driving the car a few days later and detained him, finding drugs in the car but neither the gun, the victim’s cell phone nor his car keys, although they did recover the key fob used to start the car. In his defense, Perets testified that this was really a drug deal and that the defendant had driven away because he “felt weird” about the victim’s offer to perform oral sex on him. He denied having a gun that night or demanding victim’s wallet or cell phone, but admitted having made false statements to the police officer because
he “was under the influence of drugs, and was afraid of going to jail.” During the rebuttal case, the detective testified that the defendant did not appear to be under the influence of drugs when he was questioned. A jury convicted Perets of carjacking and second degree robbery using a gun, and Perets had admitted to a prior conviction for carjacking. The court sentenced him to 21 years. The court of appeal affirmed his conviction, rejecting his claim of ineffective assistance of counsel, but found some problems with how the trial judge had calculated the sentence and remanded for revisions to the sentence. The court of appeal appointed a lawyer to represent the defendant on appeal.

**DISTRICT OF COLUMBIA** – D.C. Superior Court Judge Jose Lopez sentenced inmate Jerome Holliway to 17 ½ years in prison for the brutal rape of another inmate in the holding cells of the D.C. Superior Court on last November. The incident, reported in the *Washington Post* (June 9, 2017), was captured on videotape and was a “horror movie,” according to Judge Lopez. It showed: Holliway “dragging another inmate across the floor before beating and choking the victim and tearing off his jail jumpsuit” and sexually assaulting him for 12 minutes. United States Marshals, who entered the holding cell five minutes after the assault, found the victim curled into a fetal position. In pre-sentencing, Holliway said he heard voices and was “off his meds.” The victim (name withheld) screamed for help, when he was unable at 155 pounds to defend himself against the attack from Holliway, who is 6’ 6” and 290. The U. S. Marshals Service, which provides security for the holding cells, did not respond in time and declined substantial comment, saying the incident remains “under review” to “ensure that a similar attack does not occur.” The case was prosecuted by Assistant U.S. Attorney Elana Suttenberg, who specializes on sex crimes in the District, who described the attack as “horrific” and “viciously gratuitous.” Those who wish to follow-up on the story can contact Post reporter Keith L. Alexander at keith.alexander@washpost.com. William J. Rold

**MICHIGAN** – The Court of Appeals of Michigan affirmed the conviction and sentence imposed on Adrian Buish, a gay prison inmate who was convicted of “assault with intent to do great bodily harm less than murder” against another inmate. *People v. Buish*, 2017 WL 2664752 (June 20, 2017). Buish and Joseph Lanoue were both prisoners at Saginaw Correctional Facility. Lanoue sustained injuries in a confrontation with Buish. Lanoue “testified that he was cleaning his cell during a daily recreation period when defendant entered his cell and that the next thing he knew he was getting hit in the back of the head. Lanoue remembered being hit once with something other than a fist.” According to his testimony, his “face was bleeding” and he “was throwing up a lot.” he experienced a seizure and “blackout out or passed out,” ending up in the emergency room. Buish contended that there was a fight instigated by Lanoue. According to Buish, on the day of the fight Lanoue told others that Bush, a “homosexual, had AIDS and was trying to spread it to everybody.” Buish claimed that when he spoke to Lanoue about it, Lanoue suggested that they fight and continued to taunt Buish, “prompting defendant to go into Lanoue’s cell during the recreation period to ‘stand up for myself.’” Defendant explained that he never actually intended to fight Lanoue and denied taking any weapons into Lanoue’s cell. Defendant testified that Lanoue lunged at him and punched him, that he punched back, and that a fight ensued. There was testimony describing Lanoue’s injuries, which the court took into account in determining the seriousness of the offense. There was testimony describing Lanoue’s injuries as merely scratches and other testimony depicting them as much more serious.” The initial charge of felonious assault and weapons possess. After the close of opening statements and witnesses, the prosecutor moved to include a count of assault with intent to commit great bodily harm, which was granted by the court over the defendant’s protest. The jury found defendant guilty of the amended charge, and he was sentenced to serve 60 months to 20 years in prison. On review, he argued that there was insufficient evidence to support the verdict, but the court found the record to be ample and clear, concluding there was no 14th or 1st amendment deprivation in the case.

**NORTH CAROLINA** – N.C. Superior Court Judge Gary Gavenus declared a mistrial in the pending prosecution of Brooke Covington, a minister at Word of Faith Fellowship in Spindale, who faced charges of kidnapping and assaulting a former member, Matthew Fenner, in January 2013. Fenner, a gay man, charges that he was blocked from leaving the facility and beaten by congregants at Covington’s direction to expel his “homosexual demons.” Covington faced up to two years in prison if convicted on the charges. The mistrial was due to misconduct by a juror, Perry Shade Jr., who was held in contempt of court for bringing in documents, including North Carolina case law, and distributing them to the other jurors. “This juror has impaired the integrity and fairness of the trial,” said Gavenus from the bench, “Therefore I am removing this juror and declaring a mistrial. I instructed the jurors over and over again not to do research.” said the judge, who sentence the errant juror to thirty days in jail and a $500 fine. Shade had been seated as a juror despite having revealed that Covington’s lawyer had once represented him in a case. *Associated Press*, June 7, 2017.
TEXAS – The Texas Court of Appeals affirmed the conviction and life sentence of David Richard Wilson, an HIV-positive man, for a sexual relationship when he was 32 years old with a middle-school student, called pseudonymously “Jane” in the opinion, during which he apparently got her pregnant and may have been the source of her HIV infection. Wilson v. State of Texas, 2017 Tex. App. LEXIS 5495, 2017 WL 2590292 (Tex. App., 1st Dist. [Houston], June 15, 2017). As the court summarized the facts, “Jane knew the appellant as her little brother’s father, and he had lived with her family on and off through the years. Jane had an on-going sexual relationship with appellant, which continued even after he separated from her mother. When Jane became pregnant, her grandmother suspected that appellant was the father, which Jane denied, claiming that she was involved with a boy at her school. When Jane was three months pregnant, she miscarried. As a result of her miscarriage, the doctors performed surgery on her, at which time they saved some fetal tissue. The fetal tissue was compared to appellant’s DNA, and he could not be excluded as the father. At trial, the State also presented evidence that both appellant and Jane were infected with HIV.” Wilson’s defense counsel sought to get a pretrial ruling from the judge excluding any mention of HIV during the trial. “We cannot say that the prosecutor’s conduct in this case was the sort of flagrant repeated misconduct at issue” in Rogers v. State, 725 S.W.2d 350 (Tex. App. 1987), the case upon which Wilson relied for this argument. The court saw no deprivation of fundamental fairness or due process, so failure to object to prosecutorial conduct was found to waive that issue.

U.S. COURT OF APPEALS, 3RD CIRCUIT – The complexities of the Rooker-Feldman doctrine have done in many an experienced lawyer, but pro se Pennsylvania state inmate Corey Bracey prevailed on this rule in the Third Circuit in Bracey v. Huntington County, 2017 U.S. App. LEXIS 11438, 2017 WL 2787619 (June 27, 2017) (unpublished disposition). Bracey was in an altercation with a corrections officer, after which the officer “noticed an open wound on his hand and exposure to Bracey’s blood,” said the 3rd Circuit’s per curiam opinion. Corrections officials sought to require Bracey to submit to an HIV test, but he refused. Rather, Bracey was challenging the actions of the Corrections officer and the attorney in seeking the state court order for the blood tests. The U.S. District Judge approved the dismissal solely on Rooker-Feldman grounds. The Third Circuit reversed, stating that the District Judge had applied the Rooker-Feldman doctrine “too broadly.” Bracey was not seeking a review of the order for the blood tests – the tests were already done— and such review would violate Rooker-Feldman. Rather, Bracey was challenging the actions of the Corrections officer and the attorney in seeking the state court order for the involuntary extraction of his blood. [Extensive discussion of the elements of Rooker-Feldman by the court is omitted here]. In this instance, the injury was caused by the defendants’ alleged “violation of [Bracey’s] procedural and substantive due process rights . . . in their malicious abuse of civil process against him.” “Rooker-Feldman does not bar claims where the plaintiff does not merely contend that the state court judgment was incorrect or was itself in violation of the Constitution, but instead asserts that the
defendants involved in the state court proceedings violated some independent right,” wrote the court. Since there were other grounds for dismissal that the District Court did not address, the case is remanded. Under this ruling, a state court order for involuntary HIV testing of an inmate who was engaged in a fight is not necessarily going to be the end of it, and perhaps corrections departments within the Third Circuit will be more careful what they ask for in the future if they are properly advised of this ruling. William J. Rold

ALABAMA – In a narrowly constructed Recommendation, Chief U.S. Magistrate Judge Wallace Capel, Jr., recommended summary judgment against pro se HIV-positive inmate Ronald Lee Hatcher in Hatcher v. Bentley, 2017 WL 2661710 (M.D. Ala. May 25, 2017). Hatcher sued nearly the entire organization table from former Alabama Governor Robert Bentley on down, seeking damages for segregation as an HIV-positive inmate, relying on the class action decision in Henderson v. Thomas, 913 F. Supp. 2d 1267 (M.D. Ala. 2012), the Fourteenth Amendment to the U.S. Constitution, and the Americans with Disabilities and Rehabilitation Acts [collectively, the disability statutes]. Judge Capel ordered a special report on Hatcher from the defendants, allowing Hatcher an opportunity to respond, and then treated the papers as teeing up the case for summary judgment, which he recommended be granted on the law. Hatcher was part of the (b)(2) – i.e., non-monetary – class in Henderson, which was resolved under the disability statutes, and preserved claims, if any, for monetary relief. Hatcher claims that Alabama officials knew or should have known prior to Henderson (at least by 1996 or 1997) that HIV was not casually transmitted and could be managed without segregating HIV-positive prisoners. Judge Capel begins by noting that neither the Supreme Court nor the Eleventh Circuit has held that it is unconstitutional to segregate HIV-positive inmates, so defendants are entitled to qualified immunity on the constitutional claims. As to monetary claims for damages under the disability statutes, Hatcher has not shown any physical injury necessary to collect damages under the Prison Litigation Reform Act: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 42 U.S.C. § 1997e(e). Henderson did not change this rule, since it allows damages, if otherwise appropriate. Segregated housing, wearing of identifying armbands, and denial of programs are not physical injuries. Moreover, Judge Capel notes that Hatcher completed 39 programs while in custody. Nominal damages are not consistent with Hatcher’s multi-million-dollar demand for compensatory damages, so they are also denied. Hatcher is not entitled to declaratory relief under the disability statutes because the Henderson court already made that determination. Hatcher's claims of conspiracy are not actionable as they are too “vague and conclusory.” Although Judge Capel used a truncated form of summary judgment allowed under Rule 56, he refused to allow this pro se inmate any opportunity to amend his pleadings in response to the special report filed by the state, although his response could be construed as an attempt to do so. On June 20, 2017, Sr. U.S. District Judge W. Harold Albritton accepted Magistrate Judge Capel’s Recommendation in full and entered final judgment. William J. Rold

ALABAMA – In a thorough opinion, U.S. Magistrate Judge Bert W. Milling, Jr., recommends that summary judgment be granted against HIV-positive pro se inmate William James Steele in Steele v. Gilmore, 2017 U.S. Dist. LEXIS 108758 (S.D. Ala., July 12, 2017). Steele alleged deliberate indifference to his HIV treatment, his hypertension, and his foot and leg condition, all of which Judge Milling assumes to be serious for purposes of the decision. Steele was in the Hale County Jail for less than one month. Upon arrival, he said he needed his medications for HIV and hypertension and had an appointment with an HIV specialist pending in a few days in Birmingham. Beginning with the Prison Litigation Reform Act, Judge Milling found that the jail defendants did not show that Steele failed to exhaust remedies because he filed a grievance and they did not establish Steele’s knowledge of appeal procedures, to show that the appeal remedy was “available” under Ross v. Blake, 136 S. Ct. 1850, 1856-8 (2016), and 42 U.S.C. § 1997e(a). Judge Milling also found that Steele’s alleged injuries were physical under the PLRA, 42 U.S.C. § 1997e(e). He also found that deliberate indifference law was sufficiently well established of the second arm of the deliberate indifference test: subjective intent: a “sufficiently culpable state of mind.” Here, Judge Milling reviewed Steele’s course of treatment over his month in the jail in detail. While officials did not send him to Birmingham (where his care gap was at least 3 years), they did call the Selma AIDS group, who sent somebody to visit Steele in the jail. They insisted on a definitive diagnosis, so they are also denied. His blood pressure was under control and his leg and foot had only “slight edema.” During his one-month incarceration, Steele was
seen six times by the nurse, examined by the physician, evaluated by the Selma AIDS group, sent out for tests, and received his medication after some delay. Judge Milling found no basis for liability on Estelle's subjective element on these facts and recommended summary judgment. This case again used the procedure sometimes followed in Alabama of ordering a report, asking for a reply by the inmate, and converting the papers to summary judgment without allowing discovery. Here, Steele’s request to depose the nurse was denied, because her “story” was in her chart notes. In this writer’s view, this would not have happened if Steele had counsel, but the short duration of his time in the jail and lack of documented deterioration weakened his case in any event. William J. Rold

ARKANSAS – Eighth Circuit law is probably the least sympathetic to transgender inmates in the country. White v. Farrier, 849 F.2d 322, 327 (8th Cir. 1988), now almost thirty years old (and relying on other circuits who have since changed their views), is still good law in the Eighth Circuit per Reid v. Griffin, 808 F.3d 1191, 1192 (8th Cir. 2015) (per curiam – denying relief to transgender inmate who cut off first one then the other testicle in a futile effort to obtain transgender treatment; and then finding – over a dissent- that the failure to address self-harm issues also did not present a claim). Here, in Derx v. Kelley, 2017 WL 2874627 (E.D. Ark., June 18, 2017), U.S. Magistrate Judge Joe L. Volpe, while “sympathetic,” recommended that pro se inmate Dennis R. Derx’s civil rights claim for denial of transgender treatment likewise be dismissed. Judge Volpe points to two “similar” transgender cases in the Eastern District of Arkansas that were dismissed for failure to state a claim, characterizing decisions about hormones as merely “disagreements” about treatment. Both cases were summarily affirmed by the Eighth Circuit. While recognizing that other circuits have sustained claims on similar facts, this is not the law in the Eighth Circuit, where failure to treat gender identity disorder (while considered by the Circuit “on only a few occasions”) is regarded as a non-actionable “independent medical judgment,” citing Dulany v. Carnahan, 132 F.3d 1234, 1239 (8th Cir. 1997). According to PACER, U.S. District Judge James M. Moody, Jr., adopted the recommendation on July 5, 2017, and certified for in forma pauperis purposes that an appeal would not be taken in good faith. Transgender inmates in the Eighth Circuit definitely need help at the appellate level if progress is to be made. William J. Rold

CALIFORNIA – United States Magistrate Judge Kenly Kiya Kato dismissed pro se inmate Gerald Carter’s second amended complaint for failure to state a claim in Carter v. Ives, 2017 U.S. Dist. LEXIS 82346 (C.D. Calif., May 30, 2017). Carter’s earlier complaints alleged that he was denied HIV treatment, but they did not actually allege he had HIV. In fact, the current complaint says his HIV test was negative. Nevertheless, Carter complains that he cannot hold food in his stomach and that defendants – sued under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) – were deliberately indifferent to his serious needs. Based on the second amended complaint, Judge Kata wrote that he could not determine whether Carter’s needs were serious, or (even if they were) whether the defendants’ actions were deliberately indifferent to “serious medical issues related to his inability to ‘hold food in his stomach.’” Carter cannot rely on “vague, conclusory allegations.” “Plaintiff does not provide any facts identifying when or who he specifically told about his serious medical issue, what details he provided regarding his symptoms, and what actions Defendants did or did not take. Absent specific facts to show Defendants knew Plaintiff was unable to keep food in his stomach, and yet continued to deny him medical care, Plaintiff’s deliberate indifference claim fails.” Judge Kato granted Carter leave to file a third amended complaint, saying that was his last chance before dismissal with prejudice. William J. Rold

CALIFORNIA – U.S. District Judge Otis D. Wright, II, dismissed most of the complaint of a male to female transgender minor, Genevieve Duronslet, in Duronslet v. County of Los Angeles, 2017 U.S. Dist. LEXIS 95030, : 2017 WL 2661619 (C.D. Calif., June 20, 2017). The case was removed to federal court from California Superior Court, and most of the faults found in the decision on the motion to dismiss were pleading problems. PACER indicates that Duronslet promptly filed an amended complaint that arguably cures some of the defects, so reporting of the case incorporates the amended pleading as well, although there is no motion or decision on it. One of the problems found by Judge Wright was a failure to plead that defendants “knew” Duronslet was transgender. This appears to have been disingenuous on the part of defendants. Their own records showed: that Duronslet was in transition; that incident reports about fights at home included reference to her transition; that she wanted to be called “Rachel” instead of her birth name of “Russell;” and that she had long died hair and acrylic polished fingernails. Nevertheless, she was forced to use the male restroom and sleep on the “boys’ side” upon reception into county supervision as a dependent juvenile on an alleged policy of assigning juveniles according to birth gender. Neither the state court pleading nor the amended complaint indicates Duronslet’s age or the duration or frequency of the discrimination. Judge Wright addresses four causes of action: the California Unruh law (state civil
rights protection, including sexual identity; intentional infliction of emotional distress; federal Due Process; and federal Equal Protection. The major flaw Judge Wright found with the Unruh claim was lack of pleading that county officials knew or it was obvious that Duronslet was transgender. The opinion contains analysis of Unruh, which California practitioners may wish to review, especially since, unlike federal law, it allows vicarious liability. The opinion also addresses all the elements of intentional infliction of emotional distress. In additional to knowledge, Duronslet must plead that the conduct was “extreme and outrageous” and that she “suffered extreme emotional distress.” This is a difficult-to-prove tort; but, relying on Lambda’s amicus submission, Judge Wright notes the special relationship between dependent juveniles and the county, the “emotional and physical vulnerability of LGBTQ minors in foster care,” and “the severe emotional distress that a transgender teen could suffer by being forced to use facilities that do not comport with their gender identity.” His observation that it may ultimately be a jury question suggests that he will allow discovery after repleading. Judge Wright saw a Substantive Due Process claim in the original complaint’s allegation about a policy of forcing transgender girls to use boys’ facilities. There is an inference of policy if the county officials knew of Duronslet’s sexual identity. For purposes of Monell liability ( actionable county policy or practice), an important point is buried in a footnote: a single county policy or practice), an important point is buried in a footnote: a single

CALIFORNIA – This one is for your summertime amusement. U.S. Magistrate Judge Sheila K. Oberto dismissed pro se inmate Richard Earl George’s complaint on screening under 28 U.S.C. § 1915A(a) for failure to state a claim in George v. Voong, 2017 U.S. Dist. LEXIS 87650 (E.D. Calif., June 7, 2017). George claimed that the implementation of California legislation that caused condom dispensers to be placed in every state prison violated the rights of heterosexual inmates. Judge Oberto notes that George “does not identify which of his civil rights he believes were violated.” This is one of the few inmate decisions in which the court faults the inmate under F.R.C.P. 8 for saying “too little.” Judge Oberto gave George one chance to amend. William J. Rold

CONNECTICUT – A pro se inmate claimed that a sexual contact informed him that she had exposed him to HIV, and he requested testing. When an initial test was negative, he asked for a follow-up test, which was denied, so
he sued. U.S. District Judge Vanessa L. Bryant denied preliminary relief and dismissed the case in Taylor v. Naqvi, 2017 U.S. Dist. LEXIS 94576, 2017 WL 2662192 (D. Conn., June 20, 2017). While Judge Bryant’s opinion has extended discussion about false negatives and window periods for manifestation of HIV infection, it has significant redactions, ordered by the court. Review of the file on PACER does not give access to the gaps, some of which include almost entire pages. It does show, however, that redactions were made at the request of the physician defendant, Dr. Syed Johar Naqvi – who also requested sealing of his affidavit – over Taylor’s objections. While Taylor was provided an audiotape of the hearing (in full without gaps), it is unclear whether the physician’s affidavit or an unredacted opinion was included. Since the court’s findings clearly rely on the redacted material, and the plaintiff seeks disclosure of the doctor’s report, this disposition appears to violate Second Circuit rules on public access to decisions mentioned in United States v. Erie County, 763 F.3d 235, 241-44 (2d Cir. 2014), and the Summary Order in Hardy v. Equitable Life, No. 16-3273 (June 15, 2017). It is impossible to discern from the decision the reason for the redaction, especially since Taylor has already made his sexual history public. The case includes discussion of Eighth Amendment law, but its application to the facts is rendered useless by the redaction. William J. Rold

**ILLINOIS** – Following a hearing before U.S. Magistrate Judge Donald G. Wilkerson, who recommended denial of preliminary relief to transgender prisoner Carl Tate, U.S. District Judge Nancy Rosenstengel adopted the recommendation in Tate v. Wexford Health Sources, Inc., 2017 WL 2664791, 2017 U.S. Dist. LEXIS 95847 (S.D. Ill. June 21, 2017). Several things happened after the hearing: Tate was removed from segregation and placed on “crisis watch” for suicidal ideation, while officials seek a “suitable” cellmate; Tate’s hormone medication is being brought to her cell, so that she does not face harassment in the pill line; and Tate is receiving weekly psychotherapy from a social worker. Under the circumstances, and since Tate filed no objections to the magistrate judge’s recommendations and testified that she is “in a better place” now, Judge Rosenstengel found no reason for the extraordinary relief of a preliminary injunction requiring evaluation by an “outside” specialist on gender identity disorder. This, of course, does not end the case. It does show the value of a hearing, if the inmate plaintiff is lucky enough to get one. William J. Rold

**ILLINOIS – Pro se inmate Kenneth Houck’s case, Houck v. USA, 2017 WL 1397743 (S.D. Ill., April 19, 2017), involving safety and protection from harm from people who “hated” him because he is a convicted sex offender, was reported last month in Law Notes (June 2017 at page 258) He has another decision this issue under the same caption, at 2017 WL 1739695 (S.D. Ill., May 4, 2017), also before U.S. District Judge J. Phil Gilbert. In the second decision, which is voluminous, Houck self-identifies as gay and raises numerous claims about denial of privileges or discrimination based on his sexual orientation. He also raises claims based on failure to treat certain medical conditions. In all, the complaint runs 41 pages, with 19 defendants. Judge Gilbert separates the claims into 2 categories on preliminary review under 28 U.S.C. § 1915A: claims about his sex-offender treatment and related issues; and claims about his medical care. Relying on George v. Smith, 507 F.3d 605 (7th Cir. 2007), he severs the claims about medical care and directs the clerk to open a new case with a new file name and new filing fee for these claims. They are not screened here. That leaves 9 claims, as Judge Gilbert categories them, and he allows Houck to proceed on two of them. Count One, based on the Fifth Amendment rights to equal protection and due process, is brought against defendants who allegedly included improper information in his treatment plan that signaled him out for differential treatment as a gay man. Count One also includes claims that certain defendants denied him publications under his treatment plan based on gay content that did not violate general rules about nudity or explicit sexual acts and that similarly-situated heterosexual sex offenders are allowed to receive. Interestingly, Judge Gilbert quoted the Supreme Court in United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013), in sustaining a claim about restraints on the power of the Government to “degrade or demean” gay people under the Fifth Amendment (and its embodiment of Equal Protection principles against federal actors in a Bivens claim). “Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group.” Nabozny v. Podlesny, 92 F.3d 446, 453-54 (7th Cir. 1996). Houck also qualifies under class-of-one Equal Protection review under Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Judge Gilbert allows Houck to proceed on his claim (Count Four) that he was denied free speech and association in his treatment plan by the ban on his writing for adult pen pals, in particular Asian and Hispanic men, for whom he expressed a preference to correspond. Prison officials sweeping claimed that such groups are “generally at greater risk for exploitation.” While Turner v. Safley, 482 U.S. 78, 89-91 (1987), balancing applies, inmates
have considerable protection in their correspondence in the Seventh Circuit under Zimmerman v. Tribble, 226 F.3d 568, 572 (7th Cir. 2000), and Rowe v. Shake, 196 F.3d 778, 782 (7th Cir. 1999). Restrictions on a prisoner’s right to correspond with pen pals must therefore be reasonable. Defendants’ ethnicity argument probably did them no good. Counts Two, Three, and Five through Nine are dismissed for various reasons. Houck had not pleaded with enough specificity on retaliation or denial of access to court; defamation is statutorily excluded from the Federal Tort Claims Act; Privacy Act claims concerning federal prison documents are generally exempt from protection under 5 U.S.C. § 552(a)(6); Houck’s “official misconduct,” conspiracy” and “aiding and abetting” claims are basically recapitulations of his other claims and not separately actionable; and his “intentional infliction of emotional distress” claim fails to meet rigorous standards of pleading and is duplicative of other claims here and in a separate action commenced in Colorado. Counts Ten through Thirteen will become part of the new case, which will be initiated by the clerk, using this decision and the reviewed complaint as the basic documents. Appointment of counsel is referred to a magistrate judge.

William J. Rold

KANSAS – Another transgender inmate loses summary judgment based at least in part on antiquated law in Lamb v. Norwood, 2017 U.S. Dist. LEXIS 103876 (D. Kan., July 6, 2017) – and, in this writer’s view, because a pro se inmate cannot represent herself adequately in a dispute that turns on medical evidence. Here, U.S. District Judge Eric F. Melgren found that Michelle Renee Lamb, who is serving three consecutive life sentences, failed to raise a trial question on deliberate indifference to her constitutional rights. Lamb is receiving hormone treatment and weekly counseling sessions. She is also permitted female undergarments and jewelry (earrings). She is addressed by her chosen name (which was legally changed) and by female pronouns in prison, although her official commitment papers retain her former male name at conviction and list her current name as an “alias.” Her medical treatment is monitored by a physician and a panel of “practitioners,” who testified that her treatment was appropriate and would not result in any decline of her condition. The defendants’ experts conceded her condition was “serious,” but they said that sexual reassignment surgery [SRS] was an “impractical and unnecessary option.” Lamb sought treatment per the World Professional Association for Transgender Health [WPATH] standards, but she presented only her own affidavit and no expert testimony. Judge Melgren found that her affidavit was also mostly “improper” under F.R.C.P. 56, because it did not cite to the record. Judge Melgren found that WPATH standards were not binding, relying on Supre v. Rickets, 792 F.2d 958, 963 (10th Cir. 1986), which justified withholding even hormone treatments under certain circumstances. Under Supre, the defendants lacked subjective deliberate indifference to Lamb’s needs, even if she disagreed with the treatment decisions. Judge Melgren noted that Supre was reaffirmed two years ago in Druley v. Patton, 601 F. App’x 632 (10th Cir. 2015). While Druley did cite Supre, the case was on appeal on denial of a preliminary injunction based on WPATH standards, which the court found to allow “flexibility” and could not provide the basis for preliminary relief – 601 F.App’x at 635, citing Kosilek v. Spencer, 774 F.3d 63, 70 n.3, 86, 88 (1st Cir. 2014). Supreme Court Justice Neil M. Gorsuch was on the Tenth Circuit panel in Druley. Judge Melgren found that the corrections system could retain Lamb’s convicted name on official records, and that she was not entitled to transfer to a women’s facility, noting that she was convicted of kidnapping and murdering women. Her access to canteen items was within correctional discretion under Turner v. Safley, 482 U.S. 78, 89 (1987), and the judge would not order further relief under the Eighth Amendment. He concluded: “The Defendants have an obligation to treat Lamb’s gender dysphoria, but they are not obligated to treat it in the specific manner that Lamb prefers. Gender dysphoria is a sensitive and highly debated topic in today’s society, and if she were not in prison, Lamb would be free to seek whatever treatments and lifestyle changes that she felt were necessary.” She is unlikely, however, ever to leave prison – and so it goes. Work is needed in the Tenth Circuit; but, for now, it may be wise to keep cases out of the Supreme Court.

William J. Rold

INdiana – Pro se inmate Jason Grothjan had a verbal altercation with an Officer Rissman, during which Grothjan told Rissman to “stop acting like a fag.” Rissman then loudly proclaimed Grothjan to be a “homosexual” in the presence of other inmates. Grothjan subsequently sued. U.S. District Judge John E. DeGuilio found that Grothjan stated a claim against Rissman under the Eighth Amendment in Grothjan v. Rissman, 2017 U.S. Dist. LEXIS 93 (N. D. Ind., June 19, 2017). Judge DeGuilio found that, while ordinarily verbal abuse in prison is not actionable, a claim is stated when the words incite or place an inmate in danger of assault from other inmates, citing Beal v. Foster, 803 F.3d 356, 357-58 (7th Cir. 2015). Judge DeGuilio referred to the incident in quotation marks as “outing” Grothjan, but the opinion does not state Grothjan’s sexual orientation. While calling someone “gay” is retracting from defamation, torture law as libel per se, it is finding its way into Eighth Amendment law because the correctional environment is, in many ways, so much less evolved.

William J. Rold

PRISONER LITIGATION
**PRISONER LITIGATION**

**MICHIGAN** – Former HIV+ inmate John Dorn had the least restrictive level (Level I) of security classification until he was found guilty of having oral sex with another inmate. Thereafter, he was placed in administrative segregation under a Michigan statute requiring same when an inmate engages in “sexual misconduct” that “could transmit” HIV. Mich. Comp. Laws § 791.267(3). U.S. District Judge Paul L. Maloney dismissed most of Dorn’s case in *Dorn v. Michigan Dep’t of Corrections*, 2017 U.S. Dist. LEXIS 864. 2017 WL 2436997 (W.D. Mich., June 6, 2017). Correctional regulations state that “actual or attempted sexual penetration” satisfies the statute. Dorn was placed on “indefinite” administrative segregation because of the “misconduct” and his “HIV status.” He remained at Level IV or higher for 30 months at Michigan’s Upper Peninsula, until he was paroled. Dorn (who was turned in by other inmates) alleged that his sexual act presented “essentially no risk of HIV transmission” because he engaged in “oral sex without ejaculation” and his “undetectable viral load transforms the extremely low risk of transmission via oral sex to merely a theoretical possibility.” Presumably, learned counsel made a substantive due process argument, but Judge Maloney did nothing much with it. Instead, he spends virtually the entire opinion on procedural issues: sovereign immunity, intricacies of the Americans with Disabilities Act and Rehabilitation Act as applied in prisons, and procedural due process – focusing on whether Dorn’s higher security classification and related losses invoked a liberty interest that required procedural due process under *Sandin v. Conner*, 515 U.S. 472, 484 (1995). He eventually finds that Dorn had a liberty interest because of the duration of his segregation and its effect of delaying his parole, citing *Harden-Bey v. Rutter*, 524 F.3d 789, 793-94 (6th Cir. 2008). Dorn had a hearing before a judge, with procedural protections, and his case was reviewed periodically, resulting in some loosening of restrictions. This satisfied the process that was due, according to the court. Since Dorn has been released, Judge Maloney finds that his claims for injunctive and declaratory relief, including a facial (or, presumably, as applied) challenge to the Michigan statute, should be denied. The fact that Dorn may face future incarceration with a bad classification record is “speculative” and does not save his requests for relief. Then, inexplicably, Judge Maloney retains Dorn’s claim for expungement of his record on this point, citing *Hewitt v. Helms*, 482 U.S. 755, 766 n.1 (1987). Although *Hewitt v. Helms*, 459 U.S. 460 (1983) [note different citation and year] dealt with procedural due process in prison disciplinary proceedings, its successor case concerned attorneys’ fees. The portion cited by Judge Maloney, 482 U.S. 766 n.1., is from Justice Marshall’s dissent, on which the majority did not rely. In the context of this case, given Judge Maloney’s other rulings, it makes no sense to this writer. Right now, this case stands for two seemingly irreconcilable propositions: (1) that an inmate can spend his remaining incarceration in segregation for an interrupted “blow job” so long as enough officials talk it over at the time and during the remaining years to satisfy procedural due process; and (2) the same inmate may be entitled to have his disciplinary record about the incident expunged for violation of his constitutional rights. Perhaps counsel can sort it out in the Sixth Circuit. Dorn was represented by Lambda Legal’s Chicago office and by Michigan Protection & Advocacy Service Inc., Lansing. **William J. Rold**

**NEBRASKA** – Prose transgender inmate Mee Mee Brown has twice previously been allowed to proceed in part by Senior U.S. District Judge Richard G. Kopf in *Brown v. Department of Health & Human Services*, 2017 WL 1495987, 2017 U.S. Dist. LEXIS 84518 (D. Nebr. April 26, 2017), previously reported in Law Notes (May 2017 at page 216), and *Brown v. HHS*, 2016 U.S. Dist. LEXIS 155500 (D. Nebr. November 9, 2016), reported in Law Notes (December 2016 at pages 533-4). Now, reviewing Brown’s second amended complaint, Judge Kopf allows her to proceed to service of process on three claims: deliberate indifference to treatment of her gender dysphoria; retaliation for exercise of her First Amendment rights; and denial of equal protection. *Brown v. Dep’t of Health & Human Services*, 2017 U.S. Dist. LEXIS 84518, 2017 WL 2414567 (D. Nebr. June 2, 2017). The complaint about denial of treatment for gender dysphoria may proceed against the psychiatrist and physician’s assistant most responsible for medical decisions regarding Brown’s care. Although Brown is a civilly committed plaintiff, Judge Kopf applies Eighth Amendment substantive law to these medical claims and finds potential liability for failure to refer Brown to a gender identity specialist or to allow hormone therapy. Judge Kopf found that Brown could proceed against seven members of the institutional staff (but not the state director) for retaliation against her for filing lawsuits and contacting the state ombudsman regarding her case. These officials told Brown that she would never progress out of her unit if she continues to sue, to dress as a woman, “and to exercise her transgender rights”; and they gave or participated in giving her low marks designed to stall her institutional progress. [Note: This case is one of the few we have seen that specifies transgender expression as a First Amendment right.] Judge Kopf found that Brown could proceed against all defendants (including the state director) on denial of Equal Protection, leaving the issue of what standard is to be applied to motion practice. He surveyed the possibilities from class-
of-one, to rational basis, to mid-level scrutiny, to quasi-suspect class, citing cases from everywhere but the Eighth Circuit, whose 20-year-old transgender cases involving prisoners are of questionable continuing authority and are not controlling for civilly committed persons anyway. He included Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006), involving a “reasonably safe environment” for the civilly committed. He also cited the recent Seventh Circuit Title IX case involving heightened scrutiny for gender identity discrimination, Whitaker v. Kenosha Unified School Dist. No. 1 Board of Education, 2017 U.S. App. LEXIS 9362, 2017 WL 2331751 (7th Cir. May 30, 2017). Judge Kopf denied Brown’s claims for protection from harm arising from denial of a private bathroom, since she had never been assaulted, and the incidents described amounted to no more than “pranks” and name-calling. He also denied appointment of counsel, but without prejudice to a renewed request for counsel in the future depending how the case develops. Judge Kopf’s dicta on Equal Protection indicate that the case could benefit from counsel on this point and that it may be worthwhile to explore in this Eighth Circuit case. William J. Rold

NEBRASKA – Senior U.S. District Judge Joseph F. Bataillon appointed Omaha attorney Michael Gooch to represent transgender inmate Riley Nicole Shadle, a/k/a Scott Frakes, because his review of the law and the facts indicates that both are “unclear.” Shadle v. Frakes, 2017 U.S. Dist. LEXIS 108351 (D. Neb. July 13, 2017). Shadle claims to have been denied treatment for gender dysphoria, asserting that a diagnosis took place prior to incarceration. Attorney Gooch is allowed to draw upon the District Court’s pro bono fund for disbursements, and the like, up to $2,000, with reimbursement if he prevails and is awarded costs and fees. Judge Batillon’s dander may have been peaked because the state promised him to settle Shadle’s case last year and it was previously dismissed on that basis. See Law Notes (October 2016 at pages 447-8). Now, she is back because the state reneged, and the new case was returned to Judge Bataillon. William J. Rold

NEW YORK – New York state prisoners have a limited right of privacy under state law in their medical records. See 9 NYCRR 7651.26(a)[7]; Scott v. Smith, 90 A.D.3d 1431, 1432 (3d Dept. 2011), lv. denied, 19 N.Y.3d 803 (Ct. App. 2012). “[T]he right of confidentiality is less than absolute” and, in order for the disclosure of confidential medical records “to be considered wrongful, and thus actionable, the disclosure must be without legal justification or excuse,” quoting Rea v. Pardo, 132 A.D.2d 442, 445 (3d Dept. 1987). A prisoner suing for medical malpractice actually won $500 in the Court of Claims when his medical records were sent to the New York Attorney General without his consent or a court order in Davidson v. State of New York, 3 A.D.3d 623 (3d Dept. 2004), lv. denied 2 N.Y.3d 703 (Ct. App. 2004). All of this was to no avail to Anthony YY, who sued for medical malpractice in treatment of his foot and ankle in YY v. State of New York, 2017 WL 2366322 (Sup. Ct., App. Div. 3d Dept., June 1, 2017). The applicable regulation, 7 NYCRR 5.24(b), now specifically provides for the release of inmate medical records to the Attorney General without Court Order “for the purpose of providing legal services on behalf of [defendant – i.e., the state, in the Court of Claims].” YY, proceeding pro se, had placed his medical care in issue by suing for malpractice, and the new regulation permitted general release of his records without any duty on corrections officials to redact them to omit reference to medical issues not raised in the suit, wrote Appellate Division Justice Sharon Aarons, with concurrence of Justices Peters, Garry, Devine and Mulvey. YY’s further argument that extra protection is provided for HIV information by New York Public Health Law § 2780 was likewise rejected under the circumstances, because the limited information was merely part of medical history appearing on a patient referral form sent to another physician. The court found that YY had not preserved any issue about re-disclosure of information by the Attorney General. William J. Rold

OHIO – U.S. Magistrate Judge Karen L. Litkovitz allowed pro se transgender inmate Joel Drain to proceed on deliberate indifference to medical care claims in Drain v. Ohio Dep’t of Rehabilitation & Corrections., 2017 U.S. Dist. LEXIS 90011, 2017 WL 2557335 (S.D. Ohio, June 12, 2017). The bare-bones decision merely says that Drain protests her denial of “hormone therapy and sex reassignment surgery to treat his condition of gender dysphoria.” Because Drain only plead the Ohio Department and John Does in the caption, she is directed to identify the Does and to advise the court whether she wants to proceed against individuals named in the complaint but not in the caption (who will apparently be served after such designation without re-pleading at this stage). The case against the State is dismissed under the Eleventh Amendment. William J. Rold

PENNSYLVANIA – This case is a bit of a moving target. On July 10, 2017, United States District Judge Robert D. Mariani issued a Temporary Restraining Order to continue hormone treatment for transgender inmate Steven Fritz, a/k/a/Sparkles Wilson, in Wilson v. Lackawanna County, 3-17-cv-1191 (M.D. Pa.), reported in the Times-Tribune (Scranton) press
at 2017 WLNR 2122680. According to the petition in PACER, Wilson had been receiving hormones while in state prison in Pennsylvania and on the street from a physician after her release. Judge Mariani granted a TRO without notice to continue the medications pending hearing, when Wilson was denied same by the Lackawanna County jail after her re-arrest. Judge Mariani denied the county’s application for a stay of the TRO. The medications at issue are Estrace and Premarin, which the jail claims were ordered “off label” (or for use not approved in initial FDA documentation). Wilson countered that “off label” usage is perfectly legal if written by a physician and is common for all types of patients, particularly transgender. The stay was denied, the TRO is in force, the county says it will comply, and a hearing is pending as of this writing. This is one of the few TRO’s favorable to a transgender inmate that this writer has seen. Wilson is represented by Curtis M. Parker and Walker & Comerford Law, Scranton.

WASHINGTON – Pro se HIV+ inmate Ray Charles Harris lost a motion to dismiss filed by represented defendants (a prison doctor and a nurse) in Harris v. Balderama, 2017 U.S. Dist. LEXIS 92462, 2017 WL 2600190 (W.D. Wash. June 15, 2017). Harris claimed that he was denied HIV medication on two occasions and defendant refused to perform a blood test despite multiple requests. He also alleged the denials were prompted by his filing a grievance and because defendants were “protecting two people who impersonated witnesses during Plaintiff’s criminal trial.” U.S. Magistrate Judge David W. Christel found the pleadings of retaliation insufficient and “conclusory,” including no explanation of the link between the trial witnesses and the supposed retaliation. On the medical claims, while HIV/AIDS is a serious medical condition, Judge Christel found that Harris failed to show who ordered the supposed missing care, the involvement of the defendants he sued, or how the harm, if any, was caused by deliberate indifference to his needs. Judge Christel granted leave to re-plead. In this writer’s view, there may be something here on medical care, but it will not be found by re-pleading. William J. Rold

WISCONSIN – Screening transgender inmate John H. Balsewicz’s, a/k/a Melissa Balzewicz’s, pro se complaint under 28 U.S.C. § 1915A(a), U.S. District Judge Joseph P. Stadtmueller allowed the case to proceed on failure to treat and deliberate indifference to the plaintiff’s repeated suicide attempts, in Balsewicz v. Bartow, 2017 U.S. Dist. LEXIS 89698, 2017 WL 2544033 (E.D. Wisc. June 12, 2017), even though her complaint suffered at times from “lack of detail as to actors and dates.” Balsewicz’s treatment at the Wisconsin Resource Center [WRC] consisted primarily of “dialectical behavioral treatment,” in violation of Wisconsin guidelines for treatment of transgender patients; and Balsewicz referred to repeated expressions of transphobia from WRC staff. Her requests for referral to the state committee for decisions on hormones were repeatedly ignored, according to the complaint. See Judge Seng’s questioning of use of such committees in the article, “Federal Magistrate Refuses to Accept Limitations of California’s Inmate Transgender Rule as Satisfying Eighth Amendment,” this issue of Law Notes. Balsewicz pleaded that there were no medical or mental health staff at WRC qualified to treat transgender patients. This lack of treatment caused her depression to worsen, leading to suicide and self-mutilation attempts. She claims that instead of responding to her mental status therapeutically, WRC staff subjected her to isolation and punishment. Apparently, even the actual suicide and mutilation attempts were disregarded or misdiagnosed as aggressive or “manipulative” behavior. Multiple grievances were rejected. She states that she was given clothing with which she could hang herself and was not placed on “watch” per regulations. She was sent to an outside hospital after trying to hang herself with t-shirt straps. Her grievance on this incident was also dismissed. Another grievance was rejected after she cut herself with a sharpened eyeglass lens while in disciplinary segregation. She hoarded medicine for a planned overdose, for which pharmacy officials did not account. She again required hospitalization after taking 25 lithium pills at once. She says one defendant, Dr. Craig Blumer, tried to remove records relating to her requests for treatment from her medical records. Judge Stadtmueller found that Balsewicz had stated claims against ten defendants, including Dr. Blumer, citing Estelle v. Gamble, 429 U.S. 97 (1976); Roe v. Elyea, 631 F.3d 843, 857 (7th Cir. 2011); and Gayton v. McCoy, 593 F.3d 610, 620 (7th Cir. 2010). Eighth Amendment claims were stated on both non-treatment of gender dysphoria and suicidal ideation. The judge found that “dialectical treatment” alone is inappropriate for gender dysphoria, and he criticized the delays in hormone therapy and referral to the “committee.” A handful of defendants were dismissed as having had too little involvement in Balsewicz’s treatment, or lack of personal knowledge of the circumstances. The judge found the question “straightforward” as to the remaining ten, who will be served by the Wisconsin Attorney General pursuant to an informal agreement with the court. William J. Rold

LEGISLATIVE & ADMINISTRATIVE

U.S. HOUSE OF REPRESENTATIVES – On July 13 the House of Representatives voted 214-209 to reject an amendment to a pending defense policy bill introduced
by Rep. Vicky Hartzler, a Missouri Republican, that would have prohibited the Defense Department from paying for the medical costs of gender transition (including hormone therapy and sex-reassignment surgery) for transgender personnel. The Defense Department administratively ended its ban on service by transgender individuals a year ago, but only with respect to incumbent service members. As part of the policy change, the Department committed to provide coverage for medically necessary treatments, and a majority of health care professionals in the relevant specialties now support the view that gender transition procedures can be necessary medical treatment for persons with gender dysphoria. (Indeed, the Tax Court and subsequently the Internal Revenue Service now recognize this, as do many federal courts that have ruled in 8th Amendment cases brought by prison inmates with gender dysphoria who have been denied such treatment.) The news that the Defense Department was providing such treatment for transgender personnel sparked controversy in Congress, as many Republicans – whether out of personal conviction or political timidity – are strongly opposed to providing such coverage (or to mandating its availability as part of federal health care programs). We single out Republicans advisedly on this issue, as every House Democrat who voted on July 13 opposed the amendment, while 24 Republicans crossed party lines to help vote it down. This was seen as a surprising win for advocates for transgender equality, in light of the overall very conservative tilt of the House Republicans. * * * When the service ban was lifted a year ago, then-Secretary of Defense Ash Carter directed that the ban on enlisting transgender recruits would get further study, with the expectation it would be lifted by July 1, 2017. However, senior officers within the Defense Department remain opposed to enlisting new transgender troops, and Defense Secretary Jim Mattis announced late in June that he would extend the deadline for this to the end of 2017. Associated Press, July 1. The argument to justify delaying implementation was that further study was needed about the impact on “readiness or lethality” of the forces, but this seemed spurious, as there have been no reported problems with service by several thousand now openly-transgender personnel over the past year. Ostensibly the management folks at the Pentagon were not able to meet Carter’s schedule of having procedures in place by July 1. As Mattis, who was a high ranking military commander before retiring to the civilian world, was never an advocate of allowing transgender or homosexual people to service, this action raised concerns that he has not changed his views and is unwilling to take things further than he found them upon taking office. * * * Congress members Joe Kennedy III (D-Mass.) and Bobby Scott (D-VA) have introduced an amendment to the Religious Freedom Restoration Act, called the Do No Harm Act, which provide that the federal RFRA cannot be construed to provide a religious exemption to complying with laws guaranteeing fundamental civil and legal rights, such as the Civil Rights Act of 1964, or to deny access to healthcare or refuse service to minority populations. State News Service, July 13. * * * Rep. Pete Olson (R-TX) has introduced HR 2796, which would provide that the term “sex” when used in federal anti-discrimination statutes, may not be construed to include “gender identity or expression.” He has five co-sponsors for his bill, all Republicans, and it has been referred to the Subcommittee on the Constitution and Civil Justice, which is chaired by Rep. Steve King (R-IA), who has been characterized as an anti-LGBT extremist and who has called transgender people “eunchs” similar to those consigned to slavery in ancient harems. It seems unlikely that such a measure could come to a vote in the Senate were it to pass the House, unless the Republican leadership in the Senate were to vote to repeal the filibuster entirely for substantive legislation.

U.S. CONGRESS – Seventy-three members were listed as sponsors or co-sponsors for the Refund Equality Act of 2017, legislation intended to ensure that legally-married same-sex couples who were required to file their federal tax returns as unmarried will be allowed to file amended tax returns dating back to the year of their marriage, regardless of limitations periods for amending returns under existing federal tax law. Co-sponsor Senator Jeanne Shaheen (D-N.H.) noted that legally married same-sex partners in her state were required to file tax returns as single persons for three years until the Windsor decision required the Internal Revenue Service to recognize same-sex marriages. “This bill would make an important correction to allow same-sex couples to claim the tax refunds they deserve,” said Shaheen. “All legally married couples should be treated equally under the law.” This would seem to be a logical extension of the Supreme Court’s holding in Pavan v. Smith on June 26 (see above), emphasizing that same-sex couples are entitled to the full panoply of legal rights and benefits associated with marriage.

DEPARTMENT OF COMMERCE – Reacting quickly to push back from the public, the Department announced that it would restore “sexual orientation” and “gender identity” to the department’s non-discrimination statement. Those categories were included in policy statements on the Department’s website during the Obama Administration, but Trump’s appointee as Secretary, Wilbur Ross, signed the 2017 Secretarial Policy Statement on Equal Employment Opportunity after his confirmation omitting those categories. This seemed
inconsistent with statements out of the White House in January that the Obama Administration’s LGBT protections for federal employees would “remain intact.” The EEOC, which has an appellate role over internal discrimination rulings within executive branch departments, takes the position that Title VII of the Civil Rights Act of 1964 bans sexual orientation and gender identity discrimination, and there is also case law that would apply to such discrimination within federal agencies under the 5th Amendment. Once Trump’s new appointees to the EEOC are confirmed, however, it is uncertain whether the agency will continue to support this interpretation. As reported elsewhere in this issue of Law Notes, as of mid-July the EEOC was continuing to file LGBT-related lawsuits, appeal adverse trial court rulings, and settle cases with consent decrees.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT – Most of the Democratic members of the Senate joined in a letter to HUD Secretary Ben Carson, complaining about the Department’s removal from its website of resources for LGBTQ people facing housing discrimination. HUD is charged with enforcing the Fair Housing Act, which prohibits sex discrimination in rental and sale of residential property. During the Obama Administration, following the trend in other agencies that enforce bans on sex discrimination, HUD adopted the position that the ban includes sexual orientation and gender identity discrimination, and had placed tools on its website to inform the public – and especially Department grantees whose activities are directly subject to the FHA – about its interpretation and facilitate the receipt of complaints by the agency. In the joint letter, the Senators wrote, “It is concerning that HUD apparently removed these tools from its website, which are meant to assist grantees in meeting their underlying obligations under the law. Without these training resources, housing service providers will face additional challenges in trying to understand how best to meet the needs of their clients. The guidance resources that were withdrawn or removed are critical to ensuring nondiscrimination rules are fully and faithfully implemented.” Senator Catherine Cortez Masto (D-NV) took the lead in organizing the letter.

CALIFORNIA – The state Senate approved the Gender Recognition Act of 2017, SB 179, which will create a nonbinary gender option for birth certificates, drivers’ licenses, identity cards, and gender-change court orders. The measure was referred to two committees in the Assembly, has picked up some amendments, and as of mid-July looked like it was headed towards passage in the Assembly in a form that would require a new vote in the Senate before submission to Governor Jerry Brown. * * * Attorney General Xavier Becerra issued an announcement on June 22 that California will prohibit state-funded and state-sponsored travel to Alabama, Kentucky, South Dakota and Texas based on discriminatory legislation recently enacted in those states. He singled out Alabama HB 24, would “could prevent qualified prospective LGBT parents from adopting or serving as foster parents, Kentucky SB17, which “could allow student-run organizations in colleges and K-12 schools to discriminate against classmates based on their sexual orientation or gender identity,” South Dakota SB 149, which “could prevent qualified LGBT couples from adopting or serving as foster parents, and Texas HB 3859, which “allows foster care agencies to discriminate against children in foster care and potentially disqualify LGBT families from the state’s foster and adoption system.” This action was taken pursuant to California AB 1887, which prohibits state-funded and state-sponsored travel to states with laws that authorize or require discrimination on the basis of sexual orientation, gender identity or gender expression or against same-sex couples or their families. These four states are in addition to those already on the banned list, Kansas, Mississippi, North Carolina and Tennessee. Although North Carolina has repealed HB 2, which prompted its placement on the list, the measure which replaced it still meets the specifications for disqualification. The recent decision by the 5th Circuit that plaintiffs challenging the Mississippi law lacked standing under Article III means that Mississippi definitely stays on the banned list as well. * * * The Department of Fair Employment and Housing approved new regulations to protect transgender individuals, effective July 1. The regulations are codified in California Code of Regulations, Title 2, sections 11030, 11031, and 11034. They provided expanded definitions for gender and gender identity, transitioning, and specifically provide that employers may not request an employee to disclose information related to sex, including gender, gender expression, or gender identity, unless it is requested on a voluntary basis for recordkeeping purposes. Further, employers cannot inquire about or request documentation or proof of someone’s gender, gender expression, gender identity or sex. Furthermore, the regulations provide that the bona fide occupational qualification defense is restricted in the case of transgender individuals. The regulations require employers to make facilities such as bathrooms and locker rooms available to employees consistent with their gender identity or expression, and all single-occupancy facilities are to be designated as unisex or gender neutral. The Jackson Lewis employment law firm circulated a concise summary of the new regulations to their clients on July 3, see 2017 WLNCR 20364659.
CONNECTICUT – The Senate gave final approval on June 6 to amendments to the state’s Hate Crimes law that raise the offense from a misdemeanor to a felony, specify a mandatory minimum fine of $1,000 for those convicted, and expand coverage to hate crimes against communities and institutions. (The current law only covers hate crimes against individual victims.) The existing law covers hate crimes motivated by the victim’s actual or perceived race, religion, ethnicity, disability, sexual orientation, or gender identity or expression. The new amendments add “gender” to that list. The law is also expanded to provide increased penalties for making bomb threats or other threats of violence against a house of worship, religious community center or day care if the threat is intended to cause terror or results in evacuation of the threatened building or grounds. The Senate vote was unanimous. The House had previously approved the measure.

FLORIDA – The Wellington, FL, Village Council voted 3-2 on second reading to approve a measure prohibiting the practice of “conversion therapy” on minors within the village limits. Other Florida communities that have adopted similar bans over the past few years include West Palm Beach, Lake Worth, Miami, Wilton Manors, Miami Beach, Bay Harbor Islands, and Boynton Beach. Sun Sentinel, July 9. So, Wellington health care professionals can no longer attempt to hypnotize Christian youth and through suggestion turn them into Muslims or Jews . . . Sorry, with all these references to “conversion therapy” we’ve been seeing lately, we couldn’t resist that one.

MARYLAND – The Frederick County School Board approved a policy to protect transgender students, including allowing students to choose which bathroom to us, providing options such as privacy curtains, access to private bathrooms, and different schedules for changing in locker rooms, if necessary to accommodate student preferences. The policy also allows students to participate in sports consistent with their gender identity. Associated Press, June 15.

NEW JERSEY – Both houses of the legislature approved a measure at the end of June prohibiting health insurers from discrimination against transgender people by denying coverage for transition-related care, and the measure was sent to Governor Christie. Cliffhanger time . . .

OREGON – On June 15, Oregon became the first U.S. state to allow residents to identify neither as male nor female on driver’s licenses. Under a policy adopted administratively by the Oregon Transportation Commission, person can choose to have an X, for non-specified, on their driver’s license rather than an M or F. AOL.com, June 16.

RHODE ISLAND – Providence Mayor Jorge Elorza signed into law a new ordinance that takes effect in January, providing for police accountability by ending discriminatory profiling by race, gender identity, immigration status and other designated factors, according to an Associated Press report on June 8. The measure was approved by the City Council, which consists entirely of Democrats, earlier in June. The measure, to which the police officers’ union stated opposition, mandates policies for traffic stops and police body cameras and “reforms” the police department’s “gang database.”

TEXAS – Governor Greg Abbott called a special session of the state legislature to begin on July 18. Among its agenda items will be pending proposal to regulate restroom access by requiring people to use restrooms in public buildings consistent with their gender as recorded on birth certificates. This so-called “bathroom bill” was blocked during the regular session by House Speaker Joe Straus, a moderate Republican who has argued that the alleged justifications for the measure (safety) are unconvincing and that it would be detrimental to the business climate of the state. The bill is the special goal of Lt. Gov. Dan Patrick, an outspoken opponent of LGBT rights, who devised a strategy to hold hostage necessary legislation on other subjects in order to force the governor’s hand to call a special session. The Texas legislature ordinarily meets only in odd-number years for a relatively short session during the first half of the year, but the press of business has made “special sessions” a normal occurrence. ** * On June 15 Governor Abbott signed into law H.B. 3859, which allows faith-based adoption and foster care agencies to decline to place children consistent with their religious doctrines. The main effect of the law will be to insulate such agencies from any obligation to place children with LGBT households. Proponents of the measure had argued that it was necessary to protect the free exercise of religion and avoid excluding faith-based organizations from the child welfare system. Opponents argued that it amounted to state-sanctioned discrimination by favoring conservative Christian beliefs. The measure passed along largely party lines, with Republicans strongly in favor and most Democrats outspokenly against. Since Texas state law does not forbid discrimination of any form because of sexual orientation or gender identity, the main impact would be on enforcement of some local ordinances. Republican legislators are set on passing new legislation that
would forbid local governments from prohibiting discrimination on bases not already covered under state law.

WASHINGTON – A group seeking to reserve Washington's statutory ban on gender identity discrimination fell short in getting enough signatures to put Initiative 1552 on the ballot. The deadline was July 7 to get on the November 2017 ballot. The measure specifically sought to both repeal the anti-discrimination ban and to affirmatively require schools to maintain bathrooms based on student's sex as indicated on birth certificates. They claimed this was necessary to prevent predators from taking advantage of the law by invading public facilities to attack women and children. As we all know, there is an epidemic of such attacks under way in jurisdictions that ban gender identity discrimination in places of public accommodations – NOT! Actually, the law does not author self-identified men to enter women's restroom facilities, and there is no record of self-identified transgender women attacking women and children in restrooms. Spokane Spokesman-Review, July 9.

LAW & SOCIETY NOTES

PRIDE MONTH – It was much-noted that President Trump did not follow the “tradition” established by the Obama Administration of releasing a proclamation for Gay Pride Month and holding a reception with LGBT community leaders in the White House. However, the State Department did authorize those embassies and consulates that chose to do so to hold Gay Pride month events. Ivanka Trump issued a tweet stating that she is “proud to support my LGBTQ friends and the LGBTQ Americans who have made immense contributions to our society and economy.” Yes, but not immense enough to attract the attention of the President . . .

UNITED METHODIST CHURCH – The Des Moines Register (June 7) reports that Rev. Anna Blaedel, executive director of the Wesley Student Center at the University of Iowa, has reached “a just resolution” with the United Methodist Church of a complaint filed against her for having performed a same-sex wedding ceremony in April. She faced possible censure from the church's Iowa Conference, whose Appointive Counsel filed a unanimous complaint against her, charging her with practices “incompatible with Christian teaching.” In a statement released on June 5, the bishop and cabinet members determined that no disciplinary action will be taken against Blaedel. She had also been the subject of a similar previous complaint, which was dismissed last year. The Church is officially still studying the issue of how to respond to the fact of legal marriage equality in the United States, having created a study commission which will report to a special meeting of the General Conference in 2019. Until then, the Cabinet had urged United Methodist clergy “to refrain from officiating at same-gender weddings while the commission is doing its work, knowing that this harms our covenant with one another.” However, the cabinet resolution also states that clergy may “assist same-gender couples in finding other venues for their weddings, provide pre-marital counseling, attend the ceremony, read scripture, pray or offer a homily.” Blaedel, who has the unanimous written support of the board of directors of the Wesley Student Center, sounded a defiant note. “For now, I will keep doing the ministry I am called to do, including resisting unjust policies and practices of the UMC because I am convinced that Jesus’ teachings model radical and honest nonconformity with unjust policies and practices. I will continue to value and seek to prioritize relationships over rules, faith over fear, liberation over litigation.” In other words, she sounds much more Christian than the hierarchy looming above her. * * * On another front, the Washington Post (June 10) reported that the United Methodist Church has appointed a transgender Deacon for the first time. M Barclay, a transgender person who identifies as neither male nor female uses the pronoun “they” was commissioned on June 4 as the first non-binary member of the clergy in the UMC, in its Northern Illinois Conference. Barclay is a graduate of the Austin Presbyterian Theological Seminary, and has worked as youth director at a UMC church in Austin, pursuing ordination unsuccessfully first in Texas. M then moved to Chicago and worked at Reconciling Ministries Network, an organization that promotes inclusion of transgender and gender-nonconforming people in the UMC. M completed a two-year provisional period prior to formal ordination. M will continue to work at Reconciling Ministries and will continue to give sermons and workshops at other UMC churches, with the change that they now will be wearing the collar of ordained clergy.

GALLUP SURVEY ON MARRIAGE – The Gallup Organization has reported the results of a new survey, showing that 10.2% of LGBT Americans are now married to a same-sex partner, up from 7.9% two years ago when the Obergefell decision was announced. Most of the increase took place in the first year after the ruling, when pent-up demand in states that did not have marriage equality undoubtedly accounted for much of the marriage activity. Getting into the detail of the survey, it appears that many of those who married in the first year after

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Obergefell were already living with a same-sex partner. Interestingly, the survey also disclosed that 13.1% of self-identified LGBT respondents are married to an opposite-sex spouse, and 4.2% are living with an opposite sex partner. The proportion of the LGBT population that identifies as single/never married is 55.7%. We should remember, with all the attention focused on same-sex marriage in recent years, that a majority of LGBT people are single. Details can be found at www.gallup.com.

DEFENSE DEPARTMENT – Despite the change in administration, the top leadership in the Department of Defense allowed the usual June LGBT Pride Month celebration to take place in the Pentagon. Acting Undersecretary of Defense for Personnel and Readiness Anthony M. Kurta released a memorandum on June 2 announcing the event. It was actually a bit ironic, since at the end of Pride Month Defense Secretary Jim Mattis announced that he was delaying until the end of 2017 the deadline for department officials to devise appropriate guidelines for ending the ban on enlistment of transgender personnel.

VIRGINIA STATE LEGISLATIVE ELECTION – Danica Roem, a transgender former journalist, won the Democratic primary to oppose the reelection of Bob Marshall, a Prince William Republican who is the leader of anti-LGBT forces in the legislature. If elected, she would be the first openly transgender person to be elected and take a seat as a state legislator in Virginia. Marshall’s current legislative project is to get his colleagues to approve a so-called “bathroom bill” to protect him from having to use public facilities together with transgender men, who evidently give him quite a scare.

INTERNATIONAL NOTES

ARMENIA – The Justice Ministry announced on July 3 that same-sex marriages involving Armenian citizens celebrated abroad would be recognized in the country. According to the Family Code, reported pararmenian.net (July 3), marriages between Armenian citizens, those between Armenian citizens and foreigners or stateless persons, which have been registered outside Armenia, are valid inside the country “after consular legalization.” Also, Armenia follows the customary practice of recognizing as valid marriages that were legally valid where they were performed. As the number of countries with marriage equality increases, the Justice Ministry was called upon to announce how Armenia would handle the issue. The relevant statutes do not specifically mention sex in connection with marriage recognition, leaving the Ministry with room to adapt to the current situation.

AUSTRALIA – The United Nations Human Rights Committee issued a decision on June 15 finding that a married transgender woman in New South Wales whose attempt to have her sex changed on her birth certificate was denied had suffered a violation of human rights covered in articles 17 and 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. Six of the eight Australian states and territories provide that married persons must divorce before they can obtain such a change, as Australia does not allow or recognize same-sex marriages. BuzzFeed.com, June 19. Continued frustration with the unwillingness of the government to bring a marriage equality bill into the Parliament has prompted one member to announce he was contemplating introducing a private members bill and forcing a vote that could split the current government coalition, which was formed on an agreement between party leaders that no parliamentary vote will be taken on the subject until a non-binding national plebiscite can be held. However, one party has effectively blocked the holding of the plebiscite, arguing that the question should be decided by the Parliament. A stalemate has ensued. Prime Minister Malcolm Turnbull is caught in the middle. He has stated his personal support for marriage equality, but has insisted that the deal struck in forming the governing coalition must be honored.

AUSTRIA – Celebrating the 25th anniversary of Rechtskomitee LAMBDA, the nation’s leading LGBT rights organization, Federal President Dr. Heinz Fischer awarded the Golden Medal of Honor for Merit in the Interest of the Republic of Austria to Dr. Helmut Graupner, a co-founder and president of the organization. This is reportedly the first time that an Austrian head of state has officially honored an individual for working to advance LGBT rights. Dr. Graupner has been active in litigating LGBT rights issues in Austria, including taking cases into the appellate courts and the European courts, and in legislative lobbying. He has also been involved in consulting with LGBT rights leaders in other European countries, and was successful in litigating for pension rights in Germany in the European Court of Justice. One of his cases led to the establishment of civil unions in Austria.

BERMUDA – Opponents of same-sex marriage have filed an application to appeal a recent ruling by the Supreme Court (a trial court) that had authorized such marriages to take place in Bermuda. The application was filed.
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by a group calling itself “Preserve Marriage” after the normal deadline, its proponents claiming that they had gathered 8,000 signatures on a petition seeking to overturn the ruling in the space of just 48 hours. If accepted the appeal would be heard by the Court of Appeal. The original Supreme Court proceeding, which produced a ruling on May 5, was brought by Winston Godwin and his Canadian fiancé, Greg DeRoche, after the Registrar-General refused to post their wedding banns. Mrs. Justice Simmons found that the refusal violated their human rights and issued an Order in their favor, which has yet to be reduced to a definitive written order. The government said it would not appeal the ruling. *Royal Gazette*, June 29.

**CANADA** – The Court of Appeal of Manitoba affirmed the conviction of an HIV-positive woman who infected a male sexual partner by having unprotected sex with him without disclosing that she was infected. *Her Majesty the Queen v. Schenkels*, 2017 MBCA 62 (June 29, 2017), appeal from *R v. Schenkels*, 2016 MBQB 44. Marjorie Schenkels was convicted by a jury in December 2014 and sentenced in March 2016 to serve one day less than two years. The victim had not been tested for HIV prior to having sex with Schenkels, and tested positive in December 2011, shortly after the last time he had sex with her. On appeal, she argued there was no proof that she had infect the victim and that the prosecution should have had to prove beyond reasonable doubt that the victim could not have contracted the virus from somebody else. The court observed that there was no evidence at trial that the victim could have contracted HIV any way other than through intercourse with Schenkels. “Without such evidence,” wrote Justice Barbara Hamilton, “the accused was asking the jury, and now this court, to speculate. She is asking this court to focus on hypothetical alternative theories that have no basis in evidence.” According to a report about the opinion in the *Winnipeg Free Press* (July 7), Schenkels is “the first woman in Manitoba to be convicted of sexual assault on the basis of failing to disclose her HIV status.” In addition to her prison term, she will be listed on the sex offender registry for 10 years, the newspaper reported.

**CANADA** – The Senate approved a federal transgender rights bill on June 15, which had already been approved by the House of Commons and would go into effect upon gaining royal assent, a formality. The measure amends the Canadian Human Rights Act to add gender identity and gender expression to the list of prohibited grounds or discrimination, and amends the Criminal Code to extend protection against hate propaganda and bias-motivated violence. * * * Yukon became the last part of Canada to enact explicit anti-discrimination protection for transgender people when royal assent was given on June 13 to Bill 5, an amendment to the Yukon Human Rights Code. The bill also amended the territory’s vital statistics statute to allow transgender people to change their legal gender without undergoing surgery, and the bill allows a gender-neutral option on birth certificates, whose marker could be determined later when the individual is old enough to make a firm decision about their gender and gender identity. The bill passed the territorial legislature on a vote of 15-3. *license.icopyright.net*, June 14.

**CHECHNYA** – The activist group Russia LGBT Network reported that after Ramadan ended on June 24, the detentions of gay men in Chechnya, which had tapered off after international protests in the spring, had resumed, even as U.S. President Donald Trump was preparing to meet with Russian President Vladimir Putin. Although the U.S. State Department had issued a statement condemning the earlier round of detentions, Secretary of State Rex Tillerson told a congressional hearing that he had not raised the issue in face-to-face talks with the Russian foreign minister. Chechen leader Ramzan Kadyrov reacted to international press inquiries by claiming that no anti-gay crackdown was under way because, he insisted, there were no gay men
living in Chechnya, an absurdity rebutted by the testimonies of gay men fleeing the country in interviews published in major news outlets in the Western Europe and the U.S. Russian government spokespersons insisted that there was no evidence that gay men were being detained in Chechnya, much less tortured or killed, despite these interviews.

CHILE — President Michelle Bachelet announced her legislative agenda in a state of the union speech on June 1. It includes sending a bill to Congress in the second half of 2017 to allow same-sex marriage. However, she is a “lame-duck” president as she cannot seek reelection this fall when her term expires, so it is not clear that this promise is likely to eventuate in successfully adopted legislation. Reuters, June 1.

CHINA (PEOPLES’ REPUBLIC OF CHINA) — A man identified pseudonymously as Yu Quanhu has won a judgment from the district court in Zhumadian that a hospital must make a formal apology and pay 5,000 yuan in compensation after being subjected to forced “conversion therapy.” The court found a violation of individual freedom guaranteed by the Chinese constitution. Reported the South China Morning Post (July 5), “Yu was sent to the hospital by his wife and relatives in October 2015 after he tried to get a divorce. He was kept there for 19 days, during which time he was forced to take medicine and given injections by staff, Yu told the court.” He left his family after being discharged from the hospital, fearing that they would force him to go back. A gay rights activist, Peng Yanhui, told the newspaper that it was “the first case that homosexual people have won after being forced to undergo treatment for mental illness.” * * * The Guangzhou Intermediate Peoples’ Court ruled on June 19 that it violates the law to demand that an HIV-positive plaintiff quit his job at a state-run public institution. The case is said to be the first-ever victory in China by an HIV-positive plaintiff claiming to be the victim of unlawful employment discrimination. The 27-year-old plaintiff, Ah Ming (a pseudonym), was ordered to resign as a result of a physical exam that was required as part of his application for a permanent post after he had worked for three years as a contracted employee (temp). He filed a labor arbitration case seeking to resume his job, which was initially rejected. His first court challenge, heard in February of this year, was also rejected. But during the second trial, the court declared that allowing the employer to turn down an HIV-positive applicant goes against Chinese policies that protect the basic rights of HIV patients, emphasizing that HIV/AIDS does not require isolation. Peoples Daily Online, June 21.

CHINA (REPUBLIC OF CHINA – TAIWAN) — While the legislature is considering legislative proposals to implement the court ruling on marriage equality, the Ministry of the Interior has “improved services for same-sex couples, by urging local governments to lift location restrictions on those wanting to register their partnership before the law is revised to legalize same-sex marriage,” reported focustaiwan. tw on June 21. Several cities have establish such registries, limited to their residents. The Ministry’s suggestion is that those municipalities should open up the possibility of registration to anybody regardless of where they reside. “Partnership registration allows same-sex couples to apply for family care leave and sign surgical and medical treatment consent forms for each other,” said the report. As of May, 2,142 couples had applied for partnership registration in municipalities that allow it. The document states that the three men constitute a family and are each other’s legal partners. Bermudez and Rodriguez, together for 18 years as a couple, were the first gay male couple in Colombia to legally recognized anywhere in the world. But the lawyer who drew up the papers, German Rincon-Perfetti, said it was not technically a marriage, but rather a “special patrimonial union,” since Colombian law provides that a marriage is the union of two people. The document states that the three men constitute a family and are each other’s legal partners. Bermudez and Rodriguez, together for 18 years as a couple, were the first gay male couple in Colombia to attain formal recognition of their partnership in 2000, 16 years before the constitutional court legalized same-sex marriage, reports The Guardian. For eight of those years they had a three-way relationship that included Alex Esneider Zabala. The polyamorous relationship with Victor Hugo Prada has been going on for four years, and overlapped with that of Zabala, who passed away three years ago from cancer. It is uncertain what legal effect may be given to their formally recognized union.

FRANCE — Early in July, the Court of Cassation, France’s highest appellate court, ruled that when a French gay couple went overseas to have a child using a surrogate (which they could not do within the country as a result of restrictive laws), France will recognize the parenthood of the biological father and will allow the father’s partner to adopt the child as a co-parent. This was less relief than the couples who brought this case – who went to the U.S. to contract
with a surrogate and have appropriate birth certificates issued upon the birth of the child listing both men as parents – were seeking, as they argued that the French courts should just recognize their American birth certificates, but the court was not willing to go that far. During the recent presidential campaign, President Emmanuel Macron had argued that single women and same-sex female couples should be eligible to use assisted reproductive technology (ART), which French law now reserves for women in heterosexual marriages. However, Macron indicated he would wait for a recommendation from the National Consultative Ethics Committee before taking action on the issue. Early in July, the Committee issued an opinion after three years of deliberation, endorsing Macron’s position. Watch for next steps. This item was sourced from Ellen Trachtman, “French Gay Dads Win a Surrogacy Victory,” on AbovetheLaw.com, July 12 (see 2017 WLNR 21373779).

GERMANY – In a surprise move in anticipation of her re-election campaign, Chancellor Angela Merkel, facing announcements from her potential coalition partners in a new government that they would insist on support for marriage equality, announced that she would allow the question to come up for a vote in the Parliament and would not impose party discipline. Although she personally remained opposed and voted no on the measure, it carried with a comfortable majority of 393-226 with four abstentions on June 30. It still required approval by the upper house and the president needed to sign the bill, but these were viewed as formalities and it was widely expected that the measure would go into effect by the fall, bringing Germany in line with the rest of Western Europe, where most of its major European Union allies now allow and recognize same-sex marriages. New York Times, June 30. The major holdouts at this point are Italy and Austria, and it was widely expected that Germany’s move would exert heavy influence on these two countries. Austria has civil unions. Italy is under pressure from rulings by the European Court of Human Rights to provide at least civil unions for its same-sex couples. At some point, given the census-based interpretation of the European Convention on Human Rights, it is likely that the European Court will decide that the trend has gone far enough for the Court to recognize same-sex marriage as the European human rights norm under the respect for private life and family formation. Germany’s move undoubtedly advances that trend, and led to celebrations in other countries as well as Germany. * * * The lower house of the Parliament approved a measure on June 22 to annul the convictions of thousands of gay men who were prosecuted under anti-sodomy laws after World War II. The house voted unanimously to cancel convictions under Paragraph 175. The measure was introduced in the 19th century, was toughened during the Nazi regime, and was retained in that form by West Germany after the war, not to be modified until 1969 and fully repealed in 1994. The bill provides for monetary compensation for surviving victims of its enforcement, who are estimated to number about 5,000. It will also apply to men who were convicted in East Germany under Communist rule, where a “milder” version of Paragraph 175 remained in force until 1968. The measure now goes to the upper house. Associated Press, June 22.

IRAQ – The Daily Beast carried a detailed article in July 6 recounting the perilous situation faced by gay people in Iraq. Although some of the anti-gay violence in the country is attributed to ISIS, the general population is extremely hostile to LGBTQ people. It was recently reported that Karar Noshi, an Iraqi actor and model had been kidnapped, tortured and murdered in Baghdad because he “looked gay” to intolerant neighbors. An informant told the Tim Teeman, the Daily Beast reporter, that he was “aware of seven people being killed this past January for similar reasons to Karar’s. Those seven people were rumored to be on a list of 100 names of individuals who were targeted by an armed group” for killing because they were believed to be gay. It was also reported that this problem accelerated after American and allied forces invade the country and deposed Saddam Hussain from power. The informant insisted that these problems predated the rise of ISIS, and said, “The first enemy of LGBT people in Iraq is the government itself. Not only are they not providing protection for us, but they are directly involved in violating our rights.” He said that police and security guards routinely stop people at checkpoints who they believe “look gay” or appear to be transgender, and that an LGBT community organization called IraQueer has been assembling documentation, including videos of “individuals being humiliated and physically abused in such situations.” He said that “one of the main armed groups in Baghdad had announced a partnership with the government in the name of fighting ISIS, and this group was one of the main groups organizing the killing campaigns of gay men and feminine men perceived to be gay.” Some people are being targeted through dating apps. The New York Times recently published an article about the plight of gay Iraqis who manage to get out of the country, only to encounter significant difficulties in obtaining refuge status elsewhere, particularly in the U.S., where the Trump Administration has placed a freeze on refugee resettlement.

IRELAND – Leo Varadkar has become Ireland’s youngest and first openly-gay prime minister. His leadership of the governing Fine Gael party was
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confirmed by a vote in Parliament of 57-50 with 47 abstentions early in June. He has been characterized as a liberal on social issues but a conservative on economic issues. The abstentions came from the biggest opposition party, Fianna Fail, which disagrees with Varadkar’s economic policies. Varadkar appointed as deputy leader of Fine Gael Simon Coveney, the man who he beat out for the leadership position, in a move to heal divisions in his party. The looming issue for the Republic of Ireland will be the impact of Brexit on its relationship with Northern Ireland, which remains under British rule. When both countries were in the European Union, there was a free flow of trade and immigration possible. That may no longer be the case when the U.K. leaves the Union. Varadkar pledge at the annual Pride Festival in Dublin to use his office to advance the cause of LGBT rights and to press for marriage equality in Northern Ireland, the last part of the U.K. where same-sex couples cannot legally marry.

JAPAN – A group of “local assembly members” from Tokyo and Saitama have formed an inter-assembly league to “promote policies supporting lesbian, gay, bisexual, and transgender people,” reported japantoday.com on July 7. The initial membership includes five “out” members from the two cities, and almost 80 additional members of “prefectural and municipal assemblies across the country who support the group’s cause,” the website reported, based on a press conference held in Tokyo. The press conference provided an opportunity for one of the five to come out for the first time, Kunihiro Maeda, a member of the “Bunkyo Ward Assembly in Tokyo.” The group intended to hold a national study session in Tokyo on July 27-28.

MEXICO – Because marriage is a matter of state rather than federal law in Mexico, and the nation’s Supreme Court does not have the authority to order marriage equality nationwide in one simple decision interpreting the national constitution, the spread of marriage equality has been a laborious process, involving litigating cases from individual states and attempting to persuade state legislative bodies to amend laws in response to the litigation. The Supreme Court of Justice ruled years ago that same-sex marriages contracted in any state would have to be recognized nationwide (at a time when only Mexico City allowed same-sex marriages), but the process has moved forward as couples filed suits in local courts seeking “amparos” (court orders) directing local officials to allow them to marry. As the amparos mounted up in individual states, they reached a point where the Supreme Court could render decisions that were “jurisprudential” for the particular state. In the meantime, given the Supreme Court’s position on the issue, any same-sex couple that would be eligible to marry under state law if not for their sex can get an amparo, since the refusal to issue one would be reversed on appeal. Journalist Rex Wockner, who has been closely monitoring the situation, reported on July 11 that the Supreme Court of Justice had struck down the state of Chiapas’ ban on marriage equality, ruling on an “action of unconstitutionality” filed by the National Human Rights Commission. When this ruling comes into force, Chiapas will be the 11th of Mexico’s 31 states where same-sex couples will be entitled to get marriage licenses without having to file an action for a court order. Wockner had earlier reported that eighty people had won a collective amparo in Yucatan state from the 14th Circuit Collegiate Court on Civil and Administrative Matter on June 28.

PAKISTAN – In a move described as a “landmark,” the Pakistani government
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has issued its first passport with a transgender category. Prominent transgender activist Farzana Jan received a passport with an X to symbolize “the third sex” in the gender category. Jan, president of Trans Action Pakistan, said that this was a “significant step in the community’s fight for legal recognition in Pakistan.” Pakistan deems homosexuality to be a crime, consistent with the government’s Muslim orientation, but the Supreme Court ruled as long ago as 2009 that “hijras” (a category referring to transvestites, transsexual and eunuchs) were entitled to receive national identity cards as a “third sex.” In subsequent rulings, the court has called for equal rights for transgender people, including the right to inherit property and assets, voting rights, and the right to be recorded in a separate category in the national census. However, transgender people are disproportionately victims of discrimination and hate crimes. Jan said, “The main challenge for us is to change society’s behavior. We have largely been confined to the four walls of our houses because we are harassed, terrorized and ridiculed by the people.”

SCOTLAND – The Scottish Episcopal Church has become the first major Christian church in the U.K. to formally vote to allow its clergy to perform same-sex marriages. The vote by the Synod in Edinburgh amends canon law on marriage, removing the stipulation that it is between a man and a woman. Gay Christians from any Anglican Church can now ask to be married in a Scottish Episcopal Church, although clergy who wish to officiate at same-sex marriages will have to formally “opt-in.” Those who disagree with same-sex marriage will be allowed to continue to refrain from performing such ceremonies, as the church does not want to compel any of clergy to act against individual conscience. In reporting on this development, the BBC commented that the vote “has left the church at odds with most of the rest of the worldwide Anglican Communion.” When same-sex marriage became legal in Scotland in 2014, the Church had formally opposed the change. Interestingly, Scotland may be the nation with the most openly-LGB high level government officials and party leaders.

SERBIA – President Aleksandar Vucic nominated Ana Brnabic on June 15 to be the prime minister, making her the first openly gay premier and first woman in that position. After a bit of a struggle the appointment was confirmed in the parliament and she took office later in June. Agence France Presse EnglisH Wire, June 15.

SPAIN – Under the Gender Identity Law of 2007, more than 2,200 Spaniards have obtained an official change of sexual designation on their national ID cards. The measure requires that the applicant have a gender dysphoria diagnosis, had undergone hormone treatment for at least two years, has Spanish nationality, and is a consenting adult. Spain’s National Federation for Lesbians, Gays, Transsexuals and Bisexuals is campaigning to get the requirement of a gender dysphoria diagnosis removed. Said their spokesperson, Mane Fernandez, “We don’t need a doctor or anyone else to say who we are. To be diagnosed with gender dysphoria is like saying you have a disease, which is why we are demanding self-determination for the individual. We don’t believe there is any transsexual who wouldn’t want to take this step, but these restrictions stop them from doing so.” According to a recent statistical report published July 6 in El Pais, More than half of the recorded sex changes are by people who were originally identified as men, and 53.3% are among 18-to-30-year-olds. Only a small percentage of those applying for the official change are over 50. Different rules govern sex changes for minor.

SWITZERLAND – Although the public has approved same-sex marriage by initiative, the Parliament voted to extend for two years the deadline for drawing up a bill to implement the policy change. The delay was “attributed to the need to clarify certain legal issues with the federal administration,” which included expected law changes in the fields of tax and social security, adoption, and reproductive medicine. www.swissinfo.ch/, June 16. Sounds like time-wasting excuses to us, seeing as how other countries have managed to move very quickly once the public signified approval. See, e.g., Republic of Ireland. In the U.S., of course, within days of the Supreme Court’s Obergefell ruling on June 26, 2015, same-sex couples were marrying in almost every state.

UNITED KINGDOM – In Parliamentary elections held on June 8, the voters elected a record number of out lesbian and gay members of Parliament, 45, representing 7% of the new House of Commons. Pinknews.co.uk (June 9) asserted that this placed the U.K. first in the world in terms of the level of out lesbian and gay representatives in a national legislature. Two gay incumbents lost office, however. Seven of the out members belong to the Scottish National Party, given them 20% of that party’s membership of 35 in the House. (Scotland has emerged as a hotbed of LGBT political organizing, with LGB politicians prominent among the Scottish parliamentary leadership.) The remainder were equally divided (19 each) between the Conservatives and Labour. The large representation may prove problematic for Conservative Prime Minister Theresa May. Since the Conservatives lost their majority while remaining the largest bloc, it fell to her first to attempt to put together a
governing coalition, and her approach to the outspokenly anti-gay Democratic Unionist Party in Northern Ireland, whose ten seats would yield a slim majority, brought an outcry from gay Conservatives. Ms. May offered assurances that uniting with the DUP would not affect the Conservatives’ positions on social policy, but few were convinced, and it was generally believed that even if May cobbled together a majority, it would be fragile and the new government would not last very long.

UNITED KINGDOM – The Church of England’s General Synod has ordered the devising of a formal service for people who are transitioning to be “welcomed and affirmed in their parish church.” The Bishops voted 30-2 in favor, while the 127 lay members voted 127-48 in favor. They rejected a proposal to delay this move, after hearing from a vicar who spoke about a five-year-old in his congregation who is transitioning, and said that the church should offer this child’s parents “not just a grudging acceptance, but the full support and affirmation they will need as they journey together with [their child] on a path leading to transition to her new gender identity.” Daily Mail Online, July 10.

UNITED KINGDOM – The Supreme Court of the United Kingdom ruled on an important transitional issue for the rights of LGBT civil partners and spouses, in Walker v. Innospec Ltd., [2017] UKSC 47 (July 12). John Walker worked for Innospec from 1980 to 2003, when he took early retirement. He was living with a same-sex partner from 1993 on. Under the company’s pension plan, a 1999 amendment provided that if a pensioner was survived by a spouse, the spouse would be entitled to a survivor’s pension for the rest of his/her life. In December 2005 the UK’s civil partnership law went into effect, and Walker and his partner became civil partners. He asked the company whether his partner would be entitled to a survivor’s pension if he died, and they said no, because his entire employment with them pre-dated the passage of the law and there is no retroactivity. Walker and his partner married a few years ago when that became available in England. Meanwhile his case was working its way through the courts. In today’s decision, the court says that Walker’s spouse will be entitled to a lifetime pension if he survives Walker. The equality principle under European law requires that all spouses, whether same-sex or different sex, get the same rights and benefits. The company was relying on a provision of the English Equality Act and its predecessors which the court found to be contrary to EU legal requirements and to that extent invalid. The court says that the time the right to a pension accrues is the time when the equality issue must be resolved. Under the plan, the right to a survivor’s pension accrues when a married pensioner dies. It doesn’t matter when the marriage took place. Somebody who marries after he or she retires is covered under this provision. The court relied upon, and quoted from, an article by Professor Robert Wintemute in (2014) 43 ILJ 506, 510, to illustrate the fallacy of the Employment Appeals Tribunal’s contrary ruling, which had responded to the employer’s argument that, in effect, allowing a pension for a same-sex surviving spouse of a worker in Walker’s position would upset the actuarial assumptions of funding the benefit, presumably since throughout Walker’s employment, he was not able under UK law to marry a same-sex partner. But this is irrelevant, point out the court, since the survivor pension provision focuses on the marital status of the pensioner at the time of death, not while he was working. Also, some doubt was expressed that requiring this benefit would seriously undermine the financial stability of company pension plans. [Open question: After the UK’s anticipated withdrawal from the EU, will this result change? The May government has pledged to protect workers’ rights that were established under EU law. Let’s see if they keep their promise.]

PROFESSIONAL NOTES

NEW YORK COURT SYSTEM – On July 3, the New York Law Journal published an article setting out the history of the new commission established by New York Chief Judge Janet DiFiore to address LGBTQ issues in the state courts. Jeff Storey, New State Court Commission, Named for LGBTQ Pioneer, Begins to Map the Future. The Commission is named in memory of Justice RICHARD C. FAILLA, the first out gay man to be elected to the New York State Supreme Court (New York County), after having served as a judge of the Criminal Court of the City of New York upon appointment by then-Mayor Ed Koch in 1985. Prior to that appointment, Failla had served as the first chief judge of the City’s Office of Administrative Trials and Hearings. Justice Failla had also served as a board member of Gay Men’s Health Crisis, and as part of a New York City Bar panel that investigated and reported on how the state courts and prisons were failing to cope adequately with the HIV/AIDS epidemic. Justice Failla died from complications of AIDS in 1993. The Failla Commission is co-chaired by two out lesbian judges: Justice MARCY KAHN, Appellate Division, First Department, and Justice ELIZABETH GARRY, Appellate Division, Third Department. Members of the Commission participated prominently in Pride Month events during June in seven cities around the state. It has adopted a two-fold mission: “to promote equal participation and access to the court system regardless of sexual orientation, gender identity or gender expression, and to promote...
the presence of LGBTQ judges and employees within the court system.” It plans to sponsor training for judges, to build collaborative relationships with advocacy organization, the profession and community groups, and to general improve the atmosphere in the courts and sensitivity to LGBTQ issues. According to the Association of Gay and Lesbian Judges, there are about 50 out LGBTQ judges in New York. Other members of the Commission include recently seated New York Court of Appeals Judge PAUL FEINMAN, who was serving on the Appellate Division, First Department, when he was nominated by Governor Andrew Cuomo and unanimously confirmed by the state Senate shortly before its summer recess. Justice Feinman had been the second out gay man to be elected to the Supreme Court, New York County, the first out gay man to be elevated by appointment of the governor to the Appellate Division, and is the first openly LGBTQ person to serve on New York’s highest court. Other members of the Commission include Justice ROSALYN RICHTER, Appellate Division, First Department, who was one of the first out lesbians appointed to serve on the Appellate Division and among the finalist candidates for appointment to the Court of Appeals in June, and Acting Justice MICHAEL SONBERG, a founder and past president of the Association of Gay and Lesbian Judges. The Commission has 23 members, including a mix of judges, court staff and practicing attorneys. Marc Levine is the Executive Director. * * * The New York State CLE Board has created a new category of CLE credit effective January 1, 2018: Diversity, Inclusion and Elimination of Bias (“D&I”). Experienced attorneys who are due to re-register on or after July 1, 2018 must complete at least one (1) credit hour in D&I. Among the topics that can be included in diversity CLEs are sexual orientation and gender identity issues in the profession.

The American Lawyer reported July 7 that ROBERTA (“ROBBIE”) KAPLAN, who represented Edith Windsor in her successful challenge to the Defense of Marriage Act in the U.S. Supreme Court, is leaving her partnership at Paul Weiss Rifkind Wharton & Garrison to start a litigation boutique that will combine her commercial litigation work with continued public interest advocacy. Since U.S. v. Windsor, Kaplan has been prominently involved in litigating for marriage equality in Mississippi, where she was part of the litigation team challenging that state’s ban on same-sex marriage, and more recently challenging the anti-gay H.B. 1523. Kaplan emphasized that she sought more flexibility in taking clients and negotiating fee arrangements than was possible at a BigLaw firm like Paul Weiss, the publication reported. The initial staff of the new firm, called Kaplan and Co. LLP, includes Kaplan and three other lawyers: Julie Fink (previously in-house at Pfizer and a Paul Weiss attorney), John Quinn (a former Sullivan & Cromwell litigation associate), and Rachel Tuchman, a recent Yale law graduate. Their offices will be in the Empire State Building. They plan to staff up to a dozen or more attorneys by the fall. Kaplan and Paul Weiss have agreed that she will continue to work on some of the cases she was handling for that firm and they will work together in the future.

The ACLU LGBT & HIV PROJECT has announced its newest staff attorney, GABRIEL ARKLES, who will work in the headquarters office in New York. Arkles, an NYU Law graduate, previously worked as an Associate Teaching Professor at Northeastern University Law School in Boston. He was also a founding collective member and Director of Prisoner Justice Initiatives at the Sylvia Rivera Law Project, which specialized in transgender legal issues, and was a founding board member of the Lorena Borjas Community Fund, which provides direct cash bail and bond assistance to LGBTQ people in the criminal and immigration enforcement systems. He is a long-time transgender movement activist.

LAMBDA LEGAL and THE AMERICAN CONSTITUTION SOCIETY partnered on a report about diversity in the judiciary, which found that most states seem uninterested in figuring out whether they have a diverse judiciary! They have issued a report, titled Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It. Yuvraj Joshi, the Lambda Legal Fair Courts Project Fellow and author of the report, stated: “States can’t improve diversity on the bench if they don’t know the ways in which diversity is lacking. That’s why we need better data about state judges. We looked across the nation, from California to New Jersey to Georgia and Texas, to find best practices that should make it easier for every state to measure the diversity of its judges.” The report suggests that states should be tracking diversity on race, ethnicity, gender, gender identity, sexual orientation, disability status, and professional background. The report can be found at http://diversity-counts.com/ on the website of the American Constitution Society.


5. Clarke, Jessica A., Protected Class Gatekeeping, 92 N.Y.U. L. Rev. 101 (April 2017) (takes on the profoundly misguided courts that reject equal protection claims by asserting that the plaintiff has failed to show that she is a member of a “protected class”).


7. Davids, James A., The Role of Worldview in the Judicial Decisions of Justice John Paul Stevens, 11 Liberty U. L. Rev. 723 (Spring 2017) (suggests that Senate confirmation decisions for Supreme Court nominees should focus on the nominee’s “world view”; not surprising, given the source, he means whether the individual is religious or, as he describes Justice Stevens, “hostile to religion”).

8. Eyer, Katie R., Protected Class Rational Basis Review, 95 N.C. L. Rev. 975 (May 2017) (proposes a new strategy for using the more robust rational basis review evident in recent Supreme Court LGBT rights cases to achieve something like a disparate impact theory for constitutional race and sex discrimination claims).


12. Hier, Aron, More Bang for the Buck: “Freaks” and the Intimate-Sex-for-Money License, 46 Sw. L. Rev. 489 (2017) (suggests that courts should make an exception to criminal laws against prostitution in the case of people with immutable physical conditions that make it unlikely they can achieve sexual fulfillment without hiring sex workers).


16. Kolenc, Antony Barone, Putting Faith in Europe: Should the U.S. Supreme Court Learn From the European Court of Human Rights?, 45 Ga. J. Int’l & Comp. L. 1 (Fall 2016) (Surprise! The author says Yes.)


18. Lindevaaldsend, Rena M., When the Pursuit of Liberty Collides with the Rule of Law, 11 Liberty U. L. Rev. 667 (Spring 2017) (an example of fundamentalist Christian critique of constitutional law: the liberty protected by the Due Process Clause must be viewed through a Biblical perspective or it lacks an objective basis, leading to a crisis of legitimacy).


20. Minter, Shannon Price, “Déjà vu All Over Again”: The Recourse to Biology by Opponents of Transgender Equality, 95 N.C. L. Rev. 1161 (May 2017) (Legal Director of National Center for Lesbian Rights explodes the “biological” argument against allowing transgender people to use restroom facilities consistent with their gender identity).


26. Soucek, Brian, Hively’s Self-Induced Blindness, 127 Yale L.J. Forum 115 (June 13, 2017)(critique of the en banc 7th Circuit’s reasoning in the Hively case, from the perspective of supporting the conclusion that sexual orientation discrimination is actionable as sex discrimination under Title VII).


32. Woods, Jordan Blair, LGBT Identity and Crime, 105 Cal. L. Rev. 667 (June 2017) (explores how the difficulties faced by some LGBT youth expose them to high risk for involvement with the criminal justice system).