The Looming October SCOTUS Term

Petitions for Review of Rulings on LGBT-Related Issues Are Pending
EXECUTIVE SUMMARY

405 Repeated Victories in the “Bathroom Wars” During Summer 2018
409 Supreme Court Faces Petitions for Review of Rulings on LGBT-Related Issues as October Term 2018 Nears
413 7th Circuit Ruling Creates Federal Precedent to Protect Older Gays in Residential Facilities
415 Pennsylvania District Court Rules Catholic Adoption Agency Cannot Discriminate Against Same-Sex Foster and Adoptive Parents
417 First Circuit Claps Back at Scott Lively
419 Indiana Court of Appeals Affirms Denial of Lesbian’s Petition for Third-Party Visitation
420 Trump Administration Issues Directive Authorizing Federal Contractors to Discriminate Based on Religious Beliefs
422 Recognizing Humanity of Transgender Prisoners, Florida Federal Judge Permanently Enjoins “Freeze Frame” Policy
424 Trump Administration Suffers More Setbacks in Defending Transgender Military Ban
429 New York Appellate Division Reverses Dismissal of Alleged Co-Parent’s Visitation and Joint Custody Claim
430 New York Appellate Division Applies Equitable Distribution to Property Acquired During a Civil Union for the First Time, but Maintains Inequitable Treatment of Civil Unions
431 Wisconsin Federal Court Orders State Medicaid to Cover Gender Confirmation Surgery
433 Tenth Circuit Slams Door on Transgender Inmate Care, Upholding 32-Year-Old Precedent in Pro Se Case
435 North Dakota Supreme Court Affirms Trial Court’s Refusal to Award Spousal Support to a Lesbian Who Divorced Her Husband after Renouncing Sex with Men
436 7th Circuit Panel Blasts Corrections Staff for Delays in Responding to Inmate’s Gender Dysphoria
438 New Jersey Appeals Court Rules Lesbian Co-Parent May Seek “Bystander” Emotional Distress Compensation for Death of Child She was Raising with Her Same-Sex Partner
440 D.C. District Court Allows Title VII Sexual Orientation Claims to Proceed
441 Pro Se Prisoner Complaint Alleging Constitutional Violations for Deprivation of Gender Dysphoria Treatment Dismissed by Michigan Federal District Court
443 Wisconsin Federal Judge Issues Transphobic Decisions Denying Transgender Inmate Access to Court under “Three Strikes” Rule
444 Hong Kong’s Top Court Puts the Government on Notice that Differential Treatment for LGBTQ People in Administrative Determinations on Dependent Visas Requires Adequate Justification
446 The Perils of Pennsylvania: An HIV+ Inmate Attempts to Litigate Privacy Claims in State Court
447 Another Alabama Inmate Loses a Protection from Harm Case after Assault by Sexual Predator

Notes 507 Citations
Repeated Victories in the “Bathroom Wars” During Summer 2018

By Chan Tov McNamarah

The summer of 2018 saw a wave of transgender rights victories in the public school ‘bathroom wars,’ as courts across the nation defended the right of transgender students to use facilities that match their gender identity. The slate of four victories during June through early August — Parents for Privacy v. Dallas School District No. 2, 2018 WL 3550267, 2018 U.S. Dist. LEXIS 123567 (D. Ore., July 24), from Oregon, Doe v. Boyertown Area School District, 2018 U.S. App. LEXIS 20848, 2018 WL 3583578 (3rd Cir., July 26 [revised version of earlier decision issued on June 18, 2018]), from Pennsylvania, Adams v. School Board of St. Johns County, 2018 U.S. Dist. LEXIS 125127, 2018 WL 3583843 (M.D. Fla., July 26), from Florida, and J.A.W. v. Evansville Vanderburgh School, 2018 WL 3708049, 2018 U.S. Dist. LEXIS 130532 (S.D. Ind., August 3), from Indiana — provides several opportunities to analyze emerging trends. The cases provide a platform to consider the changing shape of litigation involving transgender students and sex-segregated facilities: while the landscape was previously dominated by cases brought by, or on behalf of transgender students trying to gain access to the appropriate facilities, a steadily growing number of cases are being brought by cisgender persons, urged on by religious conservatives, pushing back against trans-affirmative policies that school districts have put in place. Two of the four cases this summer fell into the latter category.

The four cases also provide an opportunity to consider the changing arguments in transgender student litigation and their viability. Although the four opinions are united in the conclusion that allowing transgender students to use facilities consistent with their gender identity does not conflict with the privacy rights or safety of cisgender students, the cases part company on whether Title IX requires trans-affirmative bathroom policies. Three of the cases squarely held that Title IX requires schools to grant transgender students access to facilities consistent with their gender identity, and while the fourth, the only appellate ruling from among them — Doe v. Boyertown, comes close, it stops short from taking this position.

Arguments against trans-affirmative policies have also developed recently. As courts have demonstrated the hollowness of arguments based on “safety” or “privacy interests,” schools seeking to deny access to sex-segregated facilities based on gender identity, have introduced arguments based on genderfluidity. That is, the schools argue that they are unable to determine whether students’ claims of gender fluidity are credible, and thus must require students to use biological gender or gender-neutral restrooms. Additionally, taking their cue from the Supreme Court’s June 4 Masterpiece Cakeshop decision, litigants against trans-affirmative policies have begun to assert religiously-based arguments against sharing facilities with trans students—stating that their religious beliefs forbid them from sharing facilities with members of the opposite sex. While neither of these arguments proved fruitful in this summer’s set of cases, the arguments likely signal the direction of opponents of transstudent gender-identity may consider in future litigation. Individual analysis and commentary on each case follows.

1. PARENTS FOR PRIVACY v. DALLAS SCHOOL DISTRICT NO. 2 — On July 24, U.S. District Judge Marco A. Hernández dismissed numerous constitutional and statutory challenges to a Dallas (Oregon) School District policy that allows transgender students to use bathrooms and locker rooms in line with their gender identity. The decision rejected plaintiffs’ desperate attempts at dismantling trans-affirmative protections and held unequivocally that restricting transgender students to use facilities which are gender-neutral or match their biological sex violates Title IX.

In September 2015, a transgender student (to whom the opinion refers as Student A) requested that the School District grant him permission to use the male facilities at his high school. In November 2015, the District responded by implementing a student safety plan which allowed all transgender students to use the high school’s locker rooms, restrooms, and showers consistent with their gender identity. As a result, Student A began using the boys’ facilities at his high school.

Retaliating to the Plan and Student A’s presence in the male facilities, Plaintiffs—students at the high school and their parents—filed a comprehensive lawsuit with eight constitutional and statutory claims. The suit challenged the legality of the plan, sought to enjoin the District from enforcing the Plan, and requested that the court order the District to affirmatively require students to only use the facilities that match their biological gender. Incredulously, the complaint also took aim at the federal government, contending that the U.S. Department of Education (USDOE) violated the Administrative Procedure Act (APA), the Religious Freedom Restoration Act (RFRA), and the First Amendment’s Free Exercise Clause by issuing federal Guidelines that “redefine[ed] the word ‘sex’ as used in Title IX to include gender identity.”

The opinion consolidated the plaintiff’s eight claims into six broad categories: (I) APA claims; (II) right to privacy claims; (III) Title IX claims; (IV) Oregon state law claims; (V) claims based on parents’ rights to direct the education and upbringing of their children; and (VI) those based on the First Amendment and RFRA.

First, the plaintiffs contended that the federal defendants violated the APA by promulgating and enforcing guidance that redefined the term ‘sex’ in Title IX to include ‘gender identity.’ The plaintiffs’ principal argument was that they “suffered a legal wrong as a direct result” of USDOE’s May 2016 “Dear
College students and prevent them from equally accessing educational opportunities and resources.” Even though this statement could not be more clear, Judge Hernández doubled-down, stressing that any policy limiting transgender students to only gender neutral bathrooms, or those of their biological sex “would punish transgender students for their gender nonconformity and constitute a form of sex-stereotyping,” in violation of Title IX.

The plaintiffs also argued that the Plan violated Oregon statutes prohibiting discrimination in education and public accommodations. They contended that cisgender students who were too embarrassed or ashamed to share spaces with transgender students were “deprived of equal access to school facilities.” Judge Hernández easily dismissed this argument, finding that rather than discriminate against any student, the Plan ensures that all students have access to school facilities.

Taking their cue from movements against LGBTQ equality under the guise of ‘religious freedom,’ the plaintiffs’ fifth and sixth claims alleged that the District’s trans-affirming plan infringed on cisgender student’s religious rights. Specifically, they alleged that: (1) the Plan violated their right to freely exercise their religion; and (2) the Plan violated RFRA.

In their complaint, the plaintiffs claimed that some students “are devout Christians whose faith requires that they preserve their modesty and not use the restroom, shower, or undress, in the presence of the opposite sex.” Because the Plan granted transgender students access to the sex-segregated facilities, it then made it difficult to practice the religiously-mandated modesty, burdening the plaintiffs’ free exercise of religion. However, looking at the text of the Plan, the judge found that the plaintiffs’ free exercise claim lacked standing because the law was both neutral and generally applicable, applying to all students rather than punishing any specific religious beliefs.

The plaintiffs reasserted the students’ religious beliefs in their RFRA claim. Under RFRA, the government may not burden a person’s exercise of religion unless the government can demonstrate the burden is in furtherance of a compelling interest and is the least restrictive means of doing so. Here the plaintiffs alleged that the USDOE guidance violated their exercise of religion. But recalling the failed APA claim, Judge Hernández found insufficient evidence that the government’s action caused the plaintiffs’ alleged injury. Consequently, the RFRA claim was dismissed for lack of standing.

Finding all of the plaintiffs’ claims either baseless or without standing, the judge granted the defendants’ motion to dismiss. Moreover, holding that the plaintiffs could not “plausibly re-allege their claims and that any amendment would be futile,” the judge dismissed the claims with prejudice and denied the requested preliminary injunction.

2. **DOE v. BOYERTOWN AREA SCH. DISTRICT** — On July 26, the three-judge panel of the Third Circuit Court of Appeals that issued the June 18, 2018, opinion in Doe v. Boyertown Area School District, 893 F.3d 179 (3d Cir. 2018) (Boyertown I), voted to grant panel rehearing, thereby vacating the initial opinion and simultaneously issuing a revised opinion, Doe v. Boyertown Area Sch. Dist., (as cited above) (Boyertown II). The case involved parents and students seeking to enjoin Pennsylvania school district’s transgender-affirming policies.

Additionally, in an 8-4 decision, the Third Circuit en banc, rejected the plaintiff’s petition for rehearing on the issue of the preliminary injunction. The four dissenting judges — three of whom are Republican appointees — joined an opinion authored by Judge Kent Jordon taking issue with the three-judge panel’s original suggestion that forcing transgender students to use single-user or biological-sex corresponding bathrooms would itself be a Title IX violation.

In Boyertown I, the defendant school district argued that Title IX compelled it to implement policies that allowed transgender students access to
facilities corresponding to their gender identities. The opinion, written by Judge Theodore A. McKee, appeared to favor this argument, noting that Title IX prohibited the court from “issu[ing] an injunction that would subject transgender students to different conditions than their cisgender peers are subject to.” Boyertown I, 893 F.3d 179, 199 (3d Cir. 2018) (vacated by order of July 25, 2018).

The revised opinion, Boyertown II, is largely the same as its predecessor, with only minor edits aimed to temper aspects of the initial opinion that discussed Title IX’s affirmative application to transgender students. Specifically, in one passage the revised opinion acknowledged the school district’s Title IX argument but declined to address the viability of the claim, noting instead: “We need not decide that very different issue here.”

The modified opinion seems prompted by the objection of the four judges who dissented from the vote to reject rehearing en banc. In the July 26 dissent, Circuit Judge Jordan argued that Boyertown I’s support of the school district’s Title IX argument but declined to address the viability of the claim, noting instead: “We need not decide that very different issue here.”

Judge Corrigan began his opinion by addressing Adams’ Equal Protection Clause claim, stating that intermediate scrutiny applied. Under such scrutiny, the defendant must show that its gender classification “is substantially related to a sufficiently important government interest” and the justification for the policy is “exceedingly persuasive.”

Judge Corrigan then held that the School Board’s bathroom policy violated Adams’ Title IX. Finding that the School Board’s bathroom policy violated Adams’ Title IX and Equal Protection rights, the judge awarded Adams $1,000.00 in compensatory damages and granted an injunction preventing the School Board from enforcing its unlawful bathroom policy.

The most interesting aspect of Adams is the School Board’s gender fluidity argument: that it implemented a restrictive policy because it could not determine how to address students who may vacillate genders and therefore vary their bathroom choice, or those who may deceptively claim to do so. For the most part, Judge Corrigan’s opinion punted on this “complicated issue.” But to this author the issue seems to be one of procedure rather than gender identity. If, for example, the school grants students permission to use the facilities on a case-by-case basis as proposed in Boyertown, it seems as if administrators would be able to deter false claims of transgender or gender fluid identity. Moreover, with the appropriate disciplinary measures in
place, any student—regardless of gender identity—who behaves inappropriately in the restroom would be punished, eliminating the necessity for a “blanket ban” bathroom policy. Hopefully courts will address these arguments head on in the future.

4. J.A.W. v. EVANSVILLE VANDERBURGH SCHOOL — On August 8, a Southern District of Indiana decision by District Judge William T. Lawrence granted a preliminary injunction allowing a transgender high school student to use the facilities in line with his gender identity. The decision favored the plaintiff’s Title IX and Equal Protection claims, while rejecting the defendant School’s attempts to distinguish Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Education.

Plaintiff J.A.W. is a seventeen-year-old transgender male attending North High School in the Evansville Vanderburgh School Corporation (EVSC). During his freshman year, J.A.W. began using the male facilities to change before and after gym class. After learning of this practice, EVSC instructed J.A.W. to use the female facilities or a gender-neutral alternative in the school nurse’s office. During his sophomore year, J.A.W. approached the principal with the 2016 “Dear Colleague Letter” that instructed schools to allow transgender students access to facilities that align with their gender identity. EVSC reviewed the letter, but ultimately denied J.A.W. access to the appropriate facilities. In January 2018, during J.A.W.’s junior year, his attorney contacted the school and informed them that pursuant to the Seventh Circuit’s decision in Whitaker, J.A.W. was entitled to use the male facilities. When EVSC’s general counsel responded that Whitaker was distinguishable on the facts, the present lawsuit ensued.

At trial, J.A.W. moved for a preliminary injunction allowing him to use the male facilities, arguing that EVSC’s restrictions infringed on his Equal Protection and Title IX rights. With respect to J.A.W.’s Title IX claim, EVSC attempted to distinguish Whitaker, arguing that the case did not prohibit schools from requiring parental request or some evidence that access to such facilities is medically necessary for the individual student. Judge Lawrence made quick work of this argument. First, he noted that in the most fundamental sense Whitaker was indistinguishable from the present case. Moreover, he pointed out that EVSC’s decision to prohibit J.A.W. from using the male facilities was not based on a lack of parental request or evidence of medical necessity, and thus both arguments were “irrelevant to the issue.” Consequently, the judge found that J.A.W. established a reasonable likelihood of success on the merits of his Title IX claim.

Turning to the Equal Protection claim, Judge Lawrence first recalled that Whitaker had applied heightened scrutiny with respect to school policies restricting transgender students’ use of facilities. EVSC asserted that its practices were justified to prevent “disruption,” and the related safety and privacy concerns. Judge Lawrence expressed skepticism towards claims of “disruption.” In his opinion, J.A.W.’s masculine appearance was more likely to cause a disruption in the female facilities than the male facilities. The judge then dismissed EVSC’s safety concerns due to a lack of evidence, finding no evidence that transgender students posed any threat to cisgender student safety. As such, the judge found that J.A.W. also demonstrated a probability of success on his Equal Protection claim.

Turning to the inadequate remedy and irreparable harm prongs of the preliminary injunction standard, Judge Lawrence found credible J.A.W.’s testimony of the discomfort and distress he experienced when forced to use the female facilities. Based on this testimony, the judge found “that the likely negative emotional consequences of being denied access to the boys’ restroom at school would constitute irreparable harm” to J.A.W.

Finding all of EVSC’s safety and privacy arguments to be without merit, and that J.A.W. had demonstrated the likelihood of harm if an injunction was not granted, Judge Lawrence held that the balance of harms weighed in favor of granting a preliminary injunction allowing J.A.W. the right to use the boys’ facilities at his school.

In an August 18 press release, EVSC’s counsel indicated the defendants’ intention to appeal the decision.

[Counsel for the transgender students in the affirmative litigation cases are Gavin Minor Rose, Jn P. Mensz, and Kenneth J. Falk of the ACLU of Indiana in J.A.W. and Erica Adams Kasper, Aryeh L. Kaplan, Jennifer G. Altman, Markenzy Lapointe, Shani Rivaux, of Pillsbury Winthrop Shaw Pittman, Miami, Fl; Kirsten L. Doolittle, Jacksonville, FL; Nathaniel R. Smith, Richard M. Segal, Pillsbury Winthrop Shaw Pittman LLP, San Diego, CA; Omar Gonzalez-Pagan, Lambda Legal Defense, New York, NY; Paul David Castillo, Shani Rivaux, Lambda Legal Defense and Education Fund, Inc., Dallas, TX; and William C. Miller, Pillsbury Winthrop Shaw Pittman, LLP, Washington, DC., for Drew Adams. In the cases brought by students and parents challenging trans-affirmative school policies, intervenors defending the interests of the transgender students include lawyers from the ACLU Foundation of Oregon, the ACLU’s national LGBT rights project, and local pro bono counsel in Parents for Privacy, and an extraordinary array of intervenors and amici in the 3rd Circuit Boyertown case, including attorneys from the ACLU, Lambda Legal, the National Center for Lesbian Rights, and numerous educational and civil rights organizations. The Alliance Defending Freedom is a moving force behind plaintiffs in the students/parents cases. Consistent with its current position that Title IX does not apply to gender identity claims, the Trump Administration has begun filing briefs in opposition to the transgender rights claims in Title IX cases. – Editor]

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Supreme Court Faces Petitions for Review of Rulings on LGBT-Related Issues as October Term 2018 Nears

By Arthur S. Leonard

With President Donald J. Trump’s nomination of Brett Kavanaugh to fill the seat vacated by Justice Anthony M. Kennedy, Jr.’s, retirement effective July 31, petitions pending at the Supreme Court took on heightened significance while the confirmation hearings took place during the first week of September and the Court’s traditional “long conference” for considering accumulate petitions was anticipated during the last week of the month. The Court might be announcing decisions on petitions for certiorari at the end of that last week, as it has done occasionally in recent years, or it might save them for October 1, the first Monday in October when the Constitution mandates that the Court formally open its new term. The Court continues to make such announcements from week to week over the course of the Term. Petitions are not scheduled for the Court to discuss in conference until all responding and reply briefs have been filed.

For observers of LGBT law, several pending petitions loom, the most consequential being those asking the Court to take up the question whether the federal law banning employment discrimination because of sex, Title VII of the Civil Rights Act of 1964, applies to claims of discrimination because of sexual orientation or gender identity. Three pending petitions raise this question.

In Bostock v. Clayton County Board of Commissioners, 723 Fed. Appx. 964, a three-judge panel of the Atlanta-based 11th Circuit Court of Appeals affirmed on May 10 a decision by the U.S. District Court for the Northern District of Georgia to dismiss Gerald Lynn Bostock’s Title VII claim alleging employment discrimination because of his sexual orientation, holding that it was bound by prior circuit precedent, a 1979 ruling by the old 5th Circuit in Blum v. Gulf Oil Corporation, 597 F.2d 936, which was recently reaffirmed by another panel of the 11th Circuit in Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir.), cert denied, 138 S. Ct. 557 (2017). Three-judge panels are required to follow circuit precedents, which can be overruled only by an en banc court or the Supreme Court. The 11th Circuit Bostock panel also noted that Mr. Bostock had “abandoned any challenge” to the district court’s dismissal of his alternative claim of gender stereotyping sex discrimination. The 11th Circuit had ruled in 2011 in Glenn v. Brumby, 663 F.3d 1312, that a transgender plaintiff could bring a Title VII sex discrimination claim under a gender stereotyping theory, on the authority of the Supreme Court’s decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), but the court noted that in Evans, a majority of the 11th Circuit panel had rejected extending the same theory to uphold a sexual orientation claim as sex discrimination, and this, of course, is also now binding 11th Circuit precedent.

Bostock sought en banc reconsideration of the panel decision by the full 11-member bench of the circuit, but also filed a petition for certiorari with the Supreme Court on May 25. On July 18, the 11th Circuit announced a denial of the petition for rehearing en banc, voting 9-2. Bostock v. Clayton County Board of Commissioners, 894 F.3d 1335. Circuit Judge Robin Rosenbaum, who was the dissenting member of the Evans panel, released a dissenting opinion on this denial, joined by Circuit Judge Jill Pryor.

Alternatively, Evans and Bostock panel decisions may have been foreordained by circuit precedent [which Judge Rosenbaum did not concede, in light of intervening Supreme Court rulings in Price Waterhouse and Oncale v. Sundownner Offshore Services, 523 U.S. 75 (1998), in which the Supreme Court unanimously held that interpretation of Title VII’s sex discrimination provision was not limited to the intentions of members of Congress in 1964], recent developments persuaded the dissenters that the issue raised in this case “is indisputably en-banc-worthy. Indeed,” continued Rosenbaum, “within the last fifteen months, two of our sister Circuits have found the issue of such extraordinary importance that they have each addressed it en banc. See Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. 2018)(en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc). No wonder. In 2011, about 8 million Americans identified as lesbian, gay or bisexual,” citing a demographic study published by the Williams Institute at UCLA Law School. “Of those who so identify, roughly 25% report experiencing workplace discrimination because their sexual preferences do not match their employers’ expectations. That’s a whole lot of people potentially affected by this issue.”

Judge Rosenbaum strongly argued that the 11th Circuit’s implicit decision to “cling” to a “39-year-old precedent” that predates Price Waterhouse by a decade is ignoring “the Supreme Court precedent that governs the issue and requires us to reach the opposite conclusion,” as she had argued in her Evans dissent. “Worse still,” she wrote, “Blum’s ‘analysis’ of the issue is as conclusory as it gets, consisting of a single sentence that, as relevant to Title VII, states in its entirety, ‘Discharge for homosexuality is not prohibited by Title VII.’ And if that’s not bad enough, to support this proposition, Blum relies solely on Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978) – a case that itself has been necessarily abrogated not only by Price Waterhouse but also by our own precedent in the form of Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).” Necessarily abrogated, of course, because Smith was a transgender
discrimination case, which was implicitly overruled in Glenn, also a transgender discrimination case! “I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine,” Rosenbaum continued, “when it comes to an issue that affects so many people.” Rosenbaum argued that regardless of what a majority of the court’s views might turn out to be on the substantive issue in the case, it had an obligation to, “as a Court, at least subject the issue to the crucial crucible of adversarial testing, and after that trial yields insights or reveals pitfalls we cannot muster guided only by our own lights, to give a reasonable and principled explanation for our position on this issue – something we have never done.” (Some quotation marks omitted). But, shamefully, the 11th Circuit has absented itself from the current interpretive battle.

Bostock is represented by Thomas J. Mew IV, Timothy Brian Green, and Brian J. Sutherland of Buckley Beal LLP, Atlanta, who filed the petition for certiorari on May 25, No. 17-1618, with Sutherland listed as counsel of record. Clayton County filed a “Waiver” of its right to respond to the petition on June 27, and the cert petition was circulated to the Justices’ Chambers on July 3, anticipating the “long conference” that will begin on September 24. But evidently some of the Justices were not satisfied to consider taking this case without hearing from the ‘other side,’ so on July 13 it sent a request for a response, to be due August 13. Clayton County retained counsel, Jack R. Hancock and William H. Buechner, Jr., of Freeman Mathis & Gary LLP, Forest Park, GA, who filed the County’s response to the petition on August 10, opposing the petition. They argued that the appeal was an attempt to get the Court to do Congress’s work, which should be rejected. Bostock’s attorneys filed a brief in opposition on August 24. On August 29, the Supreme Court clerk again circulated all of these papers to the Justices’ Chambers anticipating the September 24 conference.

The other case pending before the Supreme Court presenting the same question, but this time appealing from the opposite side of the issue, is Altitude Express v. Zarda, from the New York-based 2nd Circuit. A three-judge panel had affirmed the district court’s decision to dismiss a Title VII sex discrimination claim by Donald Zarda, a gay sky-diving instructor, who based his claim on alternative assertions of gender stereotyping or sexual orientation discrimination being a form of sex discrimination, on April 18, 2017. However, 2nd Circuit Chief Judge Robert Katzmann attached a concurring opinion to the panel ruling, calling for the 2nd Circuit to reconsider this issue en banc in an appropriate case, noting the then-recent ruling by the 7th Circuit in Hively and other developments. Thus encouraged, the Estate of Donald Zarda sought and obtained en banc review, resulting in a decisive repudiation of its past precedent by the 2nd Circuit on February 26, 2018. Judge Katzmann’s opinion for the majority of the en banc court held that discrimination because of sexual orientation is, at least in part, discrimination because of sex, and thus actionable under Title VII. The Estate of Zarda is represented by Gregory Antolino, New York, NY, with Stephen Bergstein, Bergstein & Ullrich, LLP, Chester, NY, on the brief.

Saul D. Zabell and Ryan T. Biesenbach, Zabell & Associates, P.C., of Bohemia, N.Y., counsel for Altitude Express, filed a petition for certiorari on May 29. Responsive papers were filed over the summer, and all the papers were distributed on September 5 to the Justices’ Chambers anticipating the September 24 “long conference.” The federal government, consistent with positions announced in various contexts by Attorney General Jeff Sessions, rejects the 2nd Circuit’s en banc ruling and, if certiorari were granted in Bostock or in Altitude Express v. Zarda, No. 17-1623, would presumably seek to participate in oral argument.

It is highly unlikely that the Court will make an announcement concerning the gender identity discrimination case, also a Title VII case, right at the beginning of the Term. The Cincinnati-based 6th Circuit Court of Appeals ruled on March 7 in Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, that the employer violated Title VII when it discharged a transgender funeral director because she insisted on presenting as female in the workplace. The EEOC, which had ruled years earlier that it considered discrimination because of gender identity or gender transitioning to be, necessarily, discrimination because of sex, initiated the lawsuit in the U.S. District Court in the Eastern District of Michigan. Although the district judge accepted the EEOC’s argument that this could be a valid claim of sex discrimination under Title VII using the gender stereotype theory (which had previously been embraced by panels of the 6th Circuit in cases involving municipal employees), he concluded that the funeral home had a right under the Religious Freedom Restoration Act (RFRA) to be free of government prosecution, because of the burden it placed on the sincere religious beliefs of the funeral home’s owner concerning sex and gender identity.

The 6th Circuit affirmed in part and reversed in part. In an opinion by Circuit Judge Karen Nelson Moore, the court agreed with the district judge that gender identity discrimination can be the basis of a Title VII claim, but the court went a step further than its prior panel opinions by asserting, as the EEOC had argued, that discrimination “because of sex” inherently includes discrimination against employees because of a change in their sex, without any need to analyze the question of gender stereotypes. The court reversed the district court’s ruling on the RFRA defense, finding that requiring the employer to continue to employ a transgender funeral director would not substantially burden his right to free exercise of religion, and specifically rejecting the employer’s reliance on presumed customer non-acceptance of a transgender funeral director as a legitimate justification for
the discharge. The court also rejected the employer’s argument that because of the religiosity of the owner and the way he conducted his business, his funeral directors should be treated as “ministers” as to whom the owner would enjoy a 1st Amendment-based “ministerial exception” from complying with Title VII.

In the normal course, one might anticipate that a petition to review a Court of Appeals decision that was issued on March 7 would generate the necessary paperwork in time to be considered during the “long conference” beginning on September 24, but in this case Alliance Defending Freedom, the anti-gay religious litigation group that is representing the funeral home, requested and received from the Court an extension of time to file their petition, which was not docketed by the Clerk until July 20, No. 18-107, with responses due August 23. Then the Court granted a request from the Solicitor General’s Office, representing the EEOC (and thus the government) for an extension of time to file a response, which was granted to September 24, 2018, the date on which the “long conference” will begin. Thus, at the end of August, the official response of the government to this petition had not yet been filed, but one would expect that with the change of administration and the position on these issues announced by the Justice Department, it is likely that the Solicitor General will urge the Court to take this case and reverse the 6th Circuit, both as to the Title VII ruling and the RFRA ruling. As to the former, Attorney General Sessions has issued written guidance binding on his Department that gender identity discrimination does not violate Title VII, and, as to the latter, President Trump has issued an executive order, recently amplified by Attorney General Sessions, directing that the Executive Branch give maximum play to free exercise of religion whenever that issue is raised.

Counsel for Petitioner filed a blanket consent for the filing of amicus briefs from the Jewish Coalition for Religious Liberty, the Foundation for Moral Law, the State of Nebraska on behalf of itself and fifteen other states, and Public Advocate of the United States, all urging the Court to take the case and reverse the 6th Circuit for a variety of reasons, taking issue with the 6th Circuit’s decision on every conceivable point.

It would be very surprising if the Court did not grant the petitions in Altitude Express and Harris Funeral Homes, as both court of appeals decisions extend existing splits in circuit court interpretations of Title VII, the nation’s basic employment discrimination statute, and employ reasoning that potentially affects the interpretation of many other federal sex discrimination statutes, such as the Fair Housing Act, the Equal Credit Opportunity Act and the Affordable Care Act. (See elsewhere in this issue of Law Notes coverage of a new 7th Circuit decision involving discrimination against a lesbian resident of a senior housing facility, for example.) The court’s denial of the petition in the 11th Circuit’s Evans case last year was surprising, but not inexplicable, given the 11th Circuit’s reiteration of longstanding precedent, as well as the 2-1 panel’s willingness to allow the lesbian plaintiff in that case to continue her lawsuit under Title VII using a gender stereotype theory. The public employer in the Hively case from the 7th Circuit did not seek Supreme Court review, so Altitude Express gives the Court its first opportunity to confront the interpretive issue head-on in an appeal brought by a frequent (and frequently-successful) advocacy group, Alliance Defending Freedom. The addition of Brett Kavanaugh to the Court, if the Senate confirms his nomination, increases the likelihood for a cert grant, given his presumed views on Title VII. Although he has not written on this precise issue as a court of appeals judge, Kavanaugh’s record in employment discrimination cases is strongly pro-employer, and his record would also suggest an expansive view of the protection of employers’ religious freedom under RFRA.

Also pending before the Court is a petition filed on behalf of Oregon Judge Vance D. Day, who was sanctioned by the Oregon Commission on Judicial Fitness and Disability in a report that was approved by the Oregon Supreme Court for, among other things, refusing to perform same-sex marriages, among a host of charges. Inquiry Concerning a Judge re: the Honorable Vance D. Day, 413 P.3d 907 (2018), petition filed July 23, Day v. Oregon Commission on Judicial Fitness and Disability, No. 18-112. The petition asks the Court to decide whether Justice Vance’s constitutional rights were violated both procedurally and substantively, and raises the contention that judges have a constitutional right to refuse to perform same-sex marriages, despite the Supreme Court’s ruling that same-sex couples have a fundamental right to marry as well as to equal protection of the law. The last paper to be filed was a reply by Judge Vance’s lawyers to the Commission’s brief opposing the Petition, on September 7. The Freedom of Conscience Defense Fund moved for leave to file an amicus brief in support of the Petition. Judge Day is represented by James Bopp, Jr., and other members of his Terre Haute, Indiana law firm. Mr. Bopp is a frequent advocate in opposition to LGBT rights.

There are several other controversies brewing in the lower courts that could rise to the level of Supreme Court petitions during the October 2018 Term (which runs through June 2019).

Following on its Masterpiece Cakeshop decision on June 4, the Court vacated a decision by the Washington State Supreme Court against a florist who had refused to provide floral decorations for a same-sex wedding and sent it back to that Court for reconsideration in light of the Masterpiece ruling. This is one of several cases pending in the lower courts, some rising to the court of appeals or state supreme court level, raising the question of religious freedom exemptions from compliance with anti-discrimination laws. The Supreme Court’s evasion of the underlying
issue in *Masterpiece* means that the issue will come back to the Supreme Court, possibly this term, especially as some lower courts have already seized upon language in Justice Kennedy’s opinion observing that the Court has never recognized a broad religious exercise exemption from complying with anti-discrimination laws. Cases are pending concerning wedding cakes, wedding invitations, and wedding videos. And, in a different arena, as reported elsewhere in this issue of *Law Notes*, the Court recently denied a request from Catholic authorities in Philadelphia to temporarily block the City suspending referrals of children to a Catholic adoption agency that refuses to deal with same-sex couples seeking to adopt, in violation of a City public accommodations ordinance that covers sexual orientation. This kind of issue could also rise to the Supreme Court, depending how lower court litigation works out.

Litigation continues over a claim by some Houston Republicans that the City is not obligated to provide equal benefits to the same-sex spouses of Houston employees. The case is pending before a state trial judge after the Texas Supreme Court, in a blatant misinterpretation of the *Obergefell* decision, held that the U.S. Supreme Court had not necessarily decided that issue; “blatant” because the *Obergefell* opinion specifically mentioned insurance as one of the important reasons why same-sex couples had a strong interest in being able to marry, making the right to marry a fundamental right. Insurance was mentioned as part of a list of reasons, another listed being “birth certificates,” and the Supreme Court specifically quoted from that list in *Pavan v. Smith*, 137 S.Ct. 1075, the 2017 case in which it reversed the Arkansas Supreme Court, rejecting that court’s opinion that *Obergefell* did not decide the question whether same-sex parents had a right to be listed on birth certificates. *Pavan* was decided just days before the Texas Supreme Court issued its obtuse and clearly politically-motivated decision in *Pidgeon v. Turner*! One need not guess too hard at the political motivation. Texas Supreme Court justices are elected, and that court was deluged with communications of protest and pressure from the state’s top elected Republican officials after an earlier announcement that the court was declining to review the Texas Court of Appeals’ decision in this case, which had found *Obergefell* and the 5th Circuit Court of Appeals’ subsequent marriage equality ruling, *DeLeon*, to be controlling on the issue.

Before long the Court will likely take up the question whether transgender public school students have a right under Title IX of the Education Amendments of 1972 and the Equal Protection Clause to use restroom and locker room facilities consistent with their gender identity. The Court granted a certiorari petition in Gavin Grimm’s case from Virginia and scheduled argument to take place during the October 2016 Term, but the Trump Administration’s withdrawal of the Obama Administration’s interpretation of Title IX persuaded the Court to cancel the argument and send the case back to the 4th Circuit for reconsideration, since the 4th Circuit’s ruling had deferred to the on the Obama Administration’s interpretation in reversing the trial court and reviving Grimm’s claim. The 4th Circuit sent the case back to the district court, where the school district argued that it was moot because Grimm had graduated. But Grimm continues to battle the district’s policy as an alumnus. The district court has since refused to dismiss a revised version of the lawsuit brought by Grimm. This is one issue as to which there is not a significant split of lower court authority, but the issue continues to rage, school districts continue to discriminate against transgender students, the U.S. Departments of Education and Justice in the Trump Administration have reversed the Obama Administration’s position that sex discrimination laws protect transgender people, and religious litigation groups such as ADF continue to generate lawsuits, representing parents and students who oppose school district policies that allow transgender students to use the desired facilities. The issue is not yet dead, and it may work its way to the Court.

Trump’s transgender military ban, announced in a tweet in July 2017 and still in abeyance due to injunctions issued by judges from four different federal district courts, which three circuit courts having jurisdiction over the four district courts (D.C., 4th, 9th) have refused to stay, could also bring the issue of transgender rights to the Supreme Court. Since the district courts have denied motions to dismiss the legal challenges to the announced policy, the cases are now in their discovery phase, where claims of privilege asserted on behalf of the President and the Defense Department by attorneys from the Justice Department are the current point of contention, as reported in detail elsewhere in this issue of *Law Notes*. It is possible that the first question to rise to the Supreme Court would concern discovery rather than the merits, since the Justice Department is vigorously contesting the plaintiffs’ demand to answer such key questions as: Who are “my generals and military experts” that Trump claimed in his tweet to have “consulted” before announcing this policy? What is the basis for the claims asserted in memoranda issued by Trump and Secretary Mattis, based on a “report” produced by individuals whose names are undisclosed, that transgender individuals are not fit, as a class, to serve in the military? What role, if any, did conservative anti-gay think tanks play in producing that report, which strikingly resembles articles published by their associates and employees? So far, after striking out in two circuit courts in its efforts to get the preliminary injunctions “stayed” to allow the policy to go into effect, the Administration has not asked the Supreme Court to issue a stay, which would take 5 votes. If/once Kavanaugh is confirmed, giving them their hoped-for solid 5-vote majority on the Court, they might try this route.

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A unanimous three-judge panel of the U.S. Court of Appeals for the 7th Circuit ruled on August 27 that a lesbian resident of a rental facility for seniors in Illinois may seek to hold the management of the facility accountable for severe harassment against her by other residents due to her sexual orientation.


Marsha Wetzel moved into Glen St. Andrew Living Community after her partner of 30 years died. Under the Tenant’s Agreement she signed with the facility, she is entitled to a private apartment, three meals daily served in a central location, access to a community room, and use of laundry facilities. The agreement requires her (and all other tenants under their agreements) to refrain from “activity that [St. Andrew] determines unreasonably interferes with the peaceful use and enjoyment of the community by other tenants” or that is “a direct threat to the health and safety of other individuals.” The Agreement also authorizes the facility to bring eviction proceedings against a tenant who violates the Agreement.

Wetzel was not closeted, speaking openly with staff and other residents about her sexual orientation when she moved in. “She was met with intolerance from many of them,” wrote Chief Judge Diane Wood in summarizing the allegations in Wetzel’s Complaint. For purposes of ruling on the facility’s motion to dismiss her case, the court’s role is to accept Wetzel’s allegations as true and to decide whether those allegations, if proved at trial, would constitute a violation of her rights under the Fair Housing Act, which forbids discrimination because of sex.

Judge Wood’s summary of the Complaint makes horrific reading. “Beginning a few months after Wetzel moved to St. Andrew and continuing at least until she filed this suit (a 15-month period), residents repeatedly berated her for being a ‘fucking dyke,’ ‘fucking faggot,’ and ‘homosexual bitch.’” One resident, Robert Herr, told Wetzel that he reveled in the memory of the Orlando massacre at the Pulse nightclub, derided Wetzel’s son for being a ‘homosexual-raised faggot,’ and threatened to ‘rip [Wetzel’s] tits off.’ Herr was the primary, but not sole, culprit. Elizabeth Rivera told Wetzel that ‘homosexuals will burn in hell.’”

The Complaint also describes incidents of physical abuse, focused on knocking Wetzel off the motorized scooter she depends upon to get around, spitting at her, and striking her from behind accompanied by anti-gay epithets.

When she complained to the staff, there was a “brief respite,” but soon the misconduct continued. Indeed, Judge Wood wrote, “the management defendants otherwise were apathetic. They told Wetzel not to worry about the harassment, dismissed the conduct as accidental, denied Wetzel’s accounts, and branded her a liar.” Furthermore, Wetzel alleges, they retaliated against her by relegating her “to a less desirable dining room location” after she notified them about one incident of physical harassment by another resident, “barred her from the lobby except to get coffee” and “halted her cleaning services, thus depriving her of access to areas specifically protected in the Agreement.” They also falsely accused her of smoking in her room and one St. Andrews worker “slapped her across the face” when she denied having violated the no-smoking rule.

In what sounds like a transparent attempt to set her up for an eviction for non-payment, they failed to send her the customary rent-due notice sent to all tenants, but she remembered to pay on time, “but she had to pray a receipt from management.”

As a result of these management responses, Wetzel sharply curtailed her activities outside her room, staying away from common spaces including the dining room, and finally, fed up with this mistreatment, filed this lawsuit, alleging violations of the FHA as well as state laws. (Illinois laws forbid sexual orientation discrimination in housing and public accommodations.)

The facility did not argue in defense that the FHA does not ban sexual orientation discrimination. They could hardly raise such an argument in the 7th Circuit, because that court was the first appellate court to rule that sexual orientation claims are a subset of sex discrimination claims, under the similar anti-discrimination provisions of Title VII of the Civil Rights Act of 1964.

Instead, the defendant argued that the landlord cannot be held liable for discrimination by other tenants under the FHA without a showing of discriminatory animus by the landlord. Furthermore, it argued that FHA deals with refusals to rent, and does not cover “post-acquisition harassment claims.” In other words, as Judge Wood explained, once an apartment has been rented, the defendant argued that the FHA is no longer relevant to claims brought by “a tenant already occupying her home.” The defendant countered Wetzel’s retaliation claim by arguing, once again, that it lacked an allegation that defendants were motivated by discriminatory animus.

District Judge Der-Yeghiayan agreed with the defendants’ FHA arguments and dismissed the case. The dismissal of the FHA claim removed the basis for federal jurisdiction, and the judge declined to keep the state claims alive, dismissing them for lack of jurisdiction, although federal courts do have discretion to continue to consider state law claims in such cases.
Writing for the appeals court, Judge Wood relied on cases of workplace harassment decided under Title VII for a standard to apply to a harassment case brought under the FHA, for which there was no precedent in the 7th Circuit. “The harassment Wetzel describes plausibly can be viewed as both severe and pervasive,” she wrote, referring to the Title VII standard. “For 15 months, she was bombarded with threats, slurs, derisive comments about her family, taunts about a deadly massacre, physical violence, and spit.” The defendants dismiss this litany of abuse as no more than ordinary ‘squabbles’ and ‘bickering’ between ‘irascible,’ ‘crotchety senior resident[s].’ A jury would be entitled to see the story otherwise.”

The question for the court was whether there was a basis to impute liability to St. Andrew for the hostile housing environment, a question new for the 7th Circuit. Again, the court borrowed from principles established under another statute, this time focusing more on Title IX of the Education Amendments Act, under which schools have been held liable for harassment of students by other students, when the harassment was brought to the attention of school authorities and they failed to take appropriate steps to assure that the harassed students were not denied equal educational opportunity because of their sex.

The question was whether the facility management had “actual knowledge of the severe harassment Wetzel was enduring and whether they were deliberately indifferent to it. If so,” wrote the judge, “they subjected Wetzel to conduct that the FHA forbids.” The court rejected St. Andrew’s argument that the landlord-tenant relationship is so different from the school-student relationship as to make such a test inappropriate. The court, finding that the defendant had inaccurately described the court’s holding, responded: “We have said only that the duty not to discriminate in housing conditions encompasses the duty not to permit known harassment on protected grounds. The landlord does have responsibility over the common areas of the building, which is where the majority of Wetzel’s harassment took place. And the incidents within her apartment occurred precisely because the landlord was exercising a right to enter.”

The court rejected St. Andrew’s argument that its ruling would unfairly hold St. Andrew liable for actions it was “incapable of addressing,” pointing out that the tenant Agreement signed by all residents imposed obligations on tenants not to engage in conduct that would constitute a “direct threat to the health and safety of other individuals” and to refrain from conduct that would “unreasonably” interfere with “the peaceful use and enjoyment of the community by other tenants.” This is, on its face, directly applicable to the conduct of other residents directed at Wetzel. And the Agreement gives the facility the right to seek to evict tenants who violate these rules. Yet, according to Wetzel’s Complaint, the facility took action against her for complaining rather than against her harassers for their misconduct.

The court also noted a rule published by the Department of Housing and Urban Development (HUD) in 2016, providing that a landlord could be held liable under the FHA for failing to “take prompt action to correct and end a discriminatory housing practice by a third party” (such as a fellow resident in a rental building) if the landlord “knew or should have known of the discriminatory conduct and had the power to correct it.” The court said it did not need to rely on this rule, however, stating that “it is enough for present purposes to say that nothing in the HUD rule standings in the way of recognizing Wetzel’s theory” for landlord liability in her case.

The court also discounted St. Andrew’s argument that this case is just about “bad manners” by some residents. “It is important,” wrote Wood, “to recognize that the facts Wetzel has presented (which we must accept at this stage) go far beyond mere rudeness, all the way to direct physical violence.” She noted that under Title VII courts have routinely had to distinguish between hostile environment harassment and mere incivility.

The court also decisively rejected St. Andrew’s claim that the FHA anti-discrimination provision does not apply once the apartment is leased to the tenant. The statute bans discrimination regarding “services or facilities,” and the court pointed out that “few ‘services or facilities’ are provided prior to the point of sale or rental; far more attach to a resident’s occupancy.” In this case, Wetzel’s allegations included her virtual exclusion from the enjoyment of the common areas of the building, and denial of certain services to which she was entitled under the tenant Agreement. “At a minimum, then,” wrote the court, “Wetzel has a cognizable post-acquisition claim because discrimination affected the provision of services and facilities connected to her rental. Beyond that, the discrimination diminished the privileges of Wetzel’s rental.”

The court also rejected St. Andrew’s argument, which the district court had accepted, that the anti-retaliation provision of the statute required proof of the landlord’s discriminatory intent. “Indeed,” wrote Judge Wood, “if we were to read the FHA’s anti-retaliation provision to require that a plaintiff allege discriminatory animus, it would be an anomaly. Like all anti-retaliation provisions, it provides protections not because of who people are, but because of what they do.” The focus, thus, is on whether the landlord takes some adverse action after a tenant complains about violation of her rights under the FHA, not whether the landlord is biased against somebody because she is a lesbian.

In sending the case back to the district court, the Court of Appeals revived Wetzel’s FHA claim and also directed the court to “reinstate the state-law claims that were dismissed for want of jurisdiction.”

Wetzel is represented by Lambda Legal and cooperating attorneys from Foley & Lardner LLP.
Penn. District Court Rules Catholic Adoption Agency Cannot Discriminate Against Same-Sex Foster and Adoptive Parents

By Matthew Goodwin

On July 13, U.S. District Judge Petrese B. Tucker of the U.S. District Court for the Eastern District of Pennsylvania held that the First Amendment’s religious free exercise and free speech protections do not allow a religious adoption agency to refuse to certify gay couples for foster care licenses or refuse to provide them with home studies for adoptions, when such a policy violates a municipal statute banning sexual orientation discrimination. Fulton v. City of Philadelphia, 2018 U.S. Dist. Lexis 116866, 2018 WL 3416393. Plaintiffs took an interlocutory appeal, and applied to the Supreme Court for an injunction against the City pending a ruling on the merits, but the eight-member Court (with the retirement of Justice Kennedy) was unable to summon five votes to authorize injunctive relief, Fulton v. City of Philadelphia, 2018 U.S. LEXIS 4205, 2018 WL 4139298 (August 30, 2018), with only Justices Thomas, Alito and Gorsuch signifying that they would have granted the application.

The ruling—the first of its kind from a federal court—rejected, *inter alia*, the claims of Catholic Social Services (CSS) that the First Amendment’s Free Exercise and Establishment Clauses exempted CSS from Philadelphia’s municipal law prohibiting discrimination on the basis of sexual orientation. Judge Tucker, an appointee of President Bill Clinton, issued the ruling which denied CSS’s motion for a temporary restraining order (TRO) and preliminary injunction against the City of Philadelphia (the City) and the Department of Human Services (DHS).

The court summarized the relevant facts as follows: In November 2015, CSS and DHS entered into a contract whereby CSS agreed to provide foster care services to the City. The contract included an “all-comers” provision, i.e. that CSS, as a provider of foster care services on behalf of the city, could not “discriminate or permit discrimination against individuals in . . . public accommodation practices . . . on the basis of sexual orientation . . . ” Under the contract, violation of the all-comers term would allow the City and DHS to suspend CSS’s contract. In March of 2018, DHS learned that CSS and another religious but non-Catholic provider of foster care services, Bethany Christian Services (Bethany), were refusing to certify same-sex couples as foster parents or to provide them with home studies as part of applications for adoptions. On March 15, DHS Commissioner Cynthia Figueroa indefinitely suspended CSS’s as well as Bethany’s intake of new referrals.

CSS then sued the City and DHS in May of 2018, filing a motion for injunctive relief in early June. Specifically, CSS’s suit alleged sixteen causes of action, including that the City breached its contract with CSS and, further, that the City and DHS’s suspension of their contract (1) substantially burdened plaintiff’s religious beliefs in violation of Pennsylvania’s religious freedom act; (2) constituted impermissible “targeting” of a religion in violation of the First Amendment’s Free Exercise Clause; and (3) impermissibly burdened plaintiff’s religious practices in derogation of the Free Exercise Clause by not evenly applying the city’s all-comers provisions to foster care agencies.

The court’s decision first set forth the appropriate standard of review. Judge Tucker wrote that in “deciding whether to grant injunctive relief, the Court must consider whether: (1) Plaintiffs have demonstrated a likelihood of success on the merits; (2) Plaintiffs will be irreparably harmed by the denial of injunctive relief; (3) the balance of equities favors Plaintiffs; and (4) the public interest favors granting the injunction.” The majority of the Court’s opinion focused on factor one, i.e. likelihood of success on the merits.

Initially, the Court observed that no legal precedent existed to control its decision in the case, but that factual precedent from other jurisdictions provided useful context. For example, in 2006 Catholic Charities in Boston unsuccessfully sought permission from Massachusetts to withhold foster care services from same-sex couples following legalization of same-sex marriage in that state and, as a result, shut down completely its foster care agency. Similarly in 2011, a Catholic charity in Illinois unsuccessfully brought suit in that state claiming that it had a right to a state government services contract, which right could not be abrogated because of the charity’s refusal to provide services to unmarried cohabitating couples.

Turning to the contractual arguments, the Court ruled against CSS, holding that it is, in fact, a “public accommodation” as defined by Philadelphia’s Fair Practices Ordinance. As a result, the “all-comers” mandate of the City applied to CSS through the parties’ contract; accordingly, CSS was required to comply therewith by providing foster parent certifications and home studies without regard to, *inter alia*, the sexual orientation of those applying for CSS’s services.

The court next considered and rejected CSS’s Free Exercise Clause arguments. The court agreed with DHS and the City, holding “the [parties’ contract] and Fair Practices Ordinance Incorporated in the [contract] is A Neutral Law of General Applicability Subject to Rational Basis Review.” Relying on a Supreme Court case, Employment Div. v. Smith, 494 U.S. 872 (1990), the court explained that “‘[d]epending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review.’ When a challenged law ‘is neutral and generally applicable, and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection.’. . . [a] law is not neutral if it has as its object . . . to infringe upon or restrict practices because of their religious motivation.”

CSS had argued that DHS and the city targeted them based on anti-
Catholic bias and that this should trigger strict scrutiny. In this connection, the Court rejected CSS’s attempts to rely on the Supreme Court’s recent ruling in *Masterpiece Cakeshop*, Ltd. v. Colorado Civil Rights Comm’n, 138 S. Ct. 1719, which reversed the decision of the Colorado Civil Rights Commission, which had found a baker of wedding cakes to be in violation of Colorado’s public accommodations law for refusing to bake a cake for a same-sex wedding due to the baker’s religious objections to same-sex marriage. The court affirmed that *Masterpiece Cakeshop* was a narrow holding which rested on the outward hostility some members of the Colorado Civil Rights Commission exhibited toward the cake baker, in the opinion of a majority of the Supreme Court. The court ruled no such hostility had been shown toward CSS, even though CSS claimed certain statements critical of the Philadelphia Archdiocese that were made by Philadelphia Mayor Jim Kenney (himself a Catholic) were evidence of the City’s hostile targeting of the Catholic faith in this case.


In *Martinez*, students at Hastings Law School in California formed a faith-based group that explicitly excluded from membership “anyone who engage[d] in unrepentant homosexual conduct.” The law school denied the student group official recognition and all the benefits thereof, such as certain subsidies and use of school facilities, because the student group’s by-laws violated the school’s “all-comer” policy for recognized student organization membership and officer qualifications. The Supreme Court upheld the school’s decision by following *Smith*, applying the rational basis test, and ruled that the school’s policy was neutral and the school could allow “all organizations to express what they wish” but refuse to allow student groups to discriminate in membership if they wanted the benefits of official recognition.

In *Teen Ranch* an eponymous faith-based residential home brought suit against a state agency when that agency refused further placements of children there due to Teen Ranch’s policies and practices that violated laws prohibiting use of state funds for sectarian activities. Teen Ranch claimed violation of the Free Exercise Clause, asserting that the state impermissibly conditioned receipt of governmental benefits on “…Teen Ranch’s surrender of its religious beliefs and practices ….” The *Teen Ranch* court rejected this argument, reasoning that “…a state contract for youth residential services is not a public benefit.”

The court thus concluded that the contract between CSS and the City, and the Fair Practices Ordinances incorporated therein, were neutral insofar as neither was drafted or enacted in order to infringe on or restrict practices because of religious motivation. In point of fact, the Fair Practices Ordinance was enacted in 1969, long before the dispute between the parties. The court ruled, moreover, that the contract and Fair Practices Ordinance were applied neutrally in this case as well. In this respect the court pointed to the fact that the city shut down Bethany’s intake of new referrals, just as it shut down CSS’s, when it discovered that both organizations were violating the all-comers provisions of their contracts with the city.

Finding rational basis the appropriate test for the free exercise claims, the court held that DHS’s and the City’s enforcement of the parties’ contract and Fair Practices Ordinance against CSS were rationally related to at least six legitimate government objectives, including but not limited to, (1) “ensuring that contractors with the City and DHS actually adhere to the terms of agreements they enter into”; (2) “ensuring that when contractors voluntarily agree to be bound by local laws, the local laws are enforced”; (3) “ensuring that when contractors are employed to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services”; (4) “ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents”; (5) “ensuring that individuals who pay taxes to fund government contractors are not denied access to those services”; and (6) “DHS and the City have an interest in avoiding likely Equal Protection and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples”.

As to CSS’s argument that DHS and the city violated the Establishment Clause, the court wrote that the plaintiffs had not demonstrated how, if at all, the defendants’ suspension of intakes ran afoul of the Constitution’s proscription that “there should be ‘no law respecting an establishment of religion.’” Moreover, the court noted, CSS did not undertake the appropriate Establishment Clause analysis as set forth in the Supreme Court case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Rather, to support their Establishment Clause claim, CSS simply cited “to the same purported evidence of religious targeting that they cited in connection with their free exercise claim, that is, evidence of the Mayor’s alleged bias against the Archdiocese of Philadelphia and the Archbishop of Philadelphia.” The court again rejected this logic, pointing to, among other things, the fact Bethany, a non-Catholic provider of adoption services, was shut down just as CSS was following its violations of the agreed-upon all-comers provisions.

The court also rejected CSS’s claim that defendants were attempting to compel their speech in violation of the First Amendment Free Speech Clause. As required by Supreme Court jurisprudence, the Court determined that the purpose of DHS’s and CSS’s contract was not to create a forum for private speech or facilitate private speech but rather to have CSS perform governmental functions for DHS and Philadelphia. Because the contract did not create a forum for or facilitate private speech, there could be no violation of the First Amendment’s Free Speech Clause as CSS claimed. The court also found no evidence that cancellation of the contract between CSS and DHS was retaliatory, so that CSS’s free speech claims failed in this respect as well.

Turning to the irreparable harm question, the court rejected all five of the CSS’s claimed harms. CSS claimed that without the TRO, they would suffer
irreparable harm of their Constitutional right to, first, freedom of religion and, second, freedom of speech. Because it was unlikely that plaintiffs would prevail on these claims at trial, the court found the claimed harms inapplicable. Also lacking under this prong was CSS’s third contention of economic harms that they might suffer without the TRO—i.e. that they might have to lay off staff or shut down operations—because damages would still be available to CSS if it could prove its claims at trial. CSS’s fourth alleged harm was the “purported” inability of CSS-certified foster parents to continue providing foster care services, but the court opined these parents could transfer to a different agency for certification. Finally, the court concluded that contrary to CSS’s fifth alleged harm, the number of children living in congregate care situations did not increase and closure of CSS’s intake of new referrals had little to no effect on the City’s foster care system.

Earlier in the opinion, the court explained Third Circuit precedent holding the first two factors of the TRO analysis, i.e. are “gateway factors” which, if not met, can terminate a court’s inquiry and analysis. The court nonetheless undertook a cursory balancing of the harms and the public interest to find the equities tilted in favor of the defendants.

Finally, the court did exercise jurisdiction over and rejected the pendant state law claim of CSS, namely that DHS and the city’s closure of intake violated Pennsylvania’s Religious Freedom Act. Plaintiffs’ attempt to get temporary or preliminary relief against the city’s foster care system

The Support Center for Child Advocates and Philadelphia Family Pride moved to intervene in the case but their brief was instead accepted and considered by the court as an amicus brief. Both were represented by Leslie Cooper, Mary Catherine Roper, and Molly M. Tack-Hooper- all of the ACLU, New York, Philadelphia, and Pennsylvania chapters respectively. ■

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First Circuit Claps Back at Scott Lively

By Vito John Marzano

In June 2017, U.S. District Judge Michael A. Ponsor (D. Mass.), granted Scott Lively’s motion for summary judgment dismissing the claims asserted against him, but described his anti-LGBTQ advocacy as “crackpot bigotry [that] could be brushed aside as pathetic, except for the terrible harm it can cause.” Sexual Minorities Uganda v. Lively, 254 F. Supp. 3d 262 (D. Mass. 2017). The court further referenced its prior order rejecting a motion to dismiss, which stated that Lively’s advocacy in Uganda “constitutes a crime against humanity that unquestionably violates international norms.” Notwithstanding his prevailing in winning summary judgment, Lively appealed, arguing, among other things, that the court erred when it included certain unflattering statements about him in its order.

By way of background, Lively employs insidious anti-LGBTQ rhetoric in advocating, domestically and internationally, for, among other things, the criminalization of homosexuality. He has published numerous books that blame LGBTQ persons for the Holocaust and slavery, or any other ailment facing society, and argues that “the Bible treats homosexuality as a form of rebellion against God even worse (from God’s perspective) than mass murder.” Lively advocated these positions in Uganda at conferences in 2002 and 2009, and for a number of years, he assisted the Ugandan anti-LGBTQ movement as they worked to pass the Anti-Homosexuality Bill in 2009. Said bill sought to impose the death penalty for the crime of aggraved homosexuality and to criminalize pro-LGBTQ advocacy in the country. Although the Ugandan High Court issued a permanent injunction against the measure in 2011, a number of LGBTQ Ugandans, including plaintiffs in this case, were forced to leave Uganda or hide.

As a result, in 2012, Sexual Minorities Uganda (SMUG) commenced suit against Lively in a U.S. District Court in Massachusetts, Lively’s home state, alleging that Lively’s advocacy resulted in crimes against humanity in persecution based on individual responsibility, criminal enterprise, and conspiracy in violation of 28 USC § 1350, the Alien Tort Statute (ATS). SMUG further alleged state causes of action for civil conspiracy and negligence. In August 2013, Judge Ponsor denied Lively’s motion to dismiss. After discovery concluded, Lively moved for summary judgment on the basis that the court lacked subject-matter jurisdiction over the ATS claims; that the court lacked diversity jurisdiction for the state law claims; and that the court should decline to exercise its supplemental jurisdiction to address the same. The court granted Lively’s motion, dismissing the ATS claim for want of subject-matter jurisdiction and declining to exercise its supplemental jurisdiction over the state-law claims.

On August 10, 2018, the 1st Circuit Court of Appeals dismissed the appeal while affirming the lower court’s judgement. See Sexual Minorities Uganda v. Lively, 2018 WL 3805847, U.S. App. LEXIS 22275. The court disposed of the appeal under the principles of judicial estoppel, and recognized the lower court’s broad discretion to decline to exercise supplemental jurisdiction.

Addressing Lively’s “most loudly bruit ed claim of errors” concerning certain unflattering statements from by the district court, the 1st Circuit panel found, in an opinion by Circuit Judge Bruce Selya, that those statements lacked any analytical foundations on the summary judgment order, constitute dictum, and inhere no binding or preclusive effect, thus depriving the court of appellate jurisdiction.

The court explained that the summary judgment order simply dismissed the action and does not include any adverse findings. The 1st
Circuit rejected Lively’s argument that those statements harm his reputation, holding that fact-finding and opinion writing by a lower court does not furnish an independent basis for an appeal. It followed by ejecting Lively’s claim that the lower court addressed the merits of plaintiff’s ATS claim as “simply wrong.” Judge Selya explained that a decision finding that the court lacks subject-matter jurisdiction renders other parts of the opinion a nullity without binding effect, but even so, the lower court focused on the issue of whether sufficient evidence had been discovered regarding Lively’s domestic conduct, not on his purported violations of international law.

Lively next attempted to argue that the lower court erred in dismissing the state law claims without prejudice for lack of diversity jurisdiction, and argued the same in his motion for summary judgment. As such, Lively’s own conduct satisfied the first criterion. Further, applying the same facts, the second criterion required no considerable discussion as the lower court implicitly adopted Lively’s arguments with respect to the same.

Next, the court found that Lively obtained a significant benefit from his denial of diversity jurisdiction, as it terminated his five-year-battle defending a long federal lawsuit and deprived SMUG of its preferred forum, thus satisfying the final criterion. This neither provided an undue benefit to SMUG nor did it unduly disadvantage Lively, as both remain free to litigate the issue, and to raise the same arguments and defenses, in state court. Finally, the court utterly disregarded Lively’s position that judicial estoppel precludes this contention, noting that a decision finding that the court lacks subject-matter jurisdiction, it does apply to prevent a party from attempting to assert the same after previously denying it. Hence, the court concluded that insisting that Lively live with the consequences of his prior representations does not result in unfairness, as he owed a duty of candor to the lower court and he cannot adopt a contradictory position simply because his interests have changed.

Turning to Lively’s fallback argument regarding supplemental jurisdiction, the court acknowledged that it had appellate review over this issue as the question concerns whether the lower court should have dismissed the state law claims without prejudice. The court reasoned that a prevailing defendant suffers a cognizable injury when the decree declines supplemental jurisdiction and dismisses the claims without prejudice, because the party faces potential litigation in state court. When a district court confronts this issue, it considers a number of factors—namely, judicial economy, convenience, fairness, and comity—and may consider whether there is a presence of novel and sensitive issues of state law. Judge Selya acknowledged that the lower court properly weighed these factors and concluded that the state-law claims raise “sensitive and undeveloped questions of state law.” Hence, the court reasoned, “[i]t is clear beyond hope of contradiction that a district court, upon appropriately declining to exercise supplemental jurisdiction, must dismiss the unadjudicated claims without prejudice, not with prejudice.”

With respect to Lively’s final claim concerning the lower court’s prior order denying his motion to dismiss, the 1st Circuit explained the well-established precept that appellate jurisdiction is limited to final orders and judgments, and that interlocutory orders merge with the final judgment unless that interlocutory order has no impact on the final judgment. The prior order had no effect on the ultimate disposition of the matter, and therefore, the general rule of non-reviewability precluded appellate consideration.

The court’s decision not only meticulously slapped down Lively’s appeal, it goes further to employ an earned patronizing tone to explain basic doctrines of appellate review and civil procedure to Lively and his attorneys, the Liberty Counsel.

because it could have applied diversity jurisdiction. The 1st Circuit adopted SMUG’s argument that judicial estoppel precludes this contention, noting that “there is every reason to invoke judicial estoppel—and no reason to discard it.” In summary, judicial estoppel, an exceptional action and sparingly used, protects the integrity of the judiciary by preventing a party from playing fast and loose with the courts to their benefit by taking inconsistent positions to their advantage.

As understood under the 1st Circuit’s development of the doctrine, the court found that Lively “all but concedes that his position on appeal flatly contradicts the position he took below,” in that he described SMUG’s assertion of diversity jurisdiction as a myth in his answer to the complaint finds no home in deciding subject-matter jurisdiction. This presented a more nuanced resolution—while it cannot create federal subject-matter jurisdiction, it does apply to prevent a party from attempting to assert the same after previously denying it. Hence, the court concluded that insisting that Lively live with the consequences of his prior representations does not result in unfairness, as he owed a duty of candor to the lower court and he cannot adopt a contradictory position simply because his interests have changed.

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The court’s decision not only meticulously slapped down Lively’s appeal, it goes further to employ an earned patronizing tone to explain basic doctrines of appellate review and civil procedure to Lively and his attorneys, the Liberty Counsel.

Sexual Minorities Uganda is represented by Pamela C. Spees of Lake Charles, Louisiana, and Jeena D. Shah, Baher Azmy, and Judith Brown Chomsky for the Center for Constitutional Rights.

Vito John Marzano is a member of the New York Bar and an incoming associate at Traub Lieberman Straus & Shrewsbury LLP in New York.
It’s not easy being (recognized as) a parent. It’s also tough to petition for third-party visitation rights as the former same-sex partner of a child’s biological mother. On July 25, 2018, a three-judge panel of the Indiana Court of Appeals unanimously affirmed two decisions by the Howard Superior Court denying third-party visitation to J.S. (Petitioner); the decisions were consolidated on appeal. J.S. v. M.C., 2018 WL 3558921, 2018 Ind. App. Unpub. LEXIS 859 (Ind. Ct. App. July 25, 2018). Petitioner, a lesbian, originally filed separate petitions to visit fraternal twins borne by Petitioner’s former partner, M.C. (Mother). On appeal, Petitioner asserted that the trial court: (1) erred in its decisions denying third-party visitation; and (2) discriminatorily focused on Petitioner’s sexual orientation and failed to relate its findings to its judgment.

Petitioner and Mother began dating in 2005 and moved in together in July 2007. Because Indiana prohibited same-sex marriage at the time, the couple had a commitment ceremony on September 8, 2007; shortly afterwards, they executed reciprocal wills and powers of attorney, and Petitioner added Mother to her health insurance. Over the next two years, the couple experienced a number of failed attempts to conceive a child through artificial insemination and in vitro fertilization (IVF). The failed attempts took a toll on the couple, and the couple ended their relationship in 2010. Petitioner then moved out and purchased her own home.

After the breakup, Mother discussed with her friends and family about her desire to have and raise a child as a single parent. In early 2012, she finally became pregnant with twins through IVF. By the time Mother was pregnant, she had resumed an intimate relationship with Petitioner; however, the couple continued to maintain separate residences. Petitioner later attended the birth of the twins and cut one of their umbilical cords.

The couple permanently ended their romantic relationship in 2013, but remained friends. Since the twins’ birth, Petitioner provided care for the twins, stayed several nights per week at Mother’s residence, and sometimes went on vacations and spent holidays with Mother and the twins. Once the twins started preschool, Petitioner picked them up from school and watched them on Monday evenings; by this time, the twins referred to her as “Dot.” However, Petitioner still maintained a separate residence since before the twins’ birth, did not provide financial support for the care of the twins, and was not the only person besides Mother who took care of the twins on a daily basis. By the summer of 2016, Petitioner and Mother’s friendship had soured. Ultimately, Mother cut off all ties with Petitioner after a heated argument on December 12, 2016; in what Mother felt was in the best interests of the twins, she cut off any further contact between the twins and Petitioner.

Writing for the appellate court, Judge Robert R. Altice, Jr., first analyzed whether the trial court erred in denying Petitioner’s request for third-party visitation. In order to be eligible for third-party visitation, a petitioner must: (1) first, demonstrate the existence of a custodial and parental relationship with the children; and (2) only after the first prong is established, show that visitation would be in the best interests of the children. In examining the facts, Judge Altice drew many comparisons with A.C. v. N.J., 1 N.E.3d 685 (Ind. Ct. App. 2013), in which the court held that a former same-sex partner had standing to seek visitation where the parties originally intended for the biological mother’s partner to fulfill the role of the child’s second parent and actively encouraged the development of a parental bond. Judge Altice found that the case at hand diverged significantly in that Mother intended to raise the twins as a single parent. Judge Altice pointed to evidence supporting this finding. Specifically, Mother continued to pursue having children without Petitioner after the couple had broken up; the couple only resumed their relationship after Mother had already undergone a successful IVF round. Furthermore, Petitioner

Judge Altice based his conclusion that Petitioner failed to establish a custodial or parental relationship with the twins partly because Petitioner did not provide financial support for the twins.
Trump Administration Issues Directive Authorizing Federal Contractors to Discriminate Based on Religious Beliefs

By Arthur S. Leonard

Acting Director Craig E. Leen of the Office of Federal Contract Compliance Programs (OFCCP), an agency within the U.S. Department of Labor that is responsible for enforcing the non-discrimination policies with which federal contractors must comply, issued a “Directive” to agency staff and federal contractors on August 10, construing three recent Supreme Court decisions and two Trump Executive Orders to allow contractors to discriminate in carrying out their contracts based on their religious beliefs.

The first decision cited by Leen is Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719, the Supreme Court’s June 4, 2018, ruling that reversed a lower court decision against a Denver-area baker who refused to make a wedding cake for a same-sex couple. The Supreme Court did not rule in Masterpiece Cakeshop that businesses have a general right to deny services to gay couples based on the owners’ religious beliefs, however. The Court finessed that issue, finding instead that the lower court’s ruling had to be reversed because the Court discerned evidence that the Colorado Civil Rights Commission had exhibited overt hostility to religion in its treatment of baker Jack Phillips, who refused to bake a wedding cake for a same-sex couple based on his religious objections to same-sex marriage. The evidence for this “hostility” boiled down to public statements by two commissioners, one of whom accurately summarized the legal rule that religious beliefs do not excuse a business from complying with state anti-discrimination law, and the other characterizing as “ugly” the use of religion to justify discrimination.

Justice Anthony Kennedy’s decision for the Court emphasized that generally businesses do not enjoy a right to discriminate based on the owners’ religious beliefs, and that a “neutral forum” free of overt hostility to religion could enforce the anti-discrimination laws against a religious objector.

Kennedy’s ruling also contended that Phillips could have believed he was entitled to decline the business because, at the time, same-sex marriages were not allowed or recognized in Colorado, and that the Commission had evinced hostility to religion by dismissing charges brought by a man who was turned down by several bakers who refused his request to make cakes decorated with religiously-based anti-gay scriptural quotes and slogans. The Court’s majority apparently believed the Commission was insufficiently evenhanded in dealing with cases involving religious views.

But Leen’s directive, consistent with two Trump Executive Orders and a Memorandum issued last fall by Attorney General Jeff Sessions, reorients the issue as “discrimination” against religious individuals when they are required to comply with non-discrimination requirements that conflict with their religious beliefs. “Recent court decisions have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law,” he wrote, painting individuals and businesses who want their religious beliefs to take priority over any contrary legal obligations as “victims.”

Twisting recent Supreme Court opinions to support this assertion, Leen summarized Masterpiece Cakeshop as holding that “the government violates the Free Exercise clause when its decisions are based on hostility to religion or a religious viewpoint.” He summarized Trinity Lutheran Church of Columbia, In., v. Comer, 137 S. Ct. 2012 (2017), in which the Court held that a state could not categorically disqualify religious organizations from receiving state funds...
for non-religious purposes, as holding that the “government violates the Free Exercise clause when it conditions a generally available public benefit on an entity’s giving up its religious character, unless that condition withstands the strictest scrutiny.” That case involved the state’s denial of funds to a religious school for repaving its playground, based on a state constitutional provision against providing taxpayer money to religious institutions. Finally, Leen summarized the Supreme Court’s notorious Burwell v. Hobby Lobby ruling, 134 S. Ct. 2751(2014), a 5-4 decision, as holding that “the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations.” That case involved a demand by a business corporation owned by a small group of devout Catholics that they should not have to provide contraception coverage for their employees as required by regulations under the Affordable Care Act. Very few federal contractors subject to federal anti-discrimination rules, which apply only to substantial federal contracts, are “closely held corporations,” so that characterization of RFRA does not seem particularly applicable to the cases where this Directive is likely to be implicated.

Leen also cited Trump’s Executive Order 13831, which states, “The executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs and other Federal funding opportunities,” and Trump’s Executive Order 13798, which says, “It shall be the policy of the executive branch to vigorously enforce Federal law’s robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government . . . Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government.” Sessions’ memorandum ran with these directives, asserting that the government should generally refrain from enforcing federal laws against people and businesses that have religious objections to complying with them.

The Directive instructs the OFCCP staff and notifies federal contractors that, in essence, they can discriminate in employing people or providing services under federal contracts if they are doing so based on their religious beliefs. The Supreme Court arguably opened the door to this kind of thinking in the Hobby Lobby and Trinity Lutheran cases, but it is rather a stretch to cite Masterpiece Cakeshop for this purpose, in light of Justice Kennedy’s invocation of Newman v. Piggie Park Enterprises, 390 US 400 (1968), which held that a southern barbecue restaurant chain could not refuse to serve black customers based on the owner’s religious belief in racial segregation, as well as Employment Division v. Smith, 494 US 872 (1990), which held that people do not enjoy a 1st Amendment Free Exercise right to refuse to comply with state laws of general application that are on their face neutral with respect to religion.

Writing for the Court in Employment Division, Justice Antonin Scalia suggested that allowing individuals to claim exemptions from the law based on their individual religious beliefs unless the government could prove that it had a compelling interest was not required by the First Amendment. “Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them,” he wrote. Although the Court’s holding was unanimous in that case, four justices concurred in an opinion arguing that Scalia had gone too far in contending, for a majority of the Court, that there was no need for the government to show there was an important government interest that justified burdening an individual’s free exercise of religion -- in that case, a Native American who was denied unemployment benefits when he was fired after he flunked the employer’s drug test due to his ritual use of peyote. Enforcing religiously-neutral anti-discrimination rules is not “hostility to religion” by the government. It is undertaken to prevent categorical discrimination against applicants and employees or those seeking government-funded benefits or services, because of their personal characteristics, such as race, national origin, sex or sexual orientation. Notably, the federal laws and regulations that OFCCP is supposed to enforce do not apply to government contractors that are religious corporations or associations or religious educational institutions, “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

This “Directive” is not a regulation adopted in accordance with the requirements of the Administrative Procedure Act, and Justice Alito’s opinion for the Court in Hobby Lobby, responding to concerns raised by Justice Ruth Bader Ginsburg in her dissenting opinion, denied that the Religious Freedom Restoration Act could be invoked as a defense in an employment discrimination case. How this will all play out if OFCCP refuses to hold contractors to their non-discrimination requirements in situations involving LGBT victims of religiously-motivated discrimination is yet to be seen, but the portents are not good in light of Trump’s nomination of Brett Kavanaugh to the Supreme Court, where, if confirmed, he would join the conservative majority in place of Justice Kennedy. It is also worth noting that in his concurring opinion in Masterpiece Cakeshop, Justice Neil Gorsuch, Trump’s first Supreme Court nominee, implied that the Court should reconsider its holding in Employment Division v. Smith.

An early report on this Directive can be found at 60 No. 31 Government Contractor ¶ 257.

Leen’s directives are available at www.dol.gov/ofccp/regs/compliance/directives/dirindex.html.
Recognizing Humanity of Transgender Prisoners, Florida Federal Judge Permanently Enjoins “Freeze Frame” Policy

By William J. Rold

Nearly all judicial opinions about transgender inmates treat the plaintiffs as people with a set of symptoms, to be treated or not. This case stands apart in its recognition of a transgender woman in all her human complexity. Here, Chief U.S. District Judge Mark E. Walker (Obama), of the Northern District of Florida, writes: “Ultimately, this case is about whether the law, and this Court by extension, recognizes Ms. Keohane’s humanity as a transgender woman. The answer is simple. It does, and I do.”

Few transgender inmates’ cases ever get to trial. Those who are fortunate enough to have competent early representation have a fair chance of achieving some relief, as the paucity of state justifications for discriminatory policy fails to survive public scrutiny. Judge Walker’s 15,000+ word opinion in Keohane v. Jones, 2018 U.S. Dist. LEXIS 142640, 2018 WL 4006798 (N.D. Fla., August 22, 2018), is an extraordinary judicial feat. The judge grants declaratory and permanent injunctive relief for plaintiff Reiyn Keohane on the hormone and feminization relief requested, even as the state had basically capitulated by the time of trial. The case is highly recommended reading for anyone representing transgender inmates with health claims. This article can only hit the high points.

Judge Walker spends several pages discussing the nature of transgender presentation, dysphoria, and the evolution of standards of treatment by the World Professional Association for Transgender Health (WPATH), which he judicially finds to be “authoritative.” [Note: Many judges have dismissed the WPATH standards as merely “aspirational” or referenced them for “guidance” only, without calling them “authoritative” in the Eighth Amendment context.] He emphasized that not all transgender people have dysphoria, since the diagnosis includes dysfunction in life and a high level of stress. Here, Judge Walker observes that transgender people can be well-adjusted, and they do not necessarily qualify for a DSM diagnosis. He writes: “This Court recognizes that many transgender people may be perfectly at ease and even rejoice in their own skin.”

Judge Walker emphasized the individualized medical judgments required by the WPATH standards and their conflict with rigid prison rules about dress and appearance. He observed: “All inmates, male and female, are severely limited when it comes to self-expression. For Ms. Keohane, aside from using the appropriate pronouns, the only way she can express her gender identity in prison is by wearing women’s undergarments and grooming like a woman.” (Emphasis by the court).

Julie Jones, the Florida Secretary of Corrections, is the only named defendant, sued for injunctive relief in her official capacity. Three wardens, named originally, were dismissed on consent after promising to abide by the outcome of the relief against the Secretary.

Keohane, a transgender woman, had identified as female since her early years. She presented as a woman in her teens, and she started hormones prior to her fifteen-year incarceration. For two years, she was denied hormones in prison because they were interrupted in the jail prior to her state imprisonment after her conviction – so she fit within Florida’s “freeze frame” policy of denying prisoners hormones if they were not receiving them prior to state custody. She filed numerous grievances without success, and repeatedly attempted suicide or self-castration in unsuccessful attempts to rid herself of her testosterone source.

Because of the denial of hormones and transitioning support, Keohane experienced dysfunction and received a DSM diagnosis – a serious need that no one contested at trial. A deeper analysis, which Judge Walker approaches, but does not explicitly adopt, is that the denial of hormones and female clothing and grooming probably contributed to Keohane’s dysfunction and thus the diagnosis, without which she would not have the serious medical need that invokes the Eighth Amendment right to treatment. The state’s policy may have largely created the condition that they then failed to treat. Judge Walker’s opinion strongly suggests that transgender people have a right to treatment in order to remain healthy, both physically and mentally.

Even after an endocrinologist associated with Wexford, Florida’s contractual provider, recommended hormones for Keohane, the state delayed acting on the specialist’s medical orders for six months, until after Keohane brought her federal lawsuit. Judge Walker characterized the state’s position on hormones and female clothing and grooming standards as a “moving target,” tied to their litigation strategy.

We would never accept the argument that a stable diabetic’s condition must become brittle before the Eighth Amendment requires insulin intervention, or that cancer first identified in prison need not be treated. Yet, that is what is suggested by the state’s position here. Judge Walker characterized the denials of treatment for Keohane as primarily influenced by “ignorance and bigotry,” noting that some of the state’s witnesses conceded knowing nothing about treating gender dysphoria or could not distinguish between gay and transgender or the mental health condition of gender dysphoria.

Judge Walker addresses at length whether the state’s delayed provision of hormones and some feminizing dress and grooming moots the claim for injunctive relief under Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 190 (2000). He notes that public defendants are entitled to a rebuttable presumption that they will not resume illegal conduct that has been voluntarily stopped, but they must still show “that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” Doe v. Wooten, 747 F. 3d 1317, 1322 (11th Cir. 2014). He finds that this burden is on the state and that it has not been met. The timing and unambiguous deliberative nature
of the cessation decision are factors in determining whether injunctive relief is still needed. Rich v. Sec'y, Fla. Dept't of Corrs., 716 F. 3d 525, 531-32 (11th Cir. 2013); Atheists of Fla., Inc. v. City of Lakeland, 713 F. 3d 577, 594 (11th Cir. 2013). That Florida “slow-walked” the Wexford recommendation for hormones until litigation is evidence against them, as is the total absence of evidence of any deliberation in making the decision to change “policy” for Keohane.

Moreover, Judge Walker found no exercise of medical judgment in the treatment decisions for Keohane, but instead a total capitulation to security interests – “divorced from medical judgment” with “blind deference to security” – without balancing, as required by case law as early as Estelle v. Gamble, 429 U.S. 97, 103 (1976). Even the state’s expert (Dr. Stephen Levine) testified that allowing female undergarments and grooming were “minor accommodations” that would be psychologically beneficial. Yet, the state confiscated Keohane’s self-fashioned undergarments as “contraband” and forcibly cut her hair, something Judge Walker preliminarily enjoined during the course of the case.

Judge Walker noted the statement of Florida’s Chief Medical Officer (CMO) concerning transgender treatment – “It’s the only process that I’m aware where we go against nature to help somebody. And while I’m trying to grasp that, I still have trouble making that leap” – as further evidence of the continuing need for injunctive relief, since the CMO would have to sign off on any accommodations. The CMO conceded that granting accommodations for gender dysphoria patients would be a “hard sell” for him. The CMO admitted that Florida was not implementing WPATH standards, which he dismissed as “political.”

In addition to the need for individual exercise of judgment endorsed by WPATH, Judge Walker relied on plaintiff’s expert, Dr. George R. Brown, who testified at length about the importance of ongoing medical and mental health care and accommodations for Keohane in prison. Finally, Judge Walker relied heavily on Keohane’s first-hand testimony, which graphically illustrated her daily “significant distress,” suicide attempts, and efforts to castrate herself – as well as the verbal abuse, punishment for making her own underwear, and forcing her to shower with her hands cuffed behind her back.

Judge Walker cited numerous decisions disallowing “blanket” rules for care of transgender inmates with dysphoria, including Kosilek v. Spencer, 774 F. 3d 63, 91 (1st Cir. 2014); De’lonta v. Johnson, 708 F. 3d 520, 526 (4th Cir. 2013); Fields v. Smith, 653 F.3d 550, 556 (7th Cir. 2011); and Soneeya v. Spencer, 851 F. Supp. 2d 228, 247 (D. Mass. 2012). Judge Walker did not cite the Eleventh Circuit case directly on point, Kothmann v. Rosario, 2014 U.S. App. LEXIS, 4263, 2014 WL 889638 (11th Cir. March 7, 2014), reported in Law Notes as “Transgender Inmate’s Medical Case Survives Qualified Immunity Defense” (April 2014 at pages 135-6). The Eleventh Circuit infuriatingly embargoed this decision with a “Do Not Publish” Order, even though it found the claim of a right to hormones was sufficiently well-established to defeat qualified immunity.

Not every transgender patient requires hormone therapy, but Keohane did, as the state’s expert Levine conceded. Keohane also required dress and grooming accommodations for both her medical and mental health, as Judge Walker exhaustively explained. The denial of same was deliberate indifference to her serious medical needs, which need not be life-threatening or even an “emergency” to state an Eighth Amendment claim. Judge Walker wrote that defendants were “sorely mistaken” in believing that “non-urgent” treatment cannot also be “medically necessary” in a constitutional sense – citing Sands v. Cheesman, 339 F. App’x 891, 894-96 (11th Cir. 2009) (unpublished) (finding severe periodontitis, or gum infection, constituted serious medical need though it was not an emergency condition).

Judge Walker found that it was “clear from the treatment team’s testimony” that “nobody has requested any exceptions to Defendant’s male grooming and clothing policies to treat her gender dysphoria.” (Emphasis by the court.) Members of the team testified on cross-examination: that they had never treated gender dysphoria (and their knowledge of it consisted of a lecture on the subject by Wexford, offered when the litigation began); that they thought they could not request exceptions from security to grooming and dress codes (even though they could request things like a low bunk permit); and that they had signed off on reports for Keohane’s “treatment” that they had not read. “Deliberate indifference to serious medical needs is shown when . . . an inmate is denied access to medical personnel capable of evaluating the need for treatment.” Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 704 (11th Cir. 1985).

Judge Walker found that defendants’ behavior amounted to a blanket rule that a transgender prisoner “simply can’t transition” in prison (court’s emphasis), because “that’s a security question,” so there was no need for a proper assessment. By the end of the trial, defendants’ security expert admitted that he had learned a lot and that the accommodations discussed could be addressed by security.

Judge Walker found that defendants’ trial epiphany was “too little, too late” to moot the case that Keohane’s Eighth Amendment rights had been violated and that she faced continued risk of same. He wrote that Keohane is “a woman stuck in a male body that’s stuck in a cage for the foreseeable future” for whom “allowing for social transitioning is a compassionate part of [her] treatment plan . . . Ms. Keohane is not an animal. She is a transgender woman. Forthwith, Defendant shall treat her with the dignity the Eighth Amendment commands.”

Judge Walker declared Florida’s “freeze frame” policy unconstitutional, and he permanently enjoined it. He ordered defendants to provide Keohane with hormone therapy for the duration of her custody so long as it was not medically contraindicated. He also ordered defendants to apply to Keohane the same dress and grooming standards used for female inmates in female institutions.

Keohane is represented by the ACLU, New York and Miami; and by DL A Piper LLP, Miami and Atlanta. Jurisdiction was retained, including rulings on costs and attorneys’ fees.

William 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.
Trump Administration Suffers More Setbacks in Defending Transgender Military Ban

By Arthur S. Leonard


After the San Francisco-based U.S. Court of Appeals for the 9th Circuit refused to lift Seattle U.S. District Judge Marsha Pechman’s preliminary injunction against the policy on July 18, she issued a new ruling on July 27 granting the plaintiffs’ motion to compel discovery and denying the government’s motion for a protective order that would shield President Trump from having to respond to any discovery requests. The Justice Department immediately announced that it would appeal this ruling to the 9th Circuit Court of Appeals. Judge Pechman had previously denied motions for summary judgment in the case, having found that there was a need for discovery before such a ruling could take place.

On August 6, D.C. District Court Judge Colleen Kollar-Kotelly, who had issued the first preliminary injunction against the policy last year, issued two decisions. In one, she rejected the government’s request to vacate her preliminary injunction as moot, finding that the plaintiffs have standing to challenge the “new” policy described by Defense Secretary James Mattis in his February 2018 memo to the President, and agreeing with Judge Pechman that the “new” policy is not essentially different from the “old” one announced by President Trump a year ago. However, Judge Kollar-Kotelly granted a motion by the government to dismiss President Trump as an individual named defendant in the case, while reserving judgment on pending cross-motions for summary judgment on the merits. Then, on August 24, she denied the cross-motions, finding that discovery was necessary before she could determine the standard of review to apply in deciding the cross-motions.

To recap for those coming late to this story, Trump tweeted a ban on transgender military service on July 26, 2017, and issued a memorandum a month later describing the policy in slightly more detail, charging Secretary Mattis to propose a plan for implementation by late February, 2018, with the goal of implementing the policy later in March. Trump’s tweet came more than a year after the Obama Administration’s Defense Secretary, Ashton Carter, had lifted the existing ban at the end of June 2016, after an extensive period of study yielded the conclusion that the ban was unnecessary on military grounds. Trump’s tweet asserted that he had acted after consultation with “my generals and military experts” but did not name any names. The tweet caught the Defense Department by surprise; Secretary Mattis had only been advised the previous night and nobody else at the Department was warned that the tweet was coming. Media inquiries to the Defense Department that day about how the newly-announced ban would be implemented were referred to the White House, where the press office was equally clueless.

Trump’s August 2017 memo specified that Mattis’s previous directive to allow transgender applicants to join the military, which had been announced at the end of June 2017 to go into effect on January 1, 2018, was to be indefinitely delayed, as Trump’s policy would not allow transgender people to enlist at all. Mattis announced that no action would be taken against currently serving transgender personnel, pending the implementation of the policy in March 2018, but there were reports in the following months of transgender personnel suffering cancellations of promotions and desired assignments and of delays or cancellations of planned medical procedures, despite Mattis’s statements.

Mattis’s memo to the President in February 2018 proposed some modifications to the policy that had been announced in Trump’s August memorandum. Transgender personnel who were already serving and had transitioned and were “stable” in their preferred gender would be allowed to continue serving, based on a determination that the investment in their training outweighed whatever “risk” they posed to the readiness of the military. Furthermore, transgender individuals who had not transitioned or been diagnosed with “gender dysphoria” would be prohibited from enlisting or serving, and those who could not comply with these requirements would be discharged. The proposal was based on a “finding” by a rigged special “expert” panel (whose members’ names were not disclosed) apparently dominated by committed opponents of transgendered service, that allowing transgender people to serve in the military was harmful to the operational efficiency of
the service – a “finding” based on no factual evidence and oblivious to the fact that transgender people had been serving openly without any problems since the Obama Administration lifted the prior ban at the end of June 2016.

Four lawsuits were filed in response to the summer 2017 policy announcement, in federal district courts in Washington, D.C., Baltimore, Seattle, and Riverside (California), and in a matter of months the four district courts had issued preliminary injunctions, having found it likely that the plaintiffs would prevail on their argument that the policy violates the 5th Amendment of the Bill of Rights. As compelled by the preliminary injunctions, the Defense Department allowed transgender people to submit applications to enlist beginning January 1, 2018, after losing a last-ditch court battle to continue the enlistment ban, but there were reports that the applications they received were getting very slow processing, and all indications are that few have been accepted for service.

Trump responded to Mattis’s February 2018 memo by “withdrawing” his prior memo and tweet, and authorizing Mattis (for the Defense Department) and the Secretary of Homeland Security (for the Coast Guard) to adopt the implementation plan that Mattis was recommending by late March. The Justice Department then filed motions in all the lawsuits seeking to lift the preliminary injunctions. Their argument was, in part, that the “new” policy was sufficiently different from the one that had been “withdrawn” as to moot the preliminary injunctions. They further contended that the plaintiffs who were already serving and the service – a “finding” based on no factual evidence and oblivious to the fact that transgender people had been serving openly without any problems since the Obama Administration lifted the prior ban at the end of June 2016.

On April 13, Judge Pechman rejected the government’s motion to lift the preliminary injunction, having already ordered that discovery proceed. In his initial tweet, as noted above, Trump had claimed that he had consulted with “my generals and military experts” before adopting the policy, but the identities of these people were not revealed, and the government has stonewalled against any attempt to discover their identities or any internal executive branch documents or other records that might have been generated on this issue, making generalized claims of executive communications privilege and deliberative privilege. Similarly, the February memorandum released under Mattis’s name did not identify any of the individuals responsible for its composition, and naturally the plaintiffs are also seeking to discover who was involved in putting it together and what information they purported to rely upon.

Judge Pechman’s July 27 order to compel discovery specified the materials sought by the plaintiffs, and pointed out that under federal evidentiary rules, any claim of privilege against disclosure is subject to evaluation by the court. “The deliberative privilege is not absolute,” she wrote. “Several courts have recognized that the privilege does not apply in cases involving claims of governmental misconduct or where the government’s intent is at issue.”

The question, under 9th Circuit precedents, is “whether plaintiffs’ need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure. In making this determination, relevant factors include: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” There is a formal process for invoking privilege, she pointed out, which requires the government to “provide precise and certain reasons for preserving the confidentiality of designated material.” A broad general assertion of privilege without such specification will not do.

In this case, Judge Pechman had previously determined that discrimination because of gender identity involves a “suspect classification” for purposes of equal protection requirements, which means the government has the burden of proving that there is a compelling justification for the discrimination. In this case, however, the government has articulated only a generalized judgment that service by transgender individuals is too “risky,” based on no facts whatsoever, just assertions of opinion. Judge Pechman concluded in granting the plaintiffs’ discovery motion that “the deliberative process privilege does not apply in this case.”

The government had moved for a protective order “precluding discovery directed at President Trump.” While conceding that Trump has “not provided substantive responses or produced a privilege log” listing specifically what information has to be protected against disclosure, the government contended that “because the requested discovery raises ‘separation of powers concerns,’ Plaintiffs must exhaust discovery ‘from sources other than the President and his immediate White House advisors and staff’ before he is required to formally invoke the privilege.”

Judge Pechman noted that so far the government has refused to provide any specific information about how the policy decision was made or developed, and has failed to identify the specific documents and other information for which it claims privilege, or the identity of the “expert panel” purportedly convened by Mattis to devise the implementation plan. In a footnote, Judge Pechman commented, “The Court notes that Defendants have steadfastly refused to identify even one general or military official President Trump consulted before announcing the ban.” Thus, she found, there was no basis for the court to evaluate “whether the privilege applies and if so, whether Plaintiffs have established a showing of need sufficient to overcome it.” Indeed, she had concluded in a prior...
decision, as far as the record stands, it looks as if Trump made the whole thing up himself without relying on any military expertise. Thus, she has preliminarily rejected the government’s contention that the policy would enjoy the deference normally extended to military policies adopted based on the specialized training and expertise of military policy makers.

Judge Kollar-Kotelly’s August 6 ruling focused on an issue that Judge Pechman had previously decided: whether the plaintiffs had standing to continue challenging the policy after Mattis’s memo supplanted the “withdrawn” earlier policy announcements. She had little trouble in determining that all the plaintiffs, even those who are currently-serving transgender personnel who would be allowed to consider serving under the “new” policy, still had standing, which requires a finding that implementing the policy would cause them harm.

“The Court rejects Defendants’ argument that Plaintiffs no longer have standing because they are not harmed by the Mattis Implementation Plan,” she wrote, stating that “the effect of that plan would be that individuals who require or have undergone gender transition would be absolutely disqualified from military service, individuals with a history or diagnosis of gender dysphoria would be largely disqualified from military service, and, to the extent that there are any individuals who identify as ‘transgender’ but do not fall under the first two categories, they would be allowed to serve, but only ‘in their biological sex’ (which means that openly transgender persons would generally not be allowed to serve in conformance with their identity.)” Furthermore, those who have already transitioned and are now serving would be doing so under the stigma of having been labeled as “unfit” for military service and presenting an undue risk to military readiness, and would likely suffer prejudice in terms of their assignments and their treatment by fellow military personnel, as well as emotional harm.

“The Mattis Implementation Plan sends a blatantly stigmatizing message to all members of the military hierarchy that has a unique and damaging effect on a narrow and identifiable set of individuals, of which Plaintiffs are members,” she wrote. They would be serving “pursuant to an exception to a policy that explicitly marks them as unfit for service. No other service members are so afflicted. These Plaintiffs are denied equal treatment because they will be the only service members who are allowed to serve only based on a technicality; as an exception to a policy that generally paints them as unfit.”

She concluded that “because their stigmatic injury derives from this unequal treatment, it is sufficient to confer standing.” She pointed out that beyond stigmatization, the Implementation Plan “creates a substantial risk that Plaintiffs will suffer concrete harms to their careers in the near future. There is a substantial risk that the plan will harm Plaintiffs’ career development in the form of reduced opportunities for assignments, promotion, training, and deployment. These harms are an additional basis for Plaintiffs’ standing.” She rejected the government’s contention that these harms were only “speculative.”

Furthermore, she rejected the claim that Trump’s “withdrawal” of his August 2017 memorandum and the substitution of the Mattis Implementation Plan made the existing lawsuits moot, agreeing with Judge Pechman that the “new” plan was merely a method of “implementing” the previously announced policy. She found that the Implementation Plan “prevents service by transgender individuals,” just as Trump had directed in July and August 2017, and the minor deviations from the complete categorical ban were not significant enough to make it substantially different.

Thus she refused to dissolve the preliminary injunction. She refrained from ruling on motions for summary judgment on the merits of the equal protection claim in the August 6 opinion, because there are sharply contested facts in this case and no discovery has taken place, so it can’t be decided purely as a matter of law. The facts count here in court, even if they don’t seem to count in the White House or the Defense Department.

However, Judge Kollar-Kotelly granted the government’s motion to partially dissolve the injunction as it applies personally to Trump, and granted the motion to “dismiss the President himself as a party to this case. Throughout this lawsuit,” she wrote, “Plaintiffs ask this Court to enjoin a policy that represents an official, non-ministerial act of the President, and declare that policy unlawful. Sound separation-of-power principles counsel the Court against granting these forms of relief against the President directly.” Thus, she concluded, there was no reason to retain Trump as a defendant. If the Plaintiffs prevail on the merits, an injunction aimed at the Defense and Homeland Security Department’s leadership preventing the policy from taking effect will provide complete relief.

The Plaintiffs complained that removing Trump from the case would undermine their attempt to discover the information necessary to make their case, since individuals who are parties to litigation are particularly susceptible to discovery requests. The judge wrote that “it would not be appropriate to retain the President as a party to this case simply because it will be more complicated to seek discovery from him if he is dismissed. To the extent that there exists relevant and appropriate discovery related to the President, Plaintiffs will still be able to obtain that discovery despite the President not being a party to the case.” And, she concluded, “Plaintiffs will be able to enforce their legal rights and obtain all relief sought in this case without the President as a party.”

The judge treated as moot the Defendants’ motion for a protective order shielding Trump from having to respond to discovery requests. “However,” she wrote, “the Court reiterates that dismissing the President as a party to this case does not mean...
that Plaintiffs are prevented from pursuing discovery related to the President. The court understands that the parties dispute whether discovery related to the President which has been sought by Plaintiffs is precluded by the deliberative process or presidential communication privileges, and the Court makes no ruling on those disputes at this point. The Court will be issuing further opinions addressing other dispositive motions that have been filed in this case. After all of those opinions have been issued, if necessary, the Court will give the parties further guidance on the resolution of the discovery requests in this case.” In a footnote, Judge Kollar-Kotelly noted Judge Pechman’s July 27 discovery order, and that defendants were appealing it to the 9th Circuit. The judge emphasized that the preliminary injunction remains in effect for all of the remaining defendants in the case, so the policy may not be implemented while the case continues.

A few weeks later, on August 24, Judge Kollar-Kotelly issued the next opinion on pending dispositive motions, this time address the cross-motions for summary judgment. She concluded that she could not rule on these motions before discovery takes place, because the initial determination to be made is whether the announced policy is entitled to the sort of deference that courts customarily pay to military policy makers, or whether the policy will be subjected to the ordinary heightened scrutiny process that she had used in deciding to grant the preliminary injunction. The Justice Department’s continued refusal to comply with the Plaintiffs’ discovery requests meant that the information necessary to make this threshold determination was not before the court. “The Court cannot summarily adjudicate the claims in this case on the present record,” wrote the judge. “There are two steps to the Court’s analysis of the Plaintiffs’ constitutional claims. The first step is to determine what level of scrutiny the Court should apply, and how much deference should be given, when reviewing the challenged policy. Only once that threshold step has been completed can the Court move on to the second step: applying that level of scrutiny to the policy and determining whether or not it is constitutional.”

“Due in part to Defendants’ refusal to provide discovery,” she continued, “summary judgment is not currently appropriate on the first step.” Defendants have been arguing that the court should apply “an extremely low level of scrutiny,” based on the Supreme Court’s ruling in Rostker v. Goldberg, 453 U.S. 57 (1981), a case which challenged the President’s decision to require draft registration by males but not females. Kollar-Kotelly found that case totally distinguishable. The Court had mandated a high level of deference there because Congress had expressly authorized the President to make such a decision after hearings and debate; thus, the court found that “the district court in that case had not sufficiently deferred to the reasoned consideration and decision-making of Congress regarding female military registration.” In rejecting this same argument last year, Kollar-Kotelly had “reasoned that the facts in Rostker were starkly different than the facts in this case.” DOJ, now focusing on the Mattis memorandum from February 2018, argues that it should enjoy deferential review because, “after the President’s 2017 directives, the military conducted an ‘independent reexamination’ of the issue that consisted of ‘an extensive deliberative process lasting over seven months and involving many of DoD’s high-ranking officials as well as experts in a variety of subjects.” DOJ is now claiming that the Mattis memo “rested on the considered professional judgment of multiple military experts” and that “this process entitles them to the sort of deferential review discussed in Rostker. This is the crux of Defendants’ defense,” wrote the judge; “It is restated in some form or another in nearly all of Defendants’ briefs.”

But the Plaintiffs countered this argument successfully, pointing out that “the only process that has occurred since the President’s 2017 Tweet and Memorandum was one merely to prepare a plan to implement an initial, unsupported, decision of the President to ban transgender military service. According to the Plaintiffs, whatever process occurred was not meaningfully independent from, and indeed was constrained by, that initial decision. Because there was no independent assessment of the issue or independent exercise of military judgment, Plaintiffs argue that no special deference is owed.”

This difference of characterization of what happened last fall and winter means that summary judgment can’t be granted. “The facts about the process leading up to the development of the Mattis Implementation Plan are both material and in dispute,” wrote Kollar-Kotelly. “Plaintiffs are entitled to complete discovery,” she asserted. “As already stated above, despite the fact that one of Defendants’ main defenses in this action is that their decisions regarding transgender military service are owed great deference because they are the product of reasoned deliberation, study and review by the military, Defendants have withheld nearly all information concerning this alleged deliberation. This is not how civil litigation works. Defendants cannot prevent Plaintiffs from obtaining the facts about a disputed issue and then expect to be granted summary judgment on that issue. Because genuine disputes of material fact exist and Plaintiffs are entitled to continue pursuing discovery of those facts, the Court will not summarily adjudicate this case at this time.”

That means that the cross-motions are denied for now and the case continues. However, the judge did not explicitly rule on the various privilege claims being asserted by the government. Presumably, these will be addressed in subsequent rulings if the government persists in resisting reasonable requests to produce relevant documents, disclose the identity of those involved in the so-called “study and review,” and making such individuals available for depositions. Indeed, as Judge Pechman’s ruling on discovery intimated, it is possible
that the most important discovery in this case would be a deposition under oath of Trump, as it becomes increasingly clear that determining the government’s “intent” in adopting this policy boils down to him.

On August 14, U.S. Magistrate Judge A. David Copperthite, to whom Baltimore U.S. District Judge Marvin J. Garbis had referred discovery matters in Stone v. Trump, another one of the pending cases, issued a ruling granting in part the plaintiffs’ motion to compel discovery of deliberative materials regarding Trump’s July 2017 tweet, August 2017 memorandum, the “activities of the DoD’s so-called panel of experts and its working groups” who put together the memorandum ultimately submitted by Mattis to the President in February 2018, and deliberative materials regarding that Implementation Plan and the President’s March memorandum, “including any participation or interference in that process by anti-transgender activists and lobbyists.” However, noting that a motion is pending before Judge Garbis to dismiss Trump as a defendant in the case, Judge Copperthite declined to rule on the government’s request for a protective order that would shield Trump from having to respond to discovery requests directed to him, “pending the resolution of the motion to dismiss President Trump as a party.” Copperthite wrote that “no interrogatories or document requests will be directed to President Trump as a party, but may be directed to other parties pursuant to this Memorandum Opinion. If the Motion to Dismiss is denied, the Court will revisit the issue of the protective order as to President Trump.”

Copperthite faced a practical dilemma in dealing with the government’s requests to shield Trump from discovery. “On July 27, 2017, President Trump tweeted transgender persons would no longer be able to serve in the military and as for any deliberative process, simply stated this policy occurred after consulting with ‘my Generals and military experts.’ There is no evidence to support the concept that ‘my Generals and military experts’ would have the information Plaintiffs request. There is no evidence provided to this Court that ‘my Generals and military experts’ are identified, in fact do exist, or that they would be included in document requests and interrogatories propounded to the Executive Branch, excluding the President. By tweeting his decisions to the world, the President has, in fact narrowed the focus of Plaintiffs’ inquiries to the President himself. The Presidential tweets put the President front and enter as the potential discriminating official.” So there is a real question whether discovery that doesn’t include President Trump is at all meaningful, since the ultimate legal question in the litigation is the intent of the government in adopting the ban which is, at bottom, Trump’s intent. On the other hand, discovery directed at President Trump raises serious questions about separation of powers and the traditional respect for the confidentiality of internal White House policy deliberations.

“So many factors are unknown at this juncture in the litigation,” wrote Copperthite. “It is unknown whether Plaintiffs can obtain the information necessary from the non-Presidential discovery to define the ‘intent’ of the government with respect to the transgender ban. Defendants offer as an alternative, a stay of discovery with respect to the President, until the Motion to Dismiss the President as a party is decided. If the President, as the discriminating official, tweeted his transgender ban sua sponte as alleged, this Court sees no alternative to obtaining the intent of the government other than denying the protective order with respect to President Trump.” However, he wrote, precedents “instruct this Court to give deference to the executive branch because ‘occasions for constitutional confrontation between the two branches should be avoided whenever possible.’” Thus, Copperthite decided to put off deciding the protective order issue until after Judge Garbis decides whether to dismiss Trump as a party, but for now will order the defendants only to comply with discovery requests directed to defendants other than Trump, Secretary Mattis and the Secretaries of the various military branches.

The possibility that Trump will be ordered to submit to questioning under oath in at least one of these cases remains a reality, but any attempt by the Plaintiffs to do so would undoubtedly arouse spirited opposition from the Justice Department, officially based on claims of privilege, but realistically due to the likelihood that Trump would perjure himself under such questioning, making the case that much more difficult for the government to defend and, of course, adding to the potential bill of particulars for the House of Representatives to consider impeaching the President for “high crimes and misdemeanors.” Recall the historical precedent: The House of Representatives voted to impeach President Clinton based, in part, on the charge that he committed perjury during questioning before a grand jury by the Special Counsel investigating his affair with Monica Lewinsky. Thus, at least in that case, the House considered presidential perjury in the context of a judicial proceeding to be an impeachable offense, even though the matter about which the president was testifying did not involve public policy or national security.

Plaintiffs in the Seattle case, Karnoski v. Trump (in which the president remains a defendant), are represented by Lambda Legal and pro bono attorneys from Kirkland & Ellis. Plaintiffs in the D.C. case, Jane Doe 2 v. Trump, are represented by the National Center for Lesbian Rights, GLBTQ Legal Advocates & Defenders (GLAD), and pro bono attorneys from Wilmer Cutler Pickering Hale & Dorr LLP and Foley Hoag LLP. Plaintiffs in the Baltimore case, Stone v. Trump, are represented by the American Civil Liberties Union, New York, NY, and the ACLU of Maryland, with pro bono assistance from attorneys at Covington & Burling LLP.
New York Appellate Division Reverses Dismissal of Alleged Co-Parent’s Visitation and Joint Custody Claim

By Jack Melnick

The New York Appellate Division, 4th Department, has ruled that a Referee erred in dismissing a petition by Jeannene June DeMarc, who is seeking visitation and joint custody of five children whom she allegedly agreed to raise with the Respondent, Patricia Goodyear, her former same-sex partner. In re Matter of deMarc v. Goodyear, 2018 N.Y. App. Div. LEXIS 5027, 2018 WL 3321520 (July 6, 2018). The matter was remanded to the Family Court for a full hearing on whether key aspects of the Court of Appeals’ ruling in Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016), which established new precedent for non-biological/non-adoptive parents seeking custody and visitation rights in New York, are satisfied.

In Brooke, the court recognized new rights for non-biological/non-adoptive partners under Domestic Relations Law § 70. Now, because of this case, where a former partner can provide clear and convincing evidence that the partners together agreed to conceive and raise a child, there is standing to seek custody and visitation by virtue of judicial estoppel. The Brooke court left open for future determination the question whether its ruling would also apply when children were born prior to the relationship.

The case of deMarc v. Goodyear is yet another in an increasing number of cases in which a non-biological/non-adoptive LGBT parent seeks to maintain relationships with the child or children for whom the person claims to have played a parental role for years. DeMarc alleges that while she and Goodyear were in a romantic relationship they had agreed to raise and co-parent Goodyear’s young child from a previous relationship. She also alleges that, prior to their conception, both parties agreed to jointly raise the next four children conceived by Goodyear. Before any of the claims with respect to each of the five children could be determined by a factual hearing, however, the Referee granted Goodyear’s motion to dismiss, finding that DeMarc, having no biological or legal relationship to the children, lacked parental standing to seek such a determination. Onondaga Count Family Court Judge William W. Rose entered an order to that effect on June 15, 2017.

The Appellate Division determined that the Referee had erred in granting the motion to dismiss because the Referee weighed the value of evidence that was only meant to show factual discrepancies, when it should have held a trial based on the prima facie showing of standing under Brooke S.B.; such a premature evidentiary consideration was prohibited in Cox v. Don’s Welding Serv., 58 A.D.2d 1013 (4th Dept 1977). There was some evidence given by Goodyear that contradicted DeMarc’s allegations, but DeMarc was listed as a parent on the birth certificate of one of the children; one child had DeMarc’s last name as his middle name; and several of the children’s middle names were the same as DeMarc’s first or middle name. The Appellate Division ruled that this was enough disputed evidence to warrant a full hearing before resolution of the standing issue.

Furthermore, the court ruled that the Referee erred in failing to appoint attorneys for the children. This is indicative of the growing recognition of equitable estoppel as a conceptual tool in determining the nature of the parent-child relationship in parentage cases such as this: the child’s wishes and what the child understands to be the role played by the putative parent must be taken into account if the child’s best interests are to be served. This cannot happen if the child’s voice is rendered silent, as emphasized by the recent First Department decision, In re K.G. v. C.H., 2018 N.Y. App. Div. LEXIS 4617, 2018 WL 3118937, 2018 N.Y. Slip Op 04683, in which the court reasoned that any case of parentage by equitable estoppel must include the child’s wishes in the record, usually by means of full representation by appointment of an attorney for the child.

The matter was remanded to the Family Court for a full hearing on whether key aspects of the Court of Appeals’ ruling in Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016), which established new precedent for non-biological/non-adoptive parents seeking custody and visitation rights in New York, are satisfied.

It is not just the relationship from the point of view of the parents seeking custody – potentially colored by ill-will after a failed romantic partnership – that must be thoroughly examined and determined; the child’s view must also be considered.

Michael Steinberg of Rochester represents Jeannene June DeMarc. Andres M. Ferro of Dyer Law Offices, P.C., Syracuse, represents Patricia Ann Goodyear.

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New York Appellate Division Applies Equitable Distribution to Property Acquired During a Civil Union for the First Time, but Maintains Inequitable Treatment of Civil Unions

By Cody Yorke

In a new decision from the New York Appellate Division for the Fourth Department, O’Rielly-Morshead v. O’Rielly-Morshead, 2018 N.Y. Slip Op. 05419, 2018 WL 3567116, released July 25, 2018, a New York court has ruled, for the first time, that property acquired during a civil union was subject to equitable distribution upon the dissolution of the civil union. Though important, the decision may represent only modest progress in the campaign to achieve true equality for LGBT persons who were long-denied equal marital rights, as the decision turned on the court’s application of the common law principle of comity, under which a state defers to the laws of the state where a marriage took place. The court held that the rights afforded by the couple’s Vermont civil union ought to be recognized under New York law, but declined to recognize civil unions as legally equivalent to marriages in New York.

The parties in the case, Deborah and Christine, were New York residents who had traveled to Vermont and entered into a civil union under that State’s laws in 2003. In 2006, the couple married in Canada. The relationship deteriorated and broke down, and, in 2014, Deborah commenced an action seeking dissolution of the marriage. There was no question that the court recognized the couple’s marriage in Canada. Christine counter-claimed for dissolution of the civil union and moved for a determination that equitable distribution applies to property acquired during the civil union, including the three years before the date of marriage. The Monroe County Supreme Court Acting Justice Richard A. Dollinger denied the motion.

Christine had argued that New York courts ought to treat the couple’s 2003 Vermont civil union as the equivalent of marriage in New York. Under Vermont’s Marriage Equality Act, “marriage” encompasses “legally recognized unions of two people”; therefore, although the civil union was not a “marriage” under Vermont law when the couple entered into it in 2003, it became a marriage, or legally equivalent to a marriage, when Vermont enacted its Marriage Equality Act. Logical consistency dictates that New York ought to recognize a civil union from another state, given that New York recognizes common law marriages from other jurisdictions (and treats property acquired during a common law marriage as marital property), notwithstanding that it has abolished common law marriage.

Finally, Christine argued that comity dictated that the court ought to distribute the pre-marriage civil union property under equitable distribution because Vermont granted the parties to a civil union such rights. In considering whether to apply comity, the court looked to the New York Court of Appeal’s decision in Debra H. v. Janice R., 14 N.Y. 3d 576, 904 N.Y.S. 2d 263 (2010), in which the Court of Appeals employed comity to sanction a Vermont civil union as a source for the presumption of parentage (giving a non-birth partner parental rights with respect to a child born during the union and decided prior to the decision in Matter of Brooke S.B. v. Elizabeth A.C.C., 2016 NY Slip Op 05903). The court interpreted Debra H. narrowly, finding that it did not suggest that comity would compel New York to recognize a civil union as a source for property rights. However, the court noted the concurring opinion in Brooke S.B. by Justice Graffeo, which seems to have set out a road map for how a court could extend comity to recognize additional rights arising out of another state’s civil union statute. In particular, Justice Graffeo highlighted the lack of any inconsistency between the Vermont statute and New York policy, because the statute in question predicated parentage on “objective evidence of a formal legal relationship” and therefore did not undermine New York’s interest in ensuring certainty for parents and children.

It now appears that the Appellate Division in O’Rielly has followed Justice Graffeo’s roadmap. Although it held that the lower court had properly refused to treat the civil union as equivalent to a marriage for the purposes of equitable distribution under the Domestic Relations Law, it indeed found that comity principles should apply in this case: contrary to the Supreme Court’s narrow reading of Debra H., the Appellate Division stated that, although the court in Debra H. had left open the question of whether New York should extend comity to a civil union for purposes other than parentage, comity does in fact require the recognition of property rights arising from a civil union in Vermont. Although the Appellate Division did not refer explicitly to Justice Graffeo’s concurring opinion in Debra H., it held that the Vermont law, under which “all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage”, was consistent with the public policy of New York because both states predicate property rights on “objective evidence of a formal legal relationship”, be it a civil union in Vermont or a civil marriage in New York. As a result, the court held that the couple were entitled to the benefit of the same rights of equitable distribution with respect to the property acquired during the civil union, and before the marriage.

This decision constitutes an important step in recognizing the rights of LGBT individuals who entered into civil unions in sister states at a time when civil marriage was not a legal possibility, regardless of whether they
later legally married. It provides much-needed clarity for such couples and for those advocating for them. That said, the decision may constitute a missed opportunity for the court to fully recognize the ongoing effects of the long denial to LGBT persons of equal marital rights, and to treat their civil unions as equivalent to marriages under the law. The failure to do so perpetuates pre-marriage equality discrimination by ensuring that the differential treatment continues to deny property rights to many LGBT persons.

The Monroe County court concluded its decision by acknowledging the absurdity of its decision: “The court is struck by the anomaly this case presents,” wrote Justice Dollinger. “This court is dissolving a pre-existing civil union but only allowing equitable property distribution based on the couple’s marriage [. . .] This court has no solution for this conundrum without violating long-standing principles in New York’s marriage-based laws. Any further answer rests with the Legislature.” And although comity carried the day for the defendant in this case on further appeal, neither court truly recognized civil unions as equivalent to marriages. It appears that the courts are unwilling to do so without the leadership of the Legislature.

The Monroe County court framed the case as “an interstitial legal battle in the long running – and now largely concluded – battle over marriage equity in this nation.” However, New York only began to recognize Canadian same-sex marriages in 2008, and only legalized same-sex marriage in New York in 2011. LGBT persons whose relationships extend before those recent events continue to have to go to court to try to fight against the lingering effects of marriage inequality. In that regard, the battle is far from over.

Plaintiff Cody Flack is a transgender man who lives in Green Bay and has been diagnosed with gender dysphoria. Flack discovered his male gender identity at the age of four or five, and undertook a gradual transition as a teenager, adopting a traditional male name and presenting as male. “However,” wrote Conley, “he was unable to complete his transition for several years because he lacked financial resources, was without emotional support, and feared isolation.” Flack suffers from cerebral palsy and other disabilities, qualifying him for Social Security disability payments as well as Medicaid coverage. Flack has been receiving hormone therapy, and was able to accomplish part of surgical gender transition because some of the internal procedures were necessary to treat other medical conditions. But Flack’s physicians agree that that he still needs top surgery to complete his transition. “At minimum,” wrote Conley, “it appears undisputed that Cody’s breasts cause him significant, personal distress, as they are a marker of the female sex often contributing to his being perceived as female. Cody is particularly ashamed of his breasts when in public and routinely avoids social situations as a result.” His doctor sought authorization from Wisconsin Medicaid for coverage of the surgery, but “DHS denied Dr. King’s prior authorization request without reviewing the medical necessity of his requested surgery as a ‘non-covered service’ and a ‘not covered benefit’ based on the Challenged Exclusion.” Cody’s appeals of this denial were unsuccessful.

Plaintiff Sara Ann Makenzie, a resident of Baraboo, is a transgender woman, who first identified as female as a child and “has been diagnosed with gender dysphoria for most of her life.” She has transitioned to the extent possible but surgery is the last necessary step to treat her gender dysphoria. She reports great distress upon seeing her male-appearing genitalia, which negatively affects her occupational functioning, sexuality and social life. She finds showering or seeing her body in a mirror painful; she lives in contact fear that some will be able to see her male genitals through her clothing; and she is concerned that she may be attacked or mistreated by someone who recognizes her as transgender. Her primary care physician referred her to a plastic surgeon specializing in this area, who advised her that she was eligible for genital surgery under medical standards of care, but that Wisconsin Medicaid would not pay for the procedure, which she could not afford otherwise. “Sara Ann has thoughts of removing her genitals on her own and of committing suicide,” wrote Conley. “As a result,
plaintiffs contend that her gender dysphoria has worsened.

In the case of both plaintiffs, defendants contend that there is not enough evidence to conclude that the requested surgery is “of proven medical value or usefulness for treating” the plaintiffs’ gender dysphoria. However, having reviewed expert testimony and journal articles, Judge Conley finds that there is plenty of evidence supporting the plaintiffs’ claims: certainly enough to find that they are likely to prevail on their assertions that the treatment they seek is medically necessary. As have many other courts, this court accords significant weight to the World Professional Association of Transgender Health’s published Standards of Care, now in their 7th edition, which have been treated by many courts as a definitive statement of treatment standards for gender dysphoria.

Wisconsin’s Medicaid program adopted its express exclusion in the mid-1990s, based on its determination that “transsexual surgery” and attendant medical treatments were “medically unnecessary.” Today there is a strong medical consensus in the other direction. Since the federal Medicaid statute obligates the state Medicaid programs to cover medically necessary treatments, there is a strong argument that the statute requires this coverage in appropriate cases. Furthermore, under the Affordable Care Act, insurance programs may not discrimination based on sex, and during the Obama Administration, the federal Medicaid program took the position that this statutory prohibition extends to discrimination because of gender identity. However, the federal Medicaid program stopped short of connecting all of the same procedures that they use to treat other medical conditions. For example, if a natal female were born without a vagina, she could have surgery to create one, which would be covered by Wisconsin Medicaid if deemed medically necessary. However, a natal male suffering from gender dysphoria would be denied the same medically necessary procedure because of her sex. Likewise, if a natal male were in a car accident and required a phalloplasty, that surgery would be covered if deemed medically necessary. However, a natal female seeking that same medically necessary procedure for gender dysphoria would be denied because of his sex. In this case, if plaintiffs’ nattaly assigned sexes had matched their gender identities, their requested, medically necessary surgeries to reconstruct their genitalia or breasts would be covered by Wisconsin Medicaid. Here, plaintiffs have instead been denied coverage because of their natal sex, which would appear to be a straightforward case of sex discrimination.”

Finding sex discrimination in this case effectively kills two birds with one stone, since it supports finding an ACA violation and a requirement, as government action is involved, that the exclusion survive heightened scrutiny, which is the standard the Supreme Court has adopted for sex-based equal protection claims. Judge Conley reviewed the extensive case law developments over the past few years supporting a sex discrimination analysis for gender identity claims, most notably the 6th Circuit’s ruling in EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (2018), in which that court accepted the argument that gender identity discrimination is a form of sex discrimination, a view also taken by the EEOC under Title VII and by an increasing number of district courts, as well as the 7th Circuit ruling on Whitaker’s Title IX suit. Conley devotes several paragraphs to discussing the alternative justification for heightened scrutiny in such cases, concluding: “In short, other than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.”

As to the other tests for preliminary injunctive relief, Conley had little trouble finding they had been met in this case. “The court recognizes that granting preliminary relief alters the status quo, if barely so, given the present uncertainty about the requirement of coverage under federal regulation, which weighs in favor of the state. However, defendants acknowledge that the balancing of equities weighs in favor of the plaintiffs should the court find that plaintiffs have shown a likelihood of success on the merits and a risk of irreparable harm. Having so found, therefore, the court also has little difficulty finding that the equities and the public interest favor entry of a preliminary injunction prohibiting the defendants from enforcing the Challenged Exclusion to deny the named plaintiffs medically necessary surgery in furtherance of treating their gender dysphoria.”

Noting the indigence of the plaintiffs and the failure of the state to request that plaintiffs post a bond, Conley
stated that the court would not require the plaintiffs to post a bond to cover the state’s expenses in the event that they eventually lose this case on the merits. “Nor,” he wrote, “for all the reasons already set forth above, will the court stay enforcement of this preliminary injunction given the plaintiffs’ already-long wait to receive medically necessary surgery for gender dysphoria, particularly since the time required for DHS’s authorization review of plaintiffs’ requests for coverage should provide sufficient time for defendants to seek a stay from the Seventh Circuit.” Judge Conley directed that defendants complete their authorization review of Cody Flack’s request within 10 business days, and that defendants provide a copy of the Court’s order to Sara Ann Makenzie’s third-party HMO and, if applicable, complete their authorization review within 10 business days of any denial of coverage by the HMO.

Conley’s extensive, detailed opinion could provide a textbook for those who might have to litigate this issue against other states’ Medicaid Programs. Judge Conley was nominated by President Obama, and took the bench in 2010. He subsequently served for several years as Chief Judge of the District Court for the Western District of Wisconsin. He is noted for having been one of the first federal trial judges to provide relief for a refugee who was blocked from entering the U.S. due to Trump’s second Muslim travel ban.

On August 22, the Wisconsin Group Insurance Board voted 5-4 to cover sex reassignment surgery and related treatment beginning January 1, 2019. The Board oversees insurance coverage for state employees and their dependents. The vote seems to have been in reaction to the court opinion described above. AP State News, Aug. 23.

Plaintiffs are represented by Daniel A. Peterson, Mark A. Peterson, and Robert Theine Pedll, of McNally Peterson, S.C. (Milwaukee); Joseph J. Wardenski and Orly May of Jennifer Klar, Relman, Dane & Colfax PLLC (Washington, D.C.); Abigail Koelzer Coursolle, of the National Health Law Program (Los Angeles) and Catherine Anne McKee of the National Health Law Program (Carrboro, N.C.).

The majority considered itself bound by the 1986 Supreme Court decision, despite Lamb’s argument that the medical and mental health community had changed its views substantially about transgender people and their needs in the last 30 years.

Lamb appealed on her own, and Judge Melgrin was affirmed in Lamb v. Norwood, 2018 U.S. App. LEXIS 18557; 2018 WL 3341031 (10th Cir., July 9, 2018). The opinion is written in a simplistic, question-and-answer (almost “Transgender Inmate Law for Dummies”) format. Lamb was still pro se, and no argument was held. Seven attorneys and 3 law firms appeared for the defendants. The panel (and appointing Presidents) consisted of Circuit Judge Robert E. Bacharach (Obama), writing for himself and Senior Judge Monroe G. McKay (Carter). Senior Judge Billy R. Ballock (Reagan) concurred “in the judgment only” without writing. Discussion of transgender people and their treatment consists of about one-half page each. The majority supports its limitations on transgender medical rights under the Eighth Amendment to a declaration of Dr. Randi Ettner (whom transgender advocates will recognize as a plaintiffs’ expert in these cases). Lamb had filed a copy of an affidavit that Dr. Ettner had submitted in the Chelsea Manning case – in which Ettner stated (but to which the court does not refer) that much of the feminizing and housing relief that Manning was (and Lamb is) seeking are “necessary parts of gender identity consolidation.”

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Tenth Circuit Slams Door on Transgender Inmate Care, Upholding 32-Year-Old Precedent in Pro Se Case

By William J. Rold

A year ago, reporting for Law Notes (Summer 2017 at page 276) on the decision by U. S. District Judge Eric F. Melgrin to grant summary judgment against pro se transgender inmate Michelle Renee Lamb, in Lamb v. Norwood, 262 F.Supp.3d 1151 (D. Kan. 2017), this writer wrote: “a pro se inmate cannot adequately represent herself in a case that turns on medical evidence.” Relying on an old Tenth Circuit precedent – Supre v. Ricketts, 792 F.2d 958, 963 (10th Cir. 1986) – that the Eighth Amendment did not even require the provision of hormones to transgender inmates – Judge Melgrin said that Lamb (who was receiving hormones and psychotherapy in Kansas) did not state a constitutional claim for more. He used the reports the defendants provided for “screening” the prisoner complaint, directed Lamb to respond, and then converted the whole proceeding to summary judgment, which he granted after criticizing Lamb for not submitting expert evidence in her support.

These reports, called “Martinez reports” in the Tenth Circuit, for Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), are designed to aid the district court in screening claims. They were never intended to be dispositive by themselves on the merits or to preclude discovery. See Rachel v. Troutt, 820 F.3d 390, 394-6 (10th Cir. 2016) (abuse of discretion to deny discovery by requiring response to summary judgment before discovery is produced after Martinez report).
needs in the last 30 years. The majority responded that, if advances in neonatal care did not convince a plurality of the Supreme Court to change the central holding of Roe v. Wade in Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992), it saw no reason to change the core of Supre, either.

The majority agreed that Judge Melgrin did not err in converting the screening reports into affidavits in support of summary judgment, or in restricting Lamb’s discovery. They wrote that Lamb was “free” to conduct discovery in the months when defendants’ motion to stay discovery had been sub judice with no ruling. [Are they kidding? The state was hardly going to cooperate. This is the same Judge (Bacharach) who found an abuse of discretion denying discovery following a Martinez report in the Rachel decision. The only difference is that Lamb made the mistake of not going through the futile actions of preservation: seeking and trying to compel discovery when a motion to stay it was pending.]

Even if they were to reach the merits despite Supre, the majority sweepingly wrote that “we have consistently held that prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants,” citing one case: Perkins v. Kansas DOC, 165 F.3d 803, 811 (10th Cir. 1999). While many cases hold that physician/patient disagreements and inmate patient preferences do not support constitutional claims, Perkins does not give a green light to “subpar” care on page 811 or anywhere else – neither does any other Tenth Circuit decision (published or unpublished) that this writer could find.

The majority noted that Lamb is receiving hormones and psychotherapy and some feminizing supplies and that, adopting a lead defendants’ “Martinez” affidavit, assignment or transfer to a woman’s facility “is impractical and unnecessary in light of the availability and effectiveness of more conservative therapies.” The majority cites to Kosilek v. Spencer, 774 F.3d 63, 91 (1st Cir. 2014) (en banc), for the proposition that, even if Lamb showed that the requested relief were the only professional way to treat her, she would still fail the second arm of the deliberate indifference test (subjective disregard of the serious need), if the defendants believed in their professional opinions that they were not being deliberately indifferent.

Kosilek, which, unlike here, followed a full-blown trial, does not go that far. In fact, its en banc majority specifically wrote that it was not categorically denying sex reassignment surgery or establishing a “blanket rule” simply because an “expert” could support that idea, and said that its decision left room for a proper record to be made for such relief. This is on the same page cited by the Tenth Circuit for holding that the subjective professional judgment of the defendant is absolutely controlling.

Lamb showed that the requested relief were the only professional way to treat her. She would still fail the second arm of the deliberate indifference test (subjective disregard of the serious need), if the defendants believed in their professional opinions that they were not being deliberately indifferent.

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It is outrageous that a U.S. Court of Appeals reaffirms a 32-year-old decision affecting inmates in six states based on “reports” turned into affidavits in a pro se case – without discovery, plaintiff’s experts, or a trial or hearing or oral argument of any kind on an issue on which there has been a tsunami of change.

Lamb filed a pro se petition for rehearing en banc. After Lamb’s petition for rehearing was filed, PACER shows that the Tenth Circuit was bombarded with half a dozen amicus briefs in support, from the ACLU, Lambda Legal, Transgender Law Center, and the like. The court accepted the amicus briefs (but not Lamb’s – see below), and it modified the opinion a bit, with the same voting. The Tenth Circuit judges were not polled for en banc consideration because no active judge or panel member requested it.

The revised opinion, found at 2018 U.S. App. LEXIS 22692, 2018 WL 3863340 (10th Cir., August 15, 2018), deletes the sections referring to scientific advances not justifying review of precedent (here, Supre), including the sarcastic reference to the plurality in Casey saving the central holding of Roe. It also deletes sections (and footnotes) referring to the absence of medical consensus on treatment for gender dysphoria. It adds language about the inadequacy of the summary judgment record to show deliberate indifference and the “sparseness of the summary judgment record.” The lacunae did not, however, lead the court to remand. It still found no error in the truncation of discovery.

Michelle Lamb’s brief was not accepted for filing because it “arrived” the day after the revised opinion was issued. She posted it, however, six days earlier. It should have been considered under the “mailbox rule” – which treats the day prisoners put legal papers in the hands of prison officials to mail as the date of filing under Houston v. Lack, 487 U.S. 266, 268 (1988); see also Hall v. Scott, 292 F.3d 1265, 1266 (10th Cir. 2002) (reversing dismissal of habeas petition as untimely when inmate gave it to prison officials for mailing within deadline).

The refusal to accept Lamb’s brief is unfortunate as well as wrong, because the court’s revised opinion cured nothing, despite the best efforts of amici, which proved to be too late. The court’s revised opinion bolsters the argument for remand (but not in fact or effect) from Lamb’s three-page brief found in PACER. She wrote: “(a) justice would have better served [sic] if I had been represented by an attorney in the District Court; (b) The medical and treatment records in this case have not been fully developed; and (c) The question as to what treatment is ‘adequate treatment’ has not been answered. This Honorable Court cannot determine from the medical and treatment records in this case: (1) What medical authority the Defendants ‘adequate treatment’ is derived from, and (2) What that treatment actually constitutes?” She concludes: “I would hope that before this Honorable Court gives the Defendants carte blanche to provide transgenders with treatment, that this court find out what unrestricted discretion is being given, and it is not possible from the current records to be able to determine that.”

Lamb does not cite any cases, but her eloquent plea shows exactly what went wrong here. This is a very unfortunate decision. The 10th Circuit should be ashamed of how it continues to mishandle this case.
North Dakota Supreme Court Affirms Trial Court’s Refusal to Award Spousal Support to a Lesbian Who Divorced Her Husband after Renouncing Sex with Men

By Arthur S. Leonard

The Supreme Court of North Dakota affirmed a ruling by Divide County District Judge Paul W. Jacobson denying spousal support to Tamra L. Knudson, a lesbian who divorced her husband after about 18 years of marriage after she had an affair with a woman and declared she had no interest in having a sexual relationship with any man. Judge Jacobson weighed heavily as factors in denying spousal support that Tamra knew she was a lesbian before the marriage but did not disclose this fact to her fiancé, Mark D. Knudson, and that her affair with a woman and renunciation of sex with her husband led to the breakdown of the marriage. The “overarching factor,” however, was the Jacobson's conclusion that the distribution of assets left Tamra in a much stronger financial position than Mark; she didn’t need the money, while he would have difficulty paying it. Knudson v. Knudson, 2018 WL 4087946, 2018 ND 199 (N.D., August 28, 2018).

The parties married in October 1998, having executed a pre-nuptial agreement under which Tamra would receive substantial funds and other assets upon a breakup of the marriage. Of course, Mark was unaware that she was a lesbian when the pre-nup was negotiated and signed. She had a child from a prior relationship, who Mark later adopted, and they had three children together, all of whom were minors at the time Tamra filed for divorce (but the oldest was already 17 and a high school senior). Many issues were settled prior to the divorce proceeding, and neither party was contesting the validity of the pre-nup, although Tamra contested the court’s decision to order her to pay child support to Mark, who was awarded primary custody of the minor children.

Tamra sought spousal support, which Mark opposed on several grounds, not least that under the pre-nup she was walking away from the marriage with substantial funds. According to Judge Jacobson’s opinion, totaling up everything, “Through the property and debt division, Tamra receives assets valued at over $1,233,000, exclusive of her household property items, the value of the Las Vegas timeshare, and the value of her life estate interest in the five quarter sections of farmland. Tamra does not receive any marital debt in the agreement and did not have any debt at the time of the trial.” In the last full tax year before this proceeding, Tamra’s income was $316,317.00, while Mark’s was $90,981.00. Some of her income derived from royalties from a producing oil well on land she owned. One might observe that there was some chutzpah involved in her holding out for spousal support, and the trial court put great weight on the conclusion that she could get along just fine without support payments from Mark, who had significantly less income as a farmer.

But in weighing the factors specified under North Dakota law to determine whether a divorcing spouse should be ordered to make support payments, the court also focused on “marital conduct.” Wrote Jacobson in his opinion, which was quoted by Supreme Court Justice Lisa K. Fair McEvers, “Tamra’s marital fault is also afforded substantial weight by the Court in denying her claim for spousal support. Tamra’s failure to inform Mark of her lesbian sexual orientation prior to the marriage is an important fact that she should have made Mark aware of prior to the marriage, and was a substantial factor in the failure of the party’s marriage. Additionally, Tamra engaged in an extramarital affair which was a proximate cause of the parties’ divorce.” In appeal the denial of support, wrote Justice McEvers, “She claims she created a family with Mark Knudson, helped him to build the farming operation, maintained a home, and care for members of their extended family, and the fact that she was privately gay is irrelevant. She contends her failure to disclose her sexual identity or being homosexual are not legitimate grounds for finding non-economic fault and the court erred by relying on those factors to deny her request for spousal support.”

The Supreme Court agreed with Tamra that “a party’s sexual orientation itself is not an appropriate factor to consider in deciding whether to award spousal support;” but insisted that this was not the basis of the trial court’s decision, asserting that “the district court did not find Tamra Knudson’s sexual orientation constituted non-economic fault. Rather, the court found she engaged in an extra-marital affair and the affair was the proximate cause of the divorce and constituted non-economic fault. This Court has
previously indicated it is appropriate for the district court to consider this type of non-economic fault in deciding whether to award spousal support.”

“There was no specific testimony that Tamra Knudson’s decision not to disclose information about her sexual orientation before the parties married was a factor in the breakdown of the marriage,” wrote Justice McEvers. “However, it is a reasonable inference that Tamra Knudson’s failure to disclose her sexual orientation before the marriage contributed to its demise, when she testified she never wanted to be intimate with a man again. Even if we disagreed with the court on the inference drawn from the evidence, it is only one factor in the court’s analysis and standing alone does not persuade us the district court’s decision to deny spousal support was clearly erroneous.” Indeed, in concluding this part of its decision, the court emphasized that the trial court’s “overarching finding was that Mark Knudson did not have the ability to pay spousal support and Tamra Knudson did not have a need for the spousal support after receiving the property awarded to her,” and the court found that the evidence supported this finding. After reviewing the evidence, wrote McEvers, “we are not left with a definite and firm conviction that a mistake has been made,” which required rejecting the appeal under the standard that the trial court’s decision could only be reversed if found to be “clearly erroneous.”

The court also rejected a challenge by Tamra to the trial court’s calculation of her child support obligation. Although the decision was unanimous, the opinion for the court by McEvers was signed by only two of the other justices, the remaining two merely indicating that they concurred in the result. They did not write separately, so there is no indication whether they abstained from signing the opinion because of the court’s discussion of the sexual orientation issue.

Tamra Knudson is represented by Elizabeth L. Pendel of Crosby, N.D., and Mark by David M. Knoll of Bismarck.

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**7th Circuit Panel Blasts Corrections Staff for Delays in Responding to Inmate’s Gender Dysphoria**

*By William J. Rold*

Wisconsin transgender inmate Lisa Mitchell, a/k/a Roy A. Mitchell, Jr., the plaintiff in *Mitchell v. Kallas*, 2018 U.S. App. LEXIS 18722, 2018 WL 3359113 (7th Cir., July 10, 2018), has been litigating for years about her right to treatment while in the criminal justice system, but she has identified as a woman for her entire life. Her litigation history goes back at least to 2012, see, e.g., “Wisconsin Transgender Inmate Who Waited Over a Year for Evaluation for Hormones Loses Summary Judgment on Failure to Treat Damages Claims” (October 2016 *Law Notes* at pages 424-5) (recounting history).

One of the key problems she has faced is her movement between state custody, county jails, parole, and homelessness in fairly rapid succession, given the pace of litigation. After her loss due to a break in custody, her appeal to the Seventh Circuit was dismissed without prejudice on mootness grounds in 2015 because she was on parole by the time it was before the court. See *Mitchell v. Wall*, 2015 WL 9309923 (7th Cir., December 23, 2015), reported in *Law Notes* (January 2016 at page 34).

After she was newly incarcerated and went back to court, District Judge William M. Conley granted summary judgment on qualified immunity for damages against the mental health director and to the prison psychologist on the subjective component of deliberate indifference; and he ruled that the parole officers were not properly joined in the same case. Meanwhile, Mitchell has been paroled again. Still *pro se*, she filed a separate case against the parole officers; and, in *Mitchell v. Wasserberg*, 2018 U.S. Dist. LEXIS 12870 (W.D. Wisc., January 23, 2018), Judge Conley allowed her to proceed against parole officers who interfered with her post-release arrangements for hormones and for living as a woman. (*Law Notes*, February 2018 at pages 95-6).

Her second appeal, resulting in the most recent 7th Circuit decision on July 10, 2018, deals with the dismissal of the state defendants on qualified immunity and the joinder of the parole defendants in the same suit. Chief Circuit Judge Diane P. Wood (Clinton), writing for herself and Circuit Judge David F. Hamilton (Obama) and N.D. Illinois District Judge Elaine E. Bucklo, by designation (Clinton), affirmed in part, reversed in part, and remanded.

Having the case before them for the second time, the court found that Mitchell’s long odyssey should not be balkanized into separate components with nobody ultimately responsible for her deprivation of treatment. This time, the court vacated the briefing, appointed counsel, and heard oral argument. Mitchell is represented by Nicole Jakubowski of Skadden Arps, LLP, Chicago. [Compare the Tenth Circuit’s treatment of a *pro se* transgender inmate’s health claims in *Lamb v. Norwood*, reported above in this issue of *Law Notes*.]

The Circuit affirms the dismissal of the prison psychologist for multiple reasons: she was not on the statewide Gender Dysphoria Committee, she saw Mitchell infrequently, she was not responsible for the delays in evaluation for hormones or for their denial, since she could not prescribe them herself. [In this writers’ view, the last point is a bit of a dodge, since doctor-level psychologists, particularly in prisons, have relationships with physicians, physician’s assistants, and nurse practitioners, who can prescribe. It more accurately reflects the court’s acceptance of the use of a Gender Dysphoria Committee as a gatekeeper, rather than a realistic reflection of how mental health medications are delivered in prisons.]
The statewide Mental Health Director, Dr. Kevin Kallas, however, does not fare so well. Mitchell’s admittedly serious condition persisted too long without treatment, and the law in the 7th Circuit was settled enough on denial of treatment for gender dysphoria to give Dr. Kallas no refuge in the subjective element of deliberate indifference. While the court does not find a controlling case on the delay for assessment by the Gender Dysphoria Committee (some 13 months), it nevertheless soundly disapproves this delay: “That is not to say that this delay cannot be criticized. Far from it. The lack of any sense of urgency, or even of the need for prompt follow through, is quite disturbing. But on these facts, no clearly established law would have signaled to Dr. Kallas that this delay amounted to deliberate indifference.” By taking up the constitutional standard as well as whether it was clearly established, the court has fired a shot across the bow in the Seventh Circuit: With this decision, there is now clearly established law – not only on gender dysphoria treatment, but also on delay in evaluation for such treatment – and individual treating doctors cannot hide behind central office committees’ “assessments” to cloak their deliberate indifference from personal suit, when such delays occur in the future.

Moreover, the court found that Dr. Kallas did not act even after the Gender Dysphoria Committee approved a months-old recommendation for hormones, invoking a Wisconsin “rule” that hormones could not be initiated within six months of an inmate’s release. The court found it “conspicuous” that no such rule existed in writing, since the Committee regulations were “newly minted.” It is a jury question whether there is such a practice and whether its application resulted in an absence of professional medical judgment in Mitchell’s case. “The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment,” wrote Chief Judge Wood. The court also referred to many illness and conditions for which treatment could not be completed in the six months prior to release, but as to which sound medical judgment would dictate treatment beginning, even if follow-up had to occur after release.

The Seventh Circuit departed from its usual practice of not clustering inmate claims involving clearly different defendants – George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) – when it held here that the parole officers should have been kept in the case. Going back to the seminal decision on deliberate indifference, it cited Estelle v. Gamble, 427 U.S. 97, 104-5 (1976), where the Supreme Court clearly said that the deliberate indifference standard applies to more than just medical staff. It also applies to deliberate indifference “by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”

Here, Mitchell was released with a community referral for hormones, but parole officers “flatly forbade her from seeking hormone therapy. Indeed, as a condition of her parole, she was required to dress and present as a man. Though Mitchell provided the agents with a copy of Osborne’s [state’s expert’s] report and recommendations, the officers did not relent.” The officers did not have a duty to arrange her care, but they did have an obligation not to interfere with it by imposing this condition on her parole. “Mitchell repeatedly between custody and parole. Her claims are “sufficiently related” for F.R.C.P. 20(a)(2), and “it is easy to imagine that if the claims were tried separately, each set of defendants could try to shift blame to the other.”

The Court concludes: “Punishment for Mitchell’s crimes cannot extend to the deprivation of the medical treatment she requires for her serious gender dysphoria. The Wisconsin DOC staff must approach Mitchell’s request for treating gender dysphoria with the same urgency and care as it would any other serious medical condition.” There is a lot to chew on here. For an application of this ruling by a district judge just days later, see Norwood v. Kallas, reported in Prisoner Litigation Notes (Wisconsin) below.

With this decision, there is now clearly established law – not only on gender dysphoria treatment, but also on delay in evaluation for such treatment – and individual treating doctors cannot hide behind central office committees’ “assessments” to cloak their deliberate indifference from personal suit, when such delays occur in the future.
New Jersey Appeals Court Rules Lesbian Co-Parent May Seek “Bystander” Emotional Distress Compensation for Death of Child She was Raising with Her Same-Sex Partner

By Arthur S. Leonard

The New Jersey Appellate Division, the state’s intermediate appeals court, issued an important decision on August 17 expanding the range of “bystanders” to whom negligent actors may have liability for causing emotional distress to include non-marital same-sex families. A unanimous three-judge panel, taking account of the momentous developments in public attitudes about LGBT families over the past 38 years, ruled in Moreland v. Parks, 2018 WL 3945312, 2018 N.J. Super. LEXIS 120, that the lesbian co-parent of a young child who died as a consequence of a tragic traffic incident should not have been dismissed from the case by a Mercer County trial judge.

It was as recently as 1980 that the New Jersey Supreme Court first recognized, in the case of Portee v. Jaffee, 84 N.J. 88, that a mother who witnessed the agonizing death of her young son, who had become trapped between an elevator’s outer doors and the wall of the elevator shaft, could sue for the emotional distress she suffered due to the negligence of the defendant building owners and the elevator company in causing her son’s death. Through a slow process of doctrinal evolution, the courts have gradually shed their earlier reluctance to award damages for emotional distress to people who had not themselves suffered a direct physical injury, but the courts were cautious about expanding the range of such potential liability.

Portee is New Jersey’s controlling state Supreme Court precedent in “bystander” cases, and the Portee court ruled that bystanders eligible to seek compensation for severe emotional distress in such cases should be limited to “a marital or intimate, familial relationship between the plaintiff and the injured person.” In a further development in New Jersey law, the Supreme Court ruled in Dunphy v. Gregor, 136 N.J. 99 (1994), that the fiancé of a man killed in a traffic incident, who had witnessed the vehicle strike his body and attempted to comfort him while awaiting an ambulance, could sue the driver of the vehicle for negligent infliction of emotional distress, even though couple were not yet legally married. The court emphasized that they were cohabiting and engaged to be married at the time, and considered this a sufficient “familial relationship.”

In the Moreland case decided on August 17, co-plaintiff Valerie Benning was standing on a street corner with her then-same-sex partner (now spouse), I’Asia Moreland and their children. Benning and Moreland had been living together for seventeen months, and were jointly raising Moreland’s two children (who were born before their relationship began) and Benning’s young godson. Benning was holding the hand of two-year-old L’Maya as they waited for the traffic signal to change so they could cross the street to attend the “Disney on Ice” show playing at the Sun Bank Arts Center in Trenton. Suddenly, a fire truck collided in the intersection with a pickup truck, and the pickup truck struck L’Maya, who was “propelled” sixty-five feet south of the intersection, and who later died from her injuries in the hospital.

Benning was also knocked down, and the next thing she remembered was lying on the ground and the confused panic that ensued around her, struggling to her feet and running towards L’Maya and hearing screaming from observers of the scene, then the ambulance trip to the hospital and the hysteria she suffered upon learning L’Maya was dead. The opinion quotes extensively from her deposition describing her experience, and the emotional and psychological trauma she suffered.

Moreland and Benning filed suit against multiple defendants, claiming a variety of damages. The Appellate Division’s ruling was about the trial judge’s decision to grant the defendants’ motion to dismiss Benning’s claim for compensation for the emotional distress she suffered as a “bystander” to the events causing L’Maya’s death.

At the time of this incident in 2009, Moreland and Benning were not legally related to each other, and Benning was not legally related to L’Maya. (Marriage equality did not come to New Jersey until several years later, at which time the women did marry, but as of 2009 they had not registered as N.J. civil union partners.)

The trial judge had to determine whether Benning’s relationship to L’Maya came within the scope of the New Jersey Supreme Court’s ruling in Portee, of an “intimate, familial relationship between plaintiff and the injured person.” The trial judge, who is not named in the court’s opinion, said that an “intimate” relationship would not “suffice” unless it could be considered “familial.” “There is a requirement that they have to be family,” wrote the judge. “Portee talks about familial relationship but it didn’t say family-ish or something similar to a family. It says familial and there are cases that must use the word family. It has to be family and there’s no question of fact that Ms. Benning was not. The evidence is that she was a girlfriend and she might have been part of the child’s household, but by any definition that I can find in the law about family, Ms. Benning doesn’t meet it. The undisputed facts are that she was neither a biological or adoptive parent.”

The judge also noted the lack of any expert psychological testimony. To the trial judge, it wasn’t enough that there was evidence that within weeks of Benning and Moreland living together, L’Maya had begun referring to Benning as “mom.” Said the judge, “just using the word mom all by itself doesn’t count for much, whether there’s a secure relationship, a bonded relationship, a reliant relationship,
whether this is someone that the two-year-old would have looked to for comfort, the facts just aren’t there to be able to know those things.”

The trial judge pointed out that the kind of evidence that would exist if there was a custody or visitation or adoption proceeding, such as a psychologist’s report, was unfortunately missing in this case.

The court also distinguished the Dunphy case, writing, “Ms. Moreland and Ms. Benning weren’t even engaged at the time. I understand the laws regarding same sex relationships had change over time but there was a statute that did allow for that in New Jersey and whether they could have availed themselves of any such laws in other jurisdictions hasn’t been addressed in any of the papers” submitted to the court. In ruling to dismiss the claim, the trial judge wrote, “Ms. Benning was a part of a very small child’s life for 17 months at most. There’s no evidence that there was any permanent bond or that the relationship that she shared with the decedent was one that was deep, lasting, and genuinely intimate.”

Benning’s lawyer argued that dismissing this claim was inappropriate, because the question of “familial relationship” required a full hearing of the facts about this relationship, and should not be disposed of as a “matter of law” without an opportunity for such a hearing. They asked the Appellate Division to review this dismissal of the claim, but at first it refused to do so. Then they appealed to the New Jersey Supreme Court, which directed the Appellate Division to accept the appeal, solely to address the question “whether Benning falls within the class of litigants entitled to bring a civil action against defendants under the tort of negligent infliction of emotional distress.”

Writing for the Appellate Division panel, Judge Jose L. Fuentes traced the development of this legal doctrine in New Jersey through Portee and Dunphy, writing, “Critical to our analysis here is not only the Dunphy Court’s unambiguous rejection of any attempt to restrict the claimants to married persons, but also the articulation of the public policy underpinning the tort itself: ‘The basis for that protection is the existence of an intimate familial relationship with the victim of the negligence . . . . When that emotional security is devastated because one witnesses, in close and direct proximity, an accident resulting in the wrongful death or grievous bodily injury of a person with whom one shares an intimate familial relationship, the infliction of that severe emotional injury may be the basis of recovery against the wrongdoer.’”

The Appellate Division concluded that Benning had “presented sufficient evidence from which a jury could find that she and two-year-old L’Maya had an intimate familial relationship at the time of the child’s tragic death.” The trial court’s job in ruling on this type of motion was to view the evidence presented up to that point in “the light most favorable to the non-moving party,” and to ask whether a jury could conclude from that evidence that Benning and L’Maya had a familial relationship. “A rational jury can find that Benning was a de facto mother to this child, and felt her loss as deeply as any parent facing that horrific event,” wrote Judge Fuentes. “Benning’s deposition testimony supports this finding.”

Fuentes’ opinion noted how social change has expanded the public’s understanding far beyond what it was when Portee was decided in 1980. “Thirty-eight years ago,” he wrote, “gay, lesbian, and transgender people were socially shunned and legally unprotected against invidious discrimination in employment, housing, and places of public accommodation under our State’s Law Against Discrimination. The notion of same-sex couples and their children constituting a ‘familial relationship’ worthy of legal recognition was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd. The overwhelming majority of our fellow citizens now unequivocally reject this shameful, morally untenable bigotry; our laws, both legislatively and through judicial decisions, now recognize and protect the rights of LGBTQ people to equal dignity and treatment under law.”

The court emphasized that “what constitutes a ‘familial relationship’ is perform a fact-sensitive analysis, driven by evolving social and moral forces,” so to rely on the understandings prevailing when Portee was decided was inappropriate, and the trial judge should have denied the defendants’ motion and given Benning an opportunity to provide more evidence about the nature of the relationship. The court suggested that Benning would have been “better served” had her counsel introduced evidence in opposition to the defendants’ motion “with certifications from individuals who knew and saw these two women interact with these children on a day-to-day basis,” as this could have “assisted the motion judge in his decision.”

The opinion sets a statewide precedent unless it is reversed or modified by the New Jersey Supreme Court.

Benning was represented on appeal by Robin Kay Lord, with Clifford D. Bidlingmaier III, of Kardos, Rickles, Hand & Bidlingmaier, assisting on the brief. The case attracted amicus participation in briefing and arguing the appeal from Garden State Equality, New Jersey’s state LGBT rights organization, represented by Jennifer L. Hamilton, and from the New Jersey State Bar Association, whose out gay former president Tom Prol also presented a brief and oral argument. ■
D.C. Dist. Ct. Allows Title VII Sexual Orientation Claims to Proceed

By Timothy Ramos

The Second and Seventh Circuits of the U.S. Courts of Appeals have split from other circuits by finding that Title VII of the Civil Rights Act of 1964, which prohibits discrimination against employees on the basis of sex, also prohibits discrimination on the basis of sexual orientation. In doing so, the two circuits overruled precedential cases based upon weak arguments such as Congress’s use of the word “sex” rather than “sexual orientation” and its inaction to add sexual orientation as a protected class under Title VII. Several other circuits are expected to review the issue soon, and the U.S. Supreme Court must ultimately resolve the deepening split between the circuits.

Until the courts catch up, it appears that litigants are more ready to presume that sexual orientation discrimination claims will be treated as a form of sex discrimination claims under Title VII. As noted by U.S. District Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia, although the D.C. Circuit has not yet confronted the question of whether Title VII prohibits discrimination on the basis of sexual orientation, the district court did not have to decide on the issue in the case at hand because both parties assumed Title VII would do so. Williams v. Dist. Of Columbia, 2018 U.S. Dist. LEXIS 109515 (June 30, 2018). In Williams, Judge Sullivan granted the Metropolitan Police Department’s (MPD) motion to dismiss the plaintiff’s claim of hostile work environment, while denying MPD’s motion to dismiss the plaintiff’s claims of sexual orientation discrimination and retaliation under Title VII and the District of Columbia Human Rights Act (“DCHRA”).

Oscar Williams is a married gay man who applied for a supervisory position at MPD in 2016. He was hired on May 5, 2016, subject to a background check. Two months later, MPD’s Human Resource Specialist Marie Dawkins called Williams to notify him that he had passed the background check. It was during this telephone call that Williams mentioned he had a partner, and subsequently clarified to Dawkins that he was gay. Dawkins reacted negatively to Williams’s revelation and denied his inquiry as to whether he could negotiate his salary. Williams subsequently complained to MPD’s Human Resource Department and Operation Manager Lennie Moore regarding Dawkins’s offensive response.

On August 5, 2016, Moore told Williams that, due to Dawkins’s mishandling of paperwork, the position Williams was offered had been reposted and Williams would need to re-apply and re-interview for it. In the meantime, Williams accepted Moore’s offer of a “non-competitive career service appointment” position. One month later, Dawkins notified Williams that all interviews for the supervisory position he applied for were cancelled and that he would receive a call if they were rescheduled; Moore later told Williams that Dawkins once again incorrectly handled the matter. At least twice during this period, Moore also told Williams that Dawkins was “not very fond” of and “not friendly” towards gay men. Ultimately, the supervisory position went to another employee, Lamont Mahone, whom Williams believes to be a heterosexual man. MPD then terminated Williams’s employment on September 30, 2016. During his meeting with Sergeant George Bernard, Williams learned that the purported reason for his termination was because he was “not a DC resident when he began employment and that ‘maybe’ the background check was unsuccessful.” However, these reasons were different than the ones listed in the written confirmation that Williams later received.

Williams’s amended complaint alleged that MPD violated Title VII and the DC Human Rights Act by: (1) discriminating against him on the basis of his sexual orientation; (2) retaliating against him after he complained to Human Resources; and (3) creating a hostile work environment. Because the legal standards for establishing these claims under Title VII and the DCHRA are substantively the same, Judge Sullivan analyzed the claims under both statutes together.

In order to plead a discrimination claim, Williams must allege that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. Interestingly, MPD conceded that Williams belonged to a protected class as a gay individual; if Title VII’s applicability to sexual orientation discrimination claims was at issue, MPD would have likely argued that Williams did not belong to a protected class enumerated by the statute. The only issue at hand was whether Williams sufficiently alleged facts suggesting that any adverse action he suffered was because of his sexual orientation. Judge Sullivan found that questions regarding Dawkins’s authority and the terminating officials’ knowledge of Williams’s sexual orientation are factual questions that cannot be resolved in the motion-to-dismiss stage when all reasonable inferences must be drawn to the plaintiff’s benefit. Thus, the judge denied MPD’s motion to dismiss Williams’s sexual orientation discrimination claim.

Next, Judge Sullivan addressed MPD’s motion to dismiss Williams’s claim of retaliation. In order to plead a retaliation claim, Williams must allege that: (1) he engaged in a statutorily protected activity; (2) that he suffered a materially adverse action by his employer; and (3) that a causal link connects the two. The only issue at hand was whether Williams alleged enough facts showing a causal link. Judge Sullivan rejected MPD’s contention that Williams failed his burden because he did not allege that Dawkins or the terminating officials knew he had engaged in a protected activity, i.e. making a complaint to Human Resources. Under D.C. Circuit precedent, a plaintiff is not required to allege that a specific supervisor had knowledge of protected activity to plead a claim of retaliation. See Hamilton v. Geithner, 666 F.3d 1344, 1358 (D.C. Cir. 2012). It was enough that Williams
Pro Se Prisoner Complaint Alleging Constitutional Violations for Deprivation of Gender Dysphoria Treatment Dismissed by Michigan Federal District Court

By Nan Wang and Kanishka Kewlani

A federal court in Michigan dismissed a transgender inmate’s pro se complaint claiming civil rights violations based on the alleged failure of state correctional facilities to provide treatment for gender dysphoria on August 6. In Miller v. Stevenson., 2018 U.S. Dist. LEXIS 131203, 2018 WL 3722164 (W.D. Mich.), plaintiff Kerry D. Miller alleged that the defendants, mental health professionals at the correctional institutions, violated various constitutional rights by depriving her of treatment for a serious medical need and interfering with the facilities’ grievance process.

According to the decision by Chief U.S. District Judge Robert J. Jonker, who used male pronouns to refer to Miller throughout the opinion, Miller is 58 years old and describes herself as a “preoperative male-to-female transsexual” with developed breast tissue and a “feminine demeanor.” Miller refers to herself as Ms. Nicki Nicole Summers and claims to have lived as a woman since the age of 17. Prior to incarceration for a 2008 first-degree sexual offense that involved raping a woman (and after a 1990 conviction involving repeatedly raping another woman), Miller received hormone therapy for three years in order to develop female physical characteristics. In January 2017, she requested that defendant Stevenson, a psychologist at the facility. McAuliffe also found that Miller did not meet the criteria for a GID diagnosis. Miller alleged that McAuliffe told her that “the only help that she was willing to give fags was to lock [Miller] up in protective custody.”

Miller allegedly sent McAuliffe several requests to be seen over the following months and complained of sexually inappropriate behavior by cellmates. Miller claimed that McAuliffe did not respond to any of her messages. Miller did, however, receive a message in July 2017 explaining she should refer issues with cellmates to the housing staff and should indicate in her messages any specific mental issues she may have been having.

On September 16, 2017, Miller filed a grievance asking for another evaluation for GID. Less than two weeks later, she met with another psychiatrist, and, in October, was assessed by a physician. The physician promised to provide Miller a treatment plan and referred her to a psychiatrist for a GID assessment. The next month, a psychiatrist performed the GID assessment. About five months later, in April 2018, Miller received the management plan, including a special accommodation for “relative privacy” in the showers.
Miller sued under 42 U.S.C. § 1983, claiming that the defendants (1) deprived her of treatment for a serious medical need, in violation of the Eighth Amendment, (2) denied her the right to equal protection under the Fourteenth Amendment by refusing to treat her with hormones, (3) violated her right under the First Amendment to petition the government for redress of grievances by interfering with the institutional grievance process, and (4) failed to comply with the Michigan Department of Corrections (MDOC) policy on the assessment and treatment of prisoners with GID. Miller sought injunctive relief requiring officials to provide her hormone treatment, castration, access to women’s undergarments, single-cell housing, and a private shower. She also sought damages of $200,000 per defendant.

Judge Jonker dismissed each of the counts for failure to state a claim upon which relief could be granted.

**EIGHTH AMENDMENT CLAIMS** – The court explained that a viable Eighth Amendment claim must allege a sufficiently serious risk to health or safety, as well as deliberate indifference by the defendant official. The judge found two possible Eighth Amendment claims in Miller’s allegations: that officials did not provide treatment for his GID and that they did not respond to his concerns about his cellmate.

As to the GID-related claim, the court recognized that gender dysphoria has been found to be a serious medical need and, therefore, deprivation of necessary treatment could constitute an Eighth Amendment violation. The court found, however, that Miller’s allegations did not indicate deliberate indifference by the defendants. The decision explained that if “a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.” The court noted that Miller had been evaluated for GID multiple times and received a treatment plan, actions it found to be inconsistent with deliberate indifference.

The court also found no facts supporting an inference that the need for immediate care (such as hormone treatment) would have been obvious and that, therefore, a failure to treat would have been deliberately indifferent. “The fact that Plaintiff has a feminine appearance or that he referred to himself as a woman at his evaluation does not,” wrote the court, “necessarily mean that he has a persistent desire to be a woman or that he has significant discomfort with his physical features.” The court noted both that Miller was incarcerated for years before requesting an evaluation for GID and that Miller’s two prior convictions for sexual offenses involving raping women “discredit his claim that he is uncomfortable with his male body parts.”

As to the Eighth Amendment claim that defendants failed to respond to plaintiff’s safety concerns about his cellmates, the court found that the mental health professionals to whom Miller complained were not responsible for cell conditions or physical safety vis-à-vis other prisoners. The court also found that defendants directed Miller to other officials to handle the complaint, and therefore did not display deliberate indifference. Further, the court found that Miller’s allegations about cellmates’ conduct (that one was masturbating near her and touching her breast, that another was behaving “inappropriately,” and that another had touched her “inappropriately” in the past) did not suggest that Miller was at risk of physical harm.

**EQUAL PROTECTION CLAIMS** – The court applied rational-basis scrutiny to the defendants’ denial of hormone therapy to Miller, as it found no fundamental right implicated, and Miller did not assert suspect-class membership. Under that standard, the court explained, Miller was required to demonstrate that the state intentionally and arbitrarily discriminated and treated her differently than others similarly situated. The judge found Miller’s equal-protection claim “wholly conclusory,” as she did not allege any facts supporting the assertion that she was treated differently from similarly-situated prisoners.

**FIRST AMENDMENT** – Miller claim that defendants violated his First Amendment right to petition the government for redress of grievances by interfering with the prison grievance process through concealing constitutional violations. The court found the claim both conclusory and meritless. The decision concludes that the complaint contains no allegations regarding concealment, and explained that interference with the grievance process does not deprive a prisoner of the right to seek redress for grievances if other avenues, such as filing a lawsuit, are available.

**CORRECTIONS DEPT. POLICY** – The court explained that § 1983 applies only to violations of federal law, so a claim based on defendants’ alleged failure to comply with prison policy would have to rise to the level of a constitutional violation for the claim to be viable. The court found that Miller’s allegation that she met all the requirements for GID under the policy, yet defendants deliberately refused to recognize her condition, did not state a constitutional violation. The court explained that, whatever claim Miller might have under state law, a policy directive does not create a protectable liberty interest under the federal constitution.

This decision is yet another example of the importance of pleading sufficient facts to state a viable claim for violation of constitutional rights in a § 1983 case, and the difficulties pro se litigants confront in doing so. This is particularly so for an Eighth Amendment claim related to health care treatment, since specific allegations of deliberate indifference by prison officials are required for a claim to survive a motion to dismiss.

Judge Jonker was appointed to the court by President George W. Bush. ■

Nan Wang and Kanishka Kewlani are attorneys at Kobre & Kim LLP.
Wisconsin Federal Judge Issues Transphobic Decisions Denying Transgender Inmate Access to Court under “Three Strikes” Rule

By William J. Rold

This is another case involving a pro se transgender inmate, Chesly Norwood, Wisconsin’s Dr. Kevin Kallas, and the state’s “Gender Dysphoria Committee.” Chief U.S. District Judge William C. Griesbach (George W. Bush) originally granted Charles L. Norwood, a/k/a Chesly Norwood, permission to proceed in forma pauperis on a claim of deliberate indifference to her gender dysphoria by the denial to her of hormone treatment. In Norwood v. Kallas, 2018 U.S. Dist. LEXIS 143984 (E.D. Wisc., August 24, 2018), in the most flagrantly hostile opinion on transgender care this writer has seen, Judge Griesbach vacated his IFP order because Norwood had three strikes from prior cases. The history was apparently unearthed sua sponte, because the state defendants had filed no substantive papers at the time of the ruling, according to PACER, and Judge Griesbach wrote in his decision: “It has come to the court’s attention that Plaintiff has acquired three strikes under 28 U.S.C. §1915(g).” He cited cases from the Western District of Wisconsin, all dating from 2004.

Norwood asked for reconsideration, invoking the exception to the three strikes rule in § 1915(g) for inmates facing “imminent danger of serious physical injury,” noting that she has attempted suicide twice and that she was having suicidal ideation at the time of her filing the instant case. Judge Griesbach found that Norwood’s prior suicide attempts were too remote to be imminent.

Norwood asked for reconsideration, invoking the exception to the three strikes rule in § 1915(g) for inmates facing “imminent danger of serious physical injury,” noting that she has attempted suicide twice and that she was having suicidal ideation at the time of her filing the instant case. Judge Griesbach found that Norwood’s prior suicide attempts were too remote to be imminent.

interventions have psychological benefits;”’ quoting Mayer & McHugh, Special Report: Sexuality and Gender – Findings from the Biological, Psychological, and Social Sciences, THE NEW ATLANTIS: A JOURNAL OF TECHNOLOGY AND SOCIETY (Fall 2016). Mayer & McHugh’s tract has been widely criticized by the LGBT community and others as unscientific and unsupported by peer review. THE NEW ATLANTIS, approximately fifteen years old, is regarded as a fundamentalist and libertarian fringe publication. For a federal judge to rely upon it to support a ruling that spells the death knell for a prisoner’s pro se case in a non-adversarial setting violated both the rules of judicial notice under F.R.C.P. 201 and the gatekeeping standards for expert opinion of Daubert v. Merrell Dow, 509 U.S. 579 (1993).

At one point, Judge Griesbach suggests that Norwood’s argument for “imminent danger” is “ridiculous,” citing Heimermann v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003). Heimermann gave as an example of “ridiculous” the claim that past forcing of an inmate to work in inclement weather constituted imminent danger.

Norwood filed a new case against the same parties (with a new docket number) after losing her bid for reconsideration. She adds grooming claims, including electrolysis, pleading that the failure to allow her to present as a woman exacerbates her gender dysphoria, increasing her risk of self-harm and therefore imminent danger. Two days later, Judge Griesbach also denied in forma pauperis in the new case, Norwood v. Kallas, 2018 U.S. Dist. LEXIS 149038 (E.D. Wisc., August 31, 2018), again finding no imminent danger exception, relying on Sanders v. Melvin, 873 F.3d 957, 961 (7th Cir. 2017). In Sanders, the plaintiff had a history of two suicide attempts and one of self-harm, which he attributed to extended solitary confinement in a mental health unit. The 7th Circuit reversed the District Court’s use of a “self-serving” characterization of pleadings to reject the “imminent danger” exception to three strikes, observing that “Everything a litigant says in support of a claim is self-serving” – id. at 960 – and that this is no justification for disregarding such statements at the pleading stage. Sanders held that the “flirtation with a doctrine that allows judges to disregard self-serving statements” is forbidden by Hill v. Tangherlini, 724 F.3d 965, 967 (7th Cir. 2013), which overruled any precedents that “so much as hinted in that direction.”
Judge Griesbach found Sanders inapplicable by focusing on the grooming claims as not “serious” and again called the plaintiff “manipulative,” although her mental health history and diagnosis are remarkably similar to Sanders’. Judge Griesbach ruled that imminent danger can be found only if the mental illness that is producing the self-harm is so severe that it has “robbed the inmate of their faculties.” Nothing in Sanders says this, and Sanders was not reduced to proceeding through a guardian ad litem. Judge Griesbach writes, quoting his own decision in Taylor v. Wausau Underwriters, 423 F.Supp.2d 882, 888 (E.D. Wisc., 2006) – where he granted summary judgment for prison defendants after finding that the decedent made a rational choice to kill himself – that the law “assumes” a person is “responsible for his own intentional acts.” He takes support for this view from the Supreme Court’s ruling that the U.S. Attorney General could not prosecute doctors under the Controlled Substances Act when they prescribed life-ending drugs in states in which assisted suicide is legal. Gonzalez v. Oregon, 546 U.S. 243, 275 (2006).

Judge Griesbach is “Through the Looking Glass” on both cases. The state did not create the despair and shame that led the inmate facing life imprisonment for despicable crimes to take his life in Taylor, nor did it create the terminal illness that led to a choice of assisted suicide in Gonzalez. If there is a dividing line here, Sanders and Norwood are on the other side of it, particularly at the pleading stage. These two decisions (both of which remain on the books) call to mind the prescient words of the late Vincent Nathan, who had served as special master in prison health cases in Texas, Puerto Rico, and California: “The death records maintained in prisons throughout this county provide eloquent, if mute, evidence of malingerers whose fabricated complaints proved to be fatal.” “Guest Editorial,” 5 JOURNAL OF PRISON & JAIL HEALTH (1985) at 9. ■

Hong Kong’s Top Court Puts the Government on Notice that Differential Treatment for LGBTQ People in Administrative Determinations on Dependent Visas Requires Adequate Justification

By Vito John Marzano

On July 4, 2018, the Court of Final Appeal, Hong Kong’s top court, unanimously held that a person living and working in the special administrative region can sponsor a dependent visa for their same-sex spouse under Hong Kong’s immigration law. QT v. Director of Immigration [2018] HKCFA 28). The Court concluded that the Policy of the Director of Immigration that excluded a person in a foreign same-sex civil partnership or marriage from sponsoring their partner’s dependent visa on the basis that Hong Kong law does not recognize their union lacked a rational connection to the Director’s legitimate aims in strictly controlling immigration while attracting talented workers.

By way of background, Hong Kong retains authority over many aspects of immigration as part of the “one country, two systems” framework employed by China and Hong Kong. As it relates to the current case, QT and SS, both British nationals, entered a civil partnership while residing in England in 2011. Thereafter, SS relocated to Hong Kong on an employment visa, and QT followed on a visitor visa. The Director denied QT’s attempts to obtain, among others, a dependent visa, relying on the existing Policy that defined “spouse” as applying only to those persons in a marriage recognized under Hong Kong law. He explained that the Policy seeks twin aims: “(i) the encouragement of persons with needed skills and talent to join [Hong Kong’s] workforce, accompanied by their dependents; while at the same time (ii) maintaining strict immigration control.” In 2014, following another failed attempt to obtain a dependent visa, QT sought judicial review, arguing, among other things, that the Policy’s interpretation of spouse lacked a rational connection to the Director’s avowed aims, and, if rational, it resulted in unjustified discrimination that violated QT’s constitutional rights under the Hong Kong Basic Law and the Hong Kong Bill of Rights.

Reversing the Court of First Instance’s dismissal of QT’s application, the Court of Appeal concluded, among other things, that the Policy’s definition of spouse lacked the requisite rationality. After the Director appealed, several top Hong Kong financial institutions and law firms, among others, applied for leave to intervene on QT’s behalf. The Appeal Committee denied leave, on the basis that proposed gravamen duplicated a conclusion already reached by the committee: the policy had a tangible and practical limiting effect on the potential hiring pool.

Importantly, the Court of Final Appeal emphasized what this case did not concern: same-sex marriage. Neither party asserted that QT possessed a right under Hong Kong law to enter such a union, and that the statutory definition of marriage as between one man and one woman meant that marriage “is not a status open to couples of the same sex.” Notwithstanding, the Court supplied fertile ground upon which proponents of LGBTQ civil rights may seek legal recourse in the future.

The Court exercised its judicial review authority of an administrative determination or policy, which analyzes whether the same is rational and fair.
When the issue of equality arises, a determination or policy that lacks justification constitutes discrimination that cannot survive judicial scrutiny. Thus, the Court presented two questions: (1) does the Policy require justification; and, if so, (2) whether a rational connection exists to justify the differential treatment?

Regarding the first question, the Director unpersuasively argued that because the traditional understanding of spouse contemplates those in a marriage, which Hong Kong legally defines as a union of one woman and one man, and certain core rights are generally reserved for marriage, the Policy requires no justification. The Court analyzed this issue under the three types of discrimination it borrowed from European Court of Human Rights and the Privy Council of the United Kingdom. First, in the case of a foreign polygamous marriage not recognized under Hong Kong law, the Policy permitted a person to sponsor a dependent visa for one of their spouses, while it did not permit a person to sponsor the same for their same-sex partner. In both instances, the unions per se lacked recognition in Hong Kong, resulting in treating like cases differently to the detriment of QT. Second, unmarried, opposite-sex couples may overcome the spouse requirement by marrying, an avenue unavailable in Hong Kong to same-sex couples. Hence, the Director treated unlike cases as like to the detriment of QT. The Court also noted the circular fallacy of the Director’s argument – the different treatment served as the criterion to justify same – which, it held, cannot defeat justification scrutiny.

With respect to the third form, the Policy resulted in indirect discrimination based on sexual orientation. Here, the Court excepted to the core rights argument, concluding that the inquiry should not focus on whether a right qualifies as one generally reserved for married couples. Rather, the proper inquiries are: “Why should that benefit be reserved uniquely for married couples? Is there a fair and rational reason for drawing that distinction?” Compounding that assessment, it concluded that “[d]ifferences in treatment to the prejudice of a particular group require justification and cannot rest on a categorical assertion.” Hence, the core rights argument that sought to distinguish same-sex unions from heterosexual marriages was “untenable as a basis for precluding scrutiny of the Policy’s justification.”

With respect to the second question regarding justification, notwithstanding that QT satisfied the eligibility requirements but for her gender, the Director unsuccessfully contended that a bright line rule that the term spouse can only apply to those who would qualify as married under Hong Kong law furthers the goal of attracting talented workers and their dependents while maintaining strict immigration control, with the administrative convenience of such a rule also furthering those goals. The Court concluded that the Policy of the Director of Immigration that excluded a person in a foreign same-sex civil partnership or marriage from sponsoring their partner’s dependent visa on the basis that Hong Kong law does not recognize their union lacked a rational connection to the Director’s legitimate aims in strictly controlling immigration while attracting talented workers.

Contrary to the Director’s arguments, the Court concluded that a person’s sexual orientation does not inform their talent, and that the bright line rule effectively limits the potential talent by not permitting a person in a same-sex union to sponsor their partner’s dependent visa. Such a limitation does not further, but rather counters the stated aim. Moreover, there lacked a cogent argument as to how treating same-sex couples differently undermined the Director’s ability to maintain strict immigration controls. The administrative convenience position collapsed as QT and SS could, like a married heterosexual couple, produce proof of their civil partnership. Hence, the Policy lacked justification as it bore no furtherance of a legitimate aim and lacked any rational connection to the stated legitimate aim. As such, a person in a same-sex union can sponsor their partner’s dependent visa as they qualify as a spouse for the purposes of immigration.

Although the Court disposed of the matter at that juncture and declined to undertake a thorough proportionality analysis, it stated in dictum that the Policy exceeded a reasonable necessity to attain legitimate aims. In any event, the breadth of this decision remains unknown. Whether it will apply to same-sex couples who cannot or have not obtained a marriage or civil partnership from a foreign jurisdiction remains unknown. Whether this even applies to a citizen of Hong Kong, or requires them to travel abroad to obtain said proof for their foreign partner also remains unknown. However, the Court put the government of Hong Kong on notice, at least in the administrative aspect, and provided a cognizable legal argument to vindicate other rights withheld from same-sex partnerships: “Why should we be treated differently than they? Is that treatment justified?” When understood in this context, the case represents a significant milestone for LGBTQ rights in Hong Kong.

QT was represented in the Court of Final Appeal by Dinah Rose QC and Timothy Parker, instructed by Vidler & Co., assigned by the Director of Legal Aid. ■
The Perils of Pennsylvania: An HIV+ Inmate Tries to Litigate Privacy Claims in State Court

By William J. Rold

The conventional wisdom is that the New York Civil Practice Law and Rules renders mastering the CPLR among the most difficult tasks facing new lawyers in New York, but the daunting morass faced by pro se plaintiff Quinterio Smart’s attempt to navigate Pennsylvania’s civil procedures makes New York’s seem like middle school. This case is recommended primarily for Pennsylvania lawyers and advocates pursuing prisoner rights litigation in state court, since the 28-page opinion (not for publication), by Judge Patricia A. McCullough – writing for herself and for Judge Renée Cohn Jubelirer and Senior Judge James Gardner Colins, in Smart v. Commonwealth of Pennsylvania, 2018 Pa. Commw. Unpub. LEXIS 348, 2018 WL 3130997 (June 27, 2018) – turns almost entirely on tort law and the excessive hurdles that can be faced both substantively and procedurally in state court.

In general, Smart’s claim is simple: his HIV status was unlawfully revealed to other inmates and non-medical staff by defendants, who include the state, state officers and medical staff, and employees of a private health care vendor. The procedural history alone extends for five pages, followed by extensive discussion of state sovereign immunity (and its exceptions, which do not include intentional acts), and Pennsylvania torts (such as medical malpractice and negligent infliction of emotional distress).

Smart is procedurally faulted for “non pros” – which appears to apply to various types of failures to prosecute or waiver under Pennsylvania procedure. He did not make clear in a letter to the judge asking for help that he needed the court to assist him with a writ or arrangements for video appearance while incarcerated. Therefore, because he did not somehow arrange to appear himself, he failed to appear.

The appellate court sustains all of the trial court’s rulings against Smart except one: it remands for a clarification as to whether a claim against a health care administrator who disclosed Smart’s HIV status was outside the state’s sovereign immunity because there is a statutory exception for medical-professional liability claims.

The court rules the private vendor defendants are “third parties” and not state employees for purposes of state tort law – note: this is contrary to the federal civil rights rule in West v. Atkins, 472 U.S. 42, 51-2 (1988). The trial court did not strike Smart’s “implied breach of contract claim” that Correct Care breached its contract with the state, of which Smart was a third-party beneficiary, by violating his privacy. Apparently, there was no cross-appeal on this point.

The trial court struck Smart’s “certificates of merit” on medical malpractice – a requirement for professional malpractice claims in many states – because they said that expert testimony was not necessary for his privacy claim. The appeals court affirmed, writing that expert testimony was needed because the breach of privacy was an allegation of a violation of medical standards, which required expert testimony under Pennsylvania Rule 1042.3(a). In addition, the appeal on this point was in the nature of an appeal of a ruling on “non pros,” which an amendment to Pennsylvania Rule 3051 now requires first be presented to the trial court in the form of a post-judgment petition before it can be heard as a point of appeal. [Whew!] The procedural tangle notwithstanding, this writer submits that most lay people would understand a claim that a medical professional violated their medical privacy without an expert telling them they had confidentiality in their medical information – or jury instructions would suffice.

Even though it was not procedurally before them, the court discussed the merits of this point anyway, and it disagreed. It cited two decisions in support of its holding that expert testimony is required for breach of medical privacy. The first (Pennsylvania) case actually reversed a trial judge’s requirement for a certificate of merit for a suit against a landscaper who installed a sewer line on plaintiff’s property without an easement. Merlini v. Gallitzin Water Authority, 934 A.2d 100, 107 (Pa. Super. 2007). While somebody may have committed professional malpractice by misreading the plot records in the county recorder’s office, the landscaper committed simple trespass. The court analogized to a case about an assault on a hospital patient not requiring expert testimony even though it had allegations about departure from patient safety standards. The second (federal) case required expert testimony on pendent state claims of malpractice in a wrongful death action for jail health officials’ failure to recognize substance withdrawal and suicidality of a new inmate who killed himself in reception. Neither of these cases supports the court’s dicta.

After all of this, the opinion does not mention the federal right of inmates to medical privacy, including HIV information, established by the Third Circuit in Doe v. Delia, 257 F.3d 309, 314, 325 (3d Cir. 2001). It also fails to mention the “Pennsylvania Confidentiality of HIV Information Act,” and its private right of action for damages, 35 P.S. § 7610.

The opinion does not mention the federal right of inmates to medical privacy, including HIV information, established by the Third Circuit in Doe v. Delia.
Another Alabama Inmate Loses a Protection from Harm Case after Assault by Sexual Predator

By William J. Rold

U.S. Magistrate Judge Gray M. Borden’s Report and Recommendation [R & R] recommends granting summary judgment against pro se bisexual inmate Brent Jacoby on all federal claims in Jacoby v. Thomas, 2018 U.S.Dist. LEXIS 121806 (M.D. Ala., July 17, 2018). Jacoby self-describes as “very feminine” and at “greater risk of harm than other inmates.” Jacoby alleges that another inmate (Palmore) stole from him to get his attention and later assaulted him because Palmore wanted to be in a sexual relationship with Jacoby.

[T]he R & R suggests . . . a different standard of protection for LGBT inmates who fall out with a dangerous partner or who may be promiscuous.

Jacoby sued nearly everyone from line officers through the Alabama DOC Commissioner. After Jacoby reported the theft, defendants moved Palmore to an adjacent dorm. Jacoby alleges that the assault occurred because there were no video cameras and the officer on duty had not secured the doors between the dorms, allowing Palmore to roam freely. (The officer admitted seeing Palmore go into Jacoby’s dorm.)

Judge Borden ordered the defendants to respond to the complaint and to file supplemental evidence. He ordered Jacoby to respond under oath and provide counter evidence, with the warning that these documents could be converted to a motion for summary judgment. There is no reference to depositions.

Jacoby attributes the lax security to the executive defendants, who admitted staffing problems. Jacoby also alleges that failure to place Palmore in segregation (where he could not roam) after the theft violated Alabama DOC regulations and standards under the Prison Rape Elimination Act [PREA], because the theft was part of sexual extortion. [Note: Judge Borden writes in a footnote: “The complete PREA rules are not part of the summary judgment record.” They do not have to be “part” of the record; they are judicially noticeable in the Code of Federal Regulations, 28 C.F.R., Part 115.] Jacoby also notes that Palmore had been subject to prior PREA complaints and sexual harassment charges at previous Alabama institutions and was known to defendants as a predator.

Judge Borden’s 32-page opinion has lengthy factual recitation. First, he finds that, since Jacoby is at a new prison, injunctive claims are moot. As to damages, the R & R focuses on qualified immunity – here, the right to be protected was clearly established, but the defendants’ deliberate indifference to a risk of harm did not present a jury question – so there was no constitutional violation. That defendants were on notice of stealing, but that does not necessarily predict an upcoming assault by the thief, even one with a predatory history, reasoned Judge Borden.

Moreover, the R & R suggests that Jacoby and Palmore were sometimes friendly and that Jacoby had other relationships. The legal relevance of this observation escapes this writer; its inclusion suggests a different standard of protection for LGBT inmates who fall out with a dangerous partner or who may be promiscuous.
Nevertheless, Judge Borden finds this relevant to the defendants’ subjective knowledge of risk. The same thing happened in “Judge Dismisses Failure to Protect Claim by Inmate Assaulted after Ending Relationship with Another Inmate,” reported in Law Notes (October 2015 at pages 437-8) (discussing several Alabama cases).

The R & R finds that the officer who left the dividing door between dorms unlocked was most culpable, but her actions were at most negligent, since Jacoby had not shown she knew Palmore posed a risk to him. Not all Alabama inmates fare so badly. See “Federal Judge Orders Trial on Failure to Protect Inmate Whose Throat was Slashed by Ex-Lover,” reporting Cunningham v. Estes, 2017 U.S. Dist. LEXIS 73194 (N.D. Ala., May 15, 2017), reported in Law Notes (June at pages 239-40) (represented case).

After the assault both Jacoby and Palmore were put into segregation, and Palmore was released first. Jacoby was told he would not be released unless he signed a “Living Agreement” regarding getting along with Palmore. Jacoby challenged this demand as violative of due process, but he signed anyway to get out of segregation. The R & R refused to reach the issue because there had been no further assaults; and Jacoby’s time in segregation did not meet the standards for a due process violation under Sandin v. Connor, 515 U.S. 472, 485-6 (1995). Alabama’s use of “Living Agreements” in assault cases has been described as a “Catch-22 solution” designed mostly to provide legal cover to the state and “not a reasonable response” to inmate-on-inmate violence. See class action case, 4:14-cv-01952 (N.D. Ala.), filed by the Equal Justice Initiative, Montgomery.

A review of the docket in Cheatem shows a motion to certify a class and a motion for summary judgment by defendants, but no class order. The case went to mediation, and it is currently administratively closed until 2019, while the parties try to implement a “private agreement” that does not appear on the docket. ■

REFUGEE APPEALS notes

REFUGEE APPEALS NOTES

By Arthur S. Leonard

Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

U.S. COURT OF APPEALS, 3RD CIRCUIT — Asylum claims can be heartbreakers but, then again, perhaps sometimes the claimants are really not credible. In Singh v. Attorney General, 2018 WL 3323378, 2018 U.S. App. LEXIS 18441 (July 6, 2018), the 3rd Circuit denied a petition from a man from India who was appealing the Board of Immigration Appeals’ denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Petitioner arrived in the U.S. through the Texas border without a valid entry visa in 2010 and was given a credible fear interview with an asylum officer when he expressed fear of being returned to India. His biggest problem was that the story he told the asylum officer was different in some particulars from the story he told, once represented by counsel, in a removal proceeding. He told the asylum officer that he was attacked and kidnapped solely because of his political opinions, and that the kidnappers falsely accused him and his male friend of engaging in a sexual act so that the police would attack them as well. But in his removal hearing, he told about discovering his sexual attraction to men years earlier, and having been kidnapped from some people who discovered him engaging in sex with a male friend. In both instances, the story went that police officers, when informed of the sexual activity (whether alleged or real) had beaten and threatened him with future harm, causing him to flee the country. Difficult to make a claim for protection based on one’s sexual orientation, when the differing stories provoke doubts about credibility underlying the sexual orientation claim.

There were various other inconsistencies in Petitioner’s story, including that his account of his injuries from the beating conflicted with the medical document he offered in evidence, that his accounts of the confrontation with police differed, and that testimony he gave about his brother’s reaction to being told about his sexual orientation differed from his brother’s testimony. The Immigration Judge found his “overall demeanor” to be “unpersuasive” and his testimony to be “vague and non-responsive” during the hearing. Indeed, the IJ found some of the narrative account presented at the hearing to be “inherently implausible.” On appeal, Petitioner argued that the BIA “failed to consider the totality of the circumstances when it made its adverse credibility determination. He maintains that he was afraid and ashamed of his identity at his credible fear interview, that he grew up in a rural community and received less than a high school education, and that he was unrepresented by counsel at his interview. He also claims that the medical document inconsistency must have been due to a typographical error on the document he submitted, although he does not address his silence to the IJ’s question about this issue. He argues that the inconsistency with his brother’s testimony is trivial as it was an easy detail to forget and thus should not have been considered. He also argues that the IJ’s plausibility analysis is speculative.” But this didn’t get him anywhere with the 3rd Circuit. “The record contains numerous significant discrepancies,” wrote the court, which agreed that Petitioner’s explanations for them “do not compel disturbing the agency’s determination.” He also made a strategic blunder by failing to preserve for appeal his contention that the IJ erred in finding that he had insufficiently corroborated his claims. Petitioner also argued that as to his CAT claim, the issue relied on evidence independent of his testimony: what is the situation for gay men in India. Is it likely that if returned there

448  LGBT Law Notes  September 2018
he would face likely torture because of his sexuality? This did not impress the court. “Here, however,” it wrote, “the relevance of the country conditions and other background documentation [he] put forward depends on his credible testimony. The other evidence alone does not substantiate a claim that [he] would face torture if he returned to India. Because [he] has not suggested that he might be tortured for reasons unrelated to his asylum and withholding of removal claims, we conclude that the agency properly denied his CAT claim.” Although the opinion indicates that Petitioner was represented by counsel in his removal proceeding, no counsel is listed in the 3rd Circuit’s per curiam opinion, so it appears that he handled his own appeal, pro se.

U.S. COURT OF APPEALS, 6TH CIRCUIT – In Iyabor v. Sessions, 2018 U.S. App. LEXIS 24007 (August 23, 2018), a 6th Circuit panel has, granting the government’s motion, remanded back to the Board of Immigration Appeals for further consideration a claim by a man from Nigeria that he should be granted refugee status in the United States. The Immigration Judge found that the petitioner “was accused of engaging in homosexual acts while living in Nigeria.” That is pretty serious stuff, considering the intense persecution of people for homosexual activity in that country. The BIA had dismissed the petitioner’s appeal from the IJ’s decision denying his application for asylum, withholding of removal, or protection under the Convention against Torture. In response to his appeal, the Attorney General moved to remand. “The Attorney General does not confess error,” wrote the court, “but maintains” that in light of this factual finding by the IJ, “the BIA should further consider his claim that his status as a ‘perceived bisexual’ was a central reason for the persecution he suffered.” The court observed that this remand “will render the December 13, 2017, order of the BIA non-final.”

U.S. COURT OF APPEALS, 9TH CIRCUIT – An effeminate man perceived as gay or bisexual who fled El Salvador to the U.S. and was subsequently diagnosed with HIV in 1998 appealed the Board of Immigration Appeals’ denial of his application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), in Munoz v. Sessions, 2018 WL 3801194, 2018 U.S. App. LEXIS 22262 (9th Cir., Aug. 10, 2018). In this case, the 9th Circuit panel agreed with the BIA and the Immigration Judge that Munoz’s claim for asylum based on his HIV status was time-barred. “Substantial evidence supports the conclusion that Munoz did not satisfy his burden to establish either changed or extraordinary circumstances that would qualify for an exception” to the statutory requirement to seek asylum within one year of entry to the U.S. Although he was diagnosed in 1998, he did not submit his asylum application until 2013. “While Munoz claims severe depression hindered his ability to timely file his application, he submitted no evidence to support this claim,” wrote the court, which dispensed with oral argument in this appeal. However, Munoz may still seek refugee protection under the provisions on withholding of removal or under the CAT. He contended that he was sexually abused by family members and “an adult male neighbor” because he was perceived as gay or bisexual due to his effeminacy. The court also remanded “Munoz’s CAT claims in the event that additional evidence adduced on remand may have an additional impact on those claims.” On remand, however, Munoz may run into problems due to Attorney General Sessions’ recent memorandum narrowing the grounds for refugee status based on persecution by private actors, all as part of the Trump Administrations attempt to sharply reduce the number of foreign nationals who can claim refugee status in the U.S. Of course, Sessions’ memo does not bind the 9th Circuit, so the IJ and the BIA may find themselves in the middle of a dispute between the 9th Circuit and the Trump Administration about the scope of protection for LGBT people subjected to persecution by family members in countries where the general culture is not supportive sexual minorities. The complicating factor of HIV infection may also play a role here, despite the court’s ruling on the asylum claim.

U.S. COURT OF APPEALS, 9TH CIRCUIT – An HIV-positive man from Guatemala also claiming to be gay suffered the denial of his petition for review of the Board of Immigration Appeals’ rejection of his claims for asylum, withholding of removal, or protection under the Convention against Torture (CAT) in Gutierrez-Bulux v. Sessions, 2018 U.S. App. LEXIS 18031,
finding that AIDS sufferers were a
status, the record does not compel a
court, “while the medical evidence
consider it.” “Moreover,” wrote the
BIA and we lack jurisdiction to
the argument was not presented to
the court stated that “insofar as [the
opportunity to do so.” In a footnote,
this statement despite being given an
credibility issue fatal to Petitioner’s
evidence.” Indeed, the court found this
BIA’s refusal to credit [his] testimony
variations between the narrative he provided in his initial application and what he testified at a
later date. Wrote the court, “[Petitioner’s]
application made no mention of an
arrest and detention allegedly orchestrated by the Guatemalan police
on trumped-up charges of theft. Only
later did [Petitioner] recount, for the
first time, the sexual assault he suffered
at the hands of prison inmates over the
course of his four-day detention and the
police’s willful blindness to that assault.
This is not a stray or trivial oversight.
The incident in question establishes
the government’s acquiescence – even participation – in [his] persecution on account of his sexual orientation. The
BIA’s refusal to credit [his] testimony
was therefore supported by substantial
evidence.” Indeed, the court found this
credibility issue fatal to Petitioner’s
claim to be a gay man. “The IJ observed
that there was ‘nothing but his testimony
to conclude that he is a homosexual,’
and [his] counsel did not controvert this
statement despite being given an
opportunity to do so.” In a footnote,
the court stated that “insofar as [the
Petitioner] suggests that the government
did not contest his homosexuality,
the argument was not presented to the
BIA and we lack jurisdiction to
consider it.” “Moreover,” wrote the
court, “while the medical evidence
established [Petitioner’s] HIV-positive
status, the record does not compel a
finding that AIDS sufferers were a
persecuted social group in Guatemala.”
As to relief under the CAT, “The BIA
concluded that while it was possible
the Guatemalan government might
acquiesce in the torture of someone
who has contracted HIV, this possibility
did not meet the ‘more probable than
not’ standard required for relief under
CAT. The record does not compel the
opposite conclusion,” stated the court.
The Petitioner’s counsel is Douglas D.
Nelson of San Diego.

CIVIL LITIGATION NOTES
By Arthur S. Leonard

U.S. COURT OF APPEALS, 10TH
CIRCUIT – On September 1, 2017,
Chief U.S. District Judge Marcia S.
Krieger (D. Colo.), denied plaintiffs’
motion for preliminary injunction and
summary judgment in 303 Creative
LLC v. Elenis, 2017 WL 4331065,
declining to declare that the Colorado
Human Rights Commission should not
interfere with the plaintiffs’ business,
which sought to sell the service of
constructing wedding websites, but only
to heterosexual couples. The judge noted
the pendency of the Supreme Court’s
ruling in Masterpiece Cakeshop, and
gave the plaintiffs “leave to renew
after ruling by the United States Supreme
Court in Masterpiece Cakeshop.”

After June 4, when the Supreme Court
issued its ruling, plaintiffs took up the
district court’s invitation to renew their
motions, but they continued to urge the
10th Circuit to decide their interlocutory
appeal, seeking a reversal of Judge
Krieger’s September 1, 2017, ruling. In
an opinion announced on August 14,
2018, the 10th Circuit said the appeal is
moot. 303 Creative LLC v. Elenis, 2018
WL 3857080. Indeed, wrote Circuit
Judge Nancy L. Moritz, the court agreed
with the state’s argument that Judge
Krieger’s action was most accurately
classified as a stay rather than a
ruling on the merits of the motions, since
“the district court expressly declined
to reach the merits of the plaintiffs’
arguments and granted leave to renew
. . . ” Furthermore, she wrote, the district
court “now appears ready to reconsider
the plaintiffs’ motion for a preliminary
injunction. Thus, this appeal is moot
regardless of how we interpret the
district court’s order.” Thus, the court
lacks jurisdiction to hear the appeal.
The court also rejected plaintiffs’
argument that it could at least hear an
appeal from some rulings by which the
district court narrowed the case on
standing grounds. Of course, plaintiffs
are represented by Alliance Defending
Freedom, their friendly neighborhood
anti-LGBT litigation outfit, ever ready
to mount affirmative challenges seeking
to vindicate the rights of people who
hate marriage equality to abstain from
providing goods or services to same-sex
couples in relation to same.

EEOC – EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION –
The EEOC announced on July 24 that
it had reached a $25,000 settlement with
Malcolm S. Gerald & Associates, Inc., an Illinois collection agency,
which had been charged with a hostile
environment violation under Title VII
involving allegations by a gay employee
of having been subjected to unwelcome
and offensive comments by supervisors
as well as co-workers concerning his
sexual orientation. The EEOC had filed
a lawsuit in the U.S. District Court
in Chicago on September 19, 2017,
after unsuccessful conciliation efforts.
Under the consent decree approved
by District Judge Edmong Chang, the
company will by the victim $25,000 and
train its employees with respect to the
requirements of Title VII, which EEOC
has construed for several years to extend
to discrimination because of sexual
orientation. The decree also embodies
an injunction against engaging in sexual
harassment or retaliation in the future.
ARIZONA – State courts continue to grapple with child custody and visitation disputes arising from the time when same-sex marriage was not available and same-sex couples had children through donor insemination with the intent of raising them together – an intention that led to litigation when the couples dissolved their relationships but could not agree whether the non-biological mother should continue to have a parental relationship with the children. This is, in some respects, a transitional problem, because some same-sex couples planning to have children will probably marry and, slowly but surely, state courts have come to understand that under Obergefell the existing custody rules applying to married heterosexual couples and their children should be translated to same-sex marriage cases. But it is not entirely a transitional problem, because some same-sex couples will continue to have children without marrying, and courts will need to determine how to deal with custody and visitation issues if these non-marital relationships break up.

In Torrez v. Bombard, 2018 WL 3722451, 2018 Ariz. App. Unpub. LEXIS 1130 (Ariz. Ct. App., Div. 1, July 31, 2018), the court is grappling with a such non-marital situation, complicated by a cross-country move. Sandra Torrez and Rhonda Bombard lived together in Arizona when Bombard gave birth to twins conceived through donor insemination. The women intended to raise the children together and had a written co-parenting agreement that “set forth a parenting plan in the event their relationship were to end,” writes Judge Kent E. Cattani for the court. “Torrez eventually moved out but continued to see the children regularly. Bombard later informed Torrez she would no longer be permitted to see the children. Bombard then moved with the children to New York.” Torrez initiated litigation in Arizona seeking parental rights, including legal decision-making, parenting time, and child support orders, and alternatively a visitation schedule. While the case was pending, she sought a temporary parenting time order, which the superior court gave her, concluding that she stood in loco parentis to the twins. Pursuant to this October 2014 order, which was explicitly denominated as temporary, Torrez was awarded Skype visitation twice each week and weekend visitation once each month. But Bombard failed to cooperate, and Torrez filed a petition for contempt. Maricopa County Judge Chuck Whitehead found Bombard in contempt and granted Torrez’s request for an enforcement injunction and an award of attorney’s fees in a new order issued in 2016. Bombard objected to the fee award and to the superior court apparently issuing a final order on visitation without the appropriate hearing and findings, and she objected to jurisdiction of the Arizona court, arguing that she and the children were New York residents now. In this July 31, 2018, appellate ruling, the Court of Appeals found that the Maricopa Superior Court still has jurisdiction of this case, inasmuch as Torrez filed her initial petition just shortly after Bombard decamped with the children for New York, so they had been living in Arizona the requisite period of time prior to the filing of the petition under relevant jurisdictional statutes. However, Judge Cattani’s opinion found merit in Bombard’s argument that the 2016 Order granting visitation could not be issued solely in reliance on the 2014 temporary order, which may have been explicitly denominated as temporary, ex parte (our surmise, since the court does not mention whether that was the case). This “deprived Bombard of her right to have the superior court issue a final ruling,” wrote Cattani, so the 2016 Order was reversed and the matter remanded for further proceedings, presumably leaving the 2014 temporary Order in effect. Bombard had argued that the trial court’s analysis of the visitation claim had misapplied Arizona precedent on third-party visitation requests, as articulated in Goodman v. Forsen, 239 Ariz. 110 (Ct. App. 2016), which had given a “fit parent’s” determination on visitation strong priority unless the parent’s decision “clearly and substantially impairs a child’s best interests.” The court pointed out that on remand the superior court should not follow Goodman, as that decision had been supplanted by the Arizona Supreme Court’s ruling, In re Marriage of Friedman, 244 Ariz. 111 (2018). “Because the issue may arise on remand,” wrote Cattani, “we note that contrary to Bombard’s assertion, sec. 25-409 does not require the court to make specific findings on the record regarding the children’s best interests in third-party visitation cases.” But, because the court was reversing Judge Whitehead’s October 2016 order, it was also vacating his award of attorney’s fees to Torrez, and remanding that issue “for reconsideration in conjunction with the reconsideration of the third-party visitation petition.” Bombard had requested an award of attorney’s fees and costs incurred in defending the motion to dismiss her appeal; as to this, wrote Cattani, “in an exercise of discretion, we decline to award attorney’s fees to Bombard; however, as the successful party on appeal, she is entitled to an award of costs . . . .” The court declined to address Bombard’s constitutional challenge to sec. 25-409, in which she argued that a finding on best interest of the child was constitutionally mandated in making a third-party visitation order. Torrez is represented by National Center for Lesbian Rights with local counsel Davis Faas Blasé PLLC (Scottsdale) and Mandel Young PLC (Phoenix). Bombard is represented by Best Law Firm (Phoenix).

CALIFORNIA – Employment discrimination litigation is not brain surgery, but on the other hand the procedural pitfalls for pro se plaintiffs can thwart their attempt to present their claims in court. Under
Title VII, an individual has 90 days to file a lawsuit upon receipt of a “right to sue” letter from the EEOC. In this case, Fabianne A. Theodule filed a charge of retaliation and discrimination because of color, race and sexual orientation against her employer with the EEOC. While the charge was pending at the EEOC, she moved from San Pablo to San Francisco, but did not notify the EEOC of her new address, relying on the mail forwarding order she left with the Post Office to get her mail. The EEOC mailed her a right to sue letter on May 3, 2017. The normal presumption used by the EEOC and courts to calculate when the 90 days begins to run is three days after the EEOC places the letter in the mail, unless there is evidence that the letter arrived later than that. The right to sue letter, of course, explains in conspicuous language that if the recipient wants to file suit in federal court, they must do so within 90 days of receiving the letter. Theodule filed her complaint in the Northern District of California court on September 26, 2017, attaching the EEOC charge and the right to sue letter. (The charge and the letter, of course, both listed her San Pablo address.) The employer moved to dismiss the case as time-barred, since the 90 day rule would have required the complaint to be filed by August 7, unless Theodule could show that the letter was delayed in getting to her. She claimed that because of slow forwarding by the Postal Service, she did not get the letter until “months later” and had then promptly filed her lawsuit. She also claimed that when the letter had not arrived as she expected, she called the EEOC and was told by somebody not to worry because she had up to two years to file a lawsuit. But she failed to note the specific date when she actually received the letter, or the date when she called the EEOC, or the name of the person who allegedly told her that she would have two years to file suit. She claims also that she didn’t know about the 90 day deadline, presumably first learning of it when she finally received the delayed letter. She represented herself at a hearing on the motion and was told to file a response with specific information. When the court tried to communicate with her in writing about what she would have to do to overcome this time-bar problem, in terms of an affidavit alleging specific facts that would support equitable tolling of the deadlines, she was non-responsive (probably because the notices were going to her old address, and the forwarding order expired, since at least one of the court’s written notices was returned as unable to forward by the Post Office). U.S. Magistrate Judge Donna M. Ryu found that the case was time-barred. It was Theodule’s responsibility to keep both the EEOC and the court advised of her current mailing address, and in the absence of any testimony under oath about the date when she actually received the right to sue letter, or about the wrong advice she claimed to have received from an employee of the EEOC, the court had no basis to excuse her late filing. No matter that she may have had a valid substantive claim under Title VII. (The opinion does not describe her factual allegations.) The rules are the rules, and, said Judge Ryu, pro se litigants have to follow the same rules as everybody else. Theodule v. Blue Mercury, 2018 U.S. Dist. LEXIS 148574 (N.D. Cal., Aug. 29, 2018).

CALIFORNIA – Once again, a plaintiff has run into court without legal counsel, producing a complaint that is so deficient that the court is compelled to dismiss, albeit with leave to file an amended complaint. Rick Nace, also known as Caitlyn Nace, filed suit pro se in San Francisco Superior Court on April 23, 2018, against her employer, G4S Secure Solutions (USA), Inc., and several employees of that company: Drew Levine (the CEO), Brian Miller, and “Does 1-5”. The company and Levine removed the case to federal district court and moved to dismiss or, in the alternative, to require a more definite statement. Nace v. G4S Secure Solutions (USA) Inc., 2018 U.S. Dist. LEXIS 134796, 2018 WL 3777567 (N.D. Cal., Aug. 9, 2018). From U.S. District Judge Yvonne Gonzalez Rogers’ description, the complaint is a mess, failing to set forth in requisite detail the factual basis for Nace’s claims and leaving some doubt as to what the case is about and who was responsible for what alleged violation of Nace’s rights. The original state court complaint states three claims: wrongful termination, sexual harassment, and retaliation. Nace names the CEO of the company as an individual defendant, but according to Judge Rogers, the complaint never states what Levine has done or failed to do on an individual basis to violate Nace’s rights. “As currently pled,” wrote Rogers, “plaintiff’s complaint reveals very little about the facts supporting Nace’s claims of wrongful termination, sexual harassment, and retaliation. The only factual allegation is that plaintiff’s ‘transition from male to female was derailed due to the acute emotional distress, mental and verbal abuse from Brian Miller, Jason Silva, Jamie Debrais for their part in this intentional deliberate scheme they concocted the high cost of hormone treatment.’ The only allegation with respect to defendant Levine is that he is the CEO of G4S.” More factual allegations come out of the document Nace filed in opposition to the defendants’ motion to dismiss or for more definite statement, in which Nace “elaborates that the alleged abuse, which occurred mostly between January and April 2016, comprised derogatory remarks, including ‘faggot,’ ‘pretty baby,’ and ‘he-she,’ and ‘lady boy,’ by Brian Miller and his direct reports. Nace’s opposition also notes that plaintiff attempted to lodge a complaint regarding the aforementioned conduct and was ‘brushed off’ by office employees. Plaintiff asserts that office employees would say that
‘Isenhart’ was either out to lunch, away, or otherwise too busy to speak with anyone.” (Isenhart is identified elsewhere in Nace’s submission as Timothy Isenhart, a branch manager at G4S.) Nace attached several emails to her opposition, and a right-to-sue letter issued by the California Department of Fair Employment and Housing dated April 21, 2017, just over a year before the lawsuit was filed. Judge Rogers granted the motion to dismiss without prejudice and gave Nace a month to come up with a new complaint, to be filed no later than September 7, advising plaintiff that “a Handbook for Pro Se Litigants, which contains helpful information about proceeding without an attorney, is available in the Clerk’s office or through the Court’s website,” and that assistance is available from the Legal Help Center without charge. The judge also explained how to sign up for an appointment at the Legal Help Center. In other words, it appears that Judge Rogers sees in the morass of disorganized allegations from the complaint and the filing in opposition to the motion to dismiss, the makings of a viable employment discrimination claim. One hopes that Nace has acquired counsel and that a viable complaint will be filed on time.

**CALIFORNIA** – In *D.L. v. Aetna, Inc.*, 2018 U.S. Dist. LEXIS 136682, 2018 WL 3869322 (C.D. Cal., Aug. 10, 2018), U.S. District Judge John F. Walter rejected an ERISA preemption claim by the defendant-insurer, denying a motion to dismiss claims asserted under California law by an HIV-positive insured person whose privacy rights were violated by Aetna’s negligence in mailing a notice in an envelope that disclosed that the addressee was a person with HIV, and remanding the case to state court. D.L. learned that he had contracted HIV from his partner and began taking antiretroviral medications paid for through his insurance from Aetna. Believing his family was not prepared to deal with his diagnosis, he did not share his HIV status with anyone. In 2017, D.L. was living in Irvine, renting rooms in a building occupied by his landlord. On August 7, 2017, a notice came in the mail from Aetna addressed to D.L., with information about the settlement of a class action lawsuit concerning coverage of HIV prescription medications. Aetna used a window envelope for this mailing that allowed anyone who handled the mail to see the addressee’s name and to discover that the mailing involved “HIV medications.” D.L. was away at a job interview when the mail arrived and his landlord retrieved the envelope from the mailbox, thereby discovering that D.L. was HIV-positive. The next day, D.L. received a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.” The next day, the landlord threatened to tell D.L.’s mother that he was HIV-positive, forcing D.L. to disclose his diagnosis to his family. Although the landlord had given him a 30-day notice terminating his lease. When he inquired as to why, the landlord “became angry” and stated that D.L. “should have disclosed his HIV status.”

Ultimately, Walter concluded that there was no preemption here. All of D.L.’s claims arise under state law, and they do not directly relate to his entitlement to benefits under an employee benefit plan or to the administration of the plan, as such. No interpretation of the contract of insurance or of an employee benefit plan is required. This is all about the alleged negligence of Aetna in disclosing confidential medical information protected under state law. Quoting a 9th Circuit case, Walter wrote: “As the Ninth Circuit has repeatedly emphasized, ‘the fact that the conduct at issue allegedly occurred in the course of defendant’s administration of the plan does not create a relationship sufficient to warrant preemption.’ Indeed, Congress’ purpose in enacting Section 1144(a) ‘was not to provide ERISA administrators with blanket immunity for garden variety torts which only peripherally impact daily plan administration.’ Accordingly,” wrote Walter, “the Court concludes that Aetna has not demonstrated that Plaintiff’s claims could have been brought under Section 502(a)” of ERISA, the provision authorizing federal suits for benefits under ERISA plans. Furthermore, all the claims by D.L. of breach of duty by Aetna arose from California state law, so no federal question is implicated in the case. Thus, “the Court concludes that Plaintiff’s claims are not solely and entirely dependent on the ERISA plan.”

**COLORADO** – Here we go again, Masterpiece Cakeshop Round II! It was probably just a matter of time . . . . On June 26, 2017, the day the U.S. Supreme Court announced that it would review the Colorado Court of Appeals decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a transgender Colorado lawyer named Autumn Scardina called up Masterpiece Cakeshop to order a birthday cake. But this was no ordinary birthday celebration, as Scardina informed the
**CIVIL LITIGATION notes**

employee who took her call. Scardina would also be celebrating “the fact that [the lawyer] transitioned from male-to-female and that [the lawyer] had come out as transgender,” according to the new complaint filed in U.S. District Court on August 14, 2018, by Masterpiece Cakeshop and baker Jack Phillips, seeking an injunction against the proceedings at the Colorado Civil Rights Commission that Scardina put into motion when Masterpiece refused to take the cake order. The federal complaint asserts that the businesses has received numerous calls requesting “cakes celebrating Satan, featuring Satanic symbols, depicting sexually explicit materials, and promoting marijuana use,” and Phillips believe some of these requests are coming from Scardina as well. The Commission issued a probable cause finding in response to Scardina’s charge “a mere 24 days after the Supreme Court released its decision in Masterpiece,” says Alliance Defending Freedom, representing Phillips and his business as in the earlier case. Relying on the Supreme Court’s decision announced on June 4, 2018 – see 138 S. Ct. 1719 – which ADF characterizes as “the Supreme Court’s stringing rebuke of [Colorado’s] anti-religious practices,” Phillips and his lawyers argue that he is free to refuse any order based on his sincere religious beliefs. As a Christian he believes that God makes people either male or female, does not make mistakes as to this (or anything, for that matter), and so forget about requiring Phillips or his business to be complicit in celebrating gender transition: he will not participate in such a celebration by producing a custom designed cake. Repeating his position from the earlier wedding cake dispute, he insists that he is a cake artist sheltered by 1st Amendment freedom of speech and a religious objector protected by the Free Exercise Clause. And, the Supreme Court having found in its June 4 decision that the Colorado Human Rights Commission was not a neutral forum when it comes to Christians who refuse to violate their conscience in this way, the Commission must be enjoined from processing the complaint against Phillips. The ADF complaint is a political screeed, as can be judged by the last paragraph of the introduction: “It is now clear that Colorado will not rest until Phillips either closes Masterpiece Cakeshop or agrees to violate his religious beliefs. The state’s continuing efforts to target Phillips do not just violate the Constitution; they cross the line into bad faith. This Court should put a stop to Colorado’s unconstitutional bullying.” At numerous points the lengthy and repetitious complaint seeks to cast Phillips as the victim of anti-religious bigotry, rather than the perpetrator of unlawful anti-LGBT discrimination. This is a transparent attempt to get the same issues back up before the Supreme Court, with this time a Trump appointee in place of the timorous Justice Kennedy (now retired), who shied from deciding the merits and focused instead on a rather thin case that the process at the Civil Rights Commission was rigged against Phillips because of his religious opposition to marriage equality. The Court as slightly reconstituted may reach the underlying merits this time, and with Gorsuch and whichever the Senate confirms on board, Employment Division v. Smith might fall, as Gorsuch’s concurring opinion in Masterpiece signals his interest in the Court reconsidering it. If that precedent goes, state and local civil rights laws might be emasculated from protecting LGBT people, along the lines suggested by various documents that Attorney General Jeff Sessions has been issuing and amicus briefs that DOJ has been filing, essentially advocating that the Free Exercise Clause be allowed to swallow up the Establishment Clause and put a stick of dynamite to what remains of the fabled wall of separation between church and state. (No coincidence that on August 30, Gorsuch joined with Alito and Thomas in stating they would have granted an injunction to require the City of Philadelphia to continue sending adoption referrals to Catholic agencies despite the agencies refusals to deal with same-sex couples in violation of the City’s anti-discrimination ordinance.)

**GEORGIA** – In *Power v. Office of Chatham County Public Defender*, 2018 U.S. Dist. LEXIS 132658, 2018 WL 3747460 (S.D. Ga., Aug. 6, 2018), Melody Power, an African-American woman, was challenging her discharge from an administrative assistant position in the Public Defender’s office. The defendants contended that the discharge was because of deficiencies in her work, but her complaint alleges, apart from violations of Title VII and the Age Discrimination in Employment Act, a claim that she was discharged because of a comment she made to the Chief Assistant Public Defender, William Lewis, when he told her about an upcoming ceremony in which his daughter was going to wed her female partner during the fall of 2014. Power responded that “the Bible does not condone same-sex marriage and homosexuality.” Power alleges that “soon after the comment” she was identified as an agenda item for a meeting of the management team and thereafter her employment was terminated. She claimed this was a violation of her 1st Amendment free speech rights. U.S. District Judge William T. Moore, Jr., granted the employer’s motion for summary judgment on this claim. The 1st Amendment would provide some protection to Power as a public employee if she was addressing “a matter of public concern” and, if so, whether the employer’s legitimate interest would outweigh the employee’s free speech interest because of the impact of her speech on the efficient running of the public workplace. In this case, there was no dispute that Power made the remark, although the Office stoutly denied that it had anything to do

454 LGBT Law Notes September 2018
with her discharge many months later. (To set the context, at that time same-sex marriage was not legal in Georgia and although lawsuits were under way challenging the constitutionality of the state’s constitutional and statutory ban on same-sex marriage, the issue would not be finally determined until June 2015, when the Supreme Court ruled in Obergefell v. Hodges, several months after Power was discharged.) The threshold question for the court, as Judge Moore saw it, was “whether Plaintiff was speaking about a matter of public concern” or “only a matter of personal interest,” to be determined by looking to “the content, form, and context of a given statement, as revealed by the whole record,” quoting from Connick v. Myers, 461 U.S. 138 (1983).

“In this case,” wrote Moore, “the court concludes that Plaintiff was not speaking on a matter of public concern. While not dispositive, Plaintiff made the comment to only one person – Defendant Lewis. Moreover, Plaintiff only points to a single comment made in response to Defendant Lewis informing Plaintiff of his daughter’s upcoming wedding: ‘the Bible does not condone same sex marriage and homosexuality.’ There was no exchange of competing viewpoints, simply an unsolicited statement about gay marriage. The statement does not even offer any commentary on the debate whether homosexual individuals should have the right to marry their same-sex partners. Rather, Plaintiff’s statement merely expresses a personal belief that, in Plaintiff’s opinion, the bible [sic] condemns gay marriage and homosexuality. In addition, the record does not contain any evidence Plaintiff even attempted to make her concerns known to the public. Rather, Plaintiff’s sole motivation appears to have been to inform Defendant Lewis that her religious beliefs do not support the idea of gay marriage and homosexuality. Only a tortured view of Plaintiff’s action could conclude that she was attempting to raise an issue of public concern in the workplace. The record contains no evidence that Plaintiff voice her position on gay marriage to any other individual in either her office or the public at large.” Moore asserted that although it was relevant that same-sex marriage was being “vigorously debated in the media and the public sphere at the time,” it was not dispositive. She wasn’t speaking “publicly” on a “matter of public concern,” only “privately” to Lewis. Thus, he found, defendants were entitled to summary judgment on her 1st Amendment claim.

Power fared no better on her other claims, and Moore devoted several caustic footnotes, directed specifically to Power’s counsel and the attorneys representing the defendants, to deficiencies he saw in the pleadings and briefs.

GEORGIA – Steven Craig Harvey, a co-owner with Chad Miller of an insurance company called North American Senior Benefits, LLC, while speaking at a conference sponsored by his company which was planned as an event to recruit new agents, gives the keynote speech, at which he says about the head of a rival company for whom he previously worked, Rory Dougherty, while commenting on a photograph projected on a screen for the audience to view: “The guy in the middle there he may or may not be HIV positive, I don’t know, I have no idea, I have no idea. I can’t confirm nor deny that, that he is, or isn’t, I don’t know, Chad, I don’t know, I don’t know. I don’t know . . . I have no idea.” A few days later, a video of Harvey’s speech was posted on his company’s website, but was removed the next day.

Dougherty filed a diversity suit in U.S. District Court against Harvey and his company, alleging defamation and false light invasion of privacy as alternative theories of liability, and seeking actual and punitive damages, based on Georgia tort law. Harvey and his company filed motions for summary judgment on all claims. U.S. District Judge Timothy C. Batten, Sr., ruling on July 31, denied summary judgment on the principal claims. Dougherty v. Harvey, 2018 WL 3629058, 2018 U.S. Dist. LEXIS 127395 (N.D. Ga.). Under Georgia law, it is defamation per se to falsely claim that somebody has a “contagious disorder” or is “guilty of some debasing act which may exclude him from society.” To be defamatory per se, a statement must meet this standard on its face, without need for further explanation. Harvey argued that his statement was not defamatory and that the words “may or may not be HIV positive” are only an indirect suggestion of Dougherty perhaps having a communicable disease; thus, he argued, “innuendo” was required to explain why the language might be defamatory, and in such cases, it is not per se defamatory. This is significant because a defamation claim that does not fall into the per se category requires the plaintiff to allege actual injury – such as, for example, lost business or other financial loss – whereas injury in the form of reputational harm is presumed for per se defamation. Judge Batten rejected the defendants’ argument, stating, “On its face, Harvey’s statement is a form of apophasis – a common rhetorical device in which the speaker or writer brings up a subject couched in a denial or dismissal and stated expressly to make the point denied or dismissed. That is, the device is utilized in order to ‘deny one’s intention to speak of a subject that is at the same time mentioned or insinuated,’” citing Webster’s Unabridged Dictionary (2001). Thus, the statement was the imputation of a contagious disease, and by statute would qualify as per se defamatory. However, since a false light claim would be based on a non-defamatory statement, Judge Batten ruled, having decided that the statement was per se defamatory, he had to grant summary judgment to the defendants on the alternative false light claim. Battle was waged over whether Harvey’s company could also be held liable for his statement. After detailed
examination of Harvey's relationship to the company (co-owner, not an employee, manager of the sales part of the business, supervising independent contractor sales agents, but the face of the company and its spokesperson at this conference), Batten decided that the question whether Harvey was an “alter ego” of the company whose comments could be attributed to the company was a fact issue for trial, not to be decided on summary judgment. However, he ruled that the company could not be held alternatively liable on a theory of ratification, as that would break new ground in Georgia tort law, which a federal diversity court should not do. The court also denied summary judgment on the punitive damages claim, finding that the defendants’ reliance on a Georgia statute limiting punitive damages for erroneous statements made in broadcasts did not bar such liability for statements made in speeches to a live audience, as was the case here. Discovery of Harvey’s financial records had been delayed pending this ruling on his summary judgment motion, but now the court ordered Harvey and his company to respond to the motion to open discovery within 14 days of its order. This dispute between corporate executives drew teams of lawyers from Florida and Georgia law firms.

HAWAII – The Supreme Court of Hawaii announced on July 10 that it was denying an application for a writ of certiorari by Aloha Bed & Breakfast, which had been found by a lower court to have violated the state’s public accommodations law by denying facilities to a lesbian couple. Alliance Defending Freedom, the anti-LGBT litigation group, represents the B&B, whose owner says that same-sex relationships “defile our land,” according to a news release by Lambda Legal reporting on the decision. Lambda Legal filed the suit in a Hawaii state trial court in December 2011 on behalf of Diane Cervelli and Teako Bufford, a lesbian couple who had been denied accommodations by the defendant. The trial court ruled in their favor in April 2013, and the B&B appealed to the intermediate Court of Appeals, which affirmed that ruling in February 2018 in Cervelli v. Aloha Bed & Breakfast, 142 Haw. 177 (Ct. App. Feb. 23, 2018).

ILLINOIS – Amy Phillips has sued her employer, Exxon Mobil Corporation, in a four-count complaint concerning the intensely hostile environment she has experienced at the company due to her sex and sexual orientation (lesbian). U.S. District Judge Jorge J. Alonso dedicates several substantial paragraphs to detailing her allegations, which if proved would clearly seem to meet the stiff evidentiary standards set by the Supreme Court for hostile environment and discrimination claims under Title VII, relating to the first two counts of her complaint, as well as under the sex and sexual orientation provisions of the Illinois Human Rights Act (IHRA). However, in his decision issued on July 18, 2018, in Phillips v. Exxon Mobil Corporation, 2018 WL 3458286, 2018 U.S. Dist. LEXIS 119687 (N.D. Ill.), Judge Alonso is focused on defendant’s motion to dismiss Counts III-V: Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Negligent Retention and Supervision, asserted as supplementary state law claims. The court first addresses the company’s argument that all the tort claims are preempted by the Illinois Workers Compensation Act. That Act provides that it is the exclusive remedy for accidental work-related injuries. As such, writes Alonso, the Workers Compensation Act does not preempt a claim for intentional infliction of emotional distress, by definition, as intentional acts are not accidents! However, he notes, in this action against the company as sole defendant, “actions committed by supervisors or managers in the scope of their employment do not represent employer-authorized actions and, thus, are accidental [with respect to the employer]. Plaintiff may, therefore, find her claim preempted at a subsequent stage of this litigation. At this stage, because plaintiff is not required to plead around an affirmative defense, it is enough to say plaintiff has not alleged (and thus admitted) that the conduct was necessarily accidental, so she has not pled herself out of court.”

Thus, at this motion to dismiss stage, the IIED claim survives a claim of Workers Compensation preemption. Turning to the negligence claims, Alonso found that negligence claims can be characterized as “accidental” rather than “intentional”, so Workers Compensation preemption applies. Next, Alonso focuses on the company’s argument that the IIED claim is preempted by the Illinois Human Rights Act. Here, he finds, the claim “is preempted by the IHRA if it is inextricably linked with her sexual harassment claim.” The inextricable linkage factor does not apply “where a plaintiff can establish the necessary elements of the tort independent of any legal duties created by the Illinois Human Rights Act,” and “mere factual overlap between the state-law tort and the IHRA claim does not establish preemption.”

The court opined, “Offensive conduct may give rise both to a claim for IIED and to a claim under the IHRA, so long as the former does not rest on the legal responsibilities created by the latter. The essential question to be asked is whether Exxon Mobil’s conduct – devoid of any sexually discriminatory motive – could support a claim for intentional infliction of emotional distress. Among other things, plaintiff alleges that defendant assigned Phillips to work in a sexist environment, condoned the proliferation of sexist comments and graffiti, ignored her complaints of misconduct and refused to ensure her safety.” Some of these allegations are inextricably linked to duties created by the IHRA, but not all of them. “Plaintiff’s allegations that
Exxon Mobil employees failed to give her proper training, refused to provide her proper assistance for dangerous and difficult tasks, and undermined her ability to perform her job by incapacitating her bicycle. All examples of independently outrageous conduct. This behavior seems to extend beyond mere annoyance or minor irritations. Because plaintiff alleges conduct that is outrageous without reference to the legal duties created by the IHRA, Court III is not preempted and survives defendant’s motion to dismiss.” (An explanation of the reference to bicycles: It seems that, due to the size of the facility, employees routinely used bicycles to get around, and Phillips’ bicycle was a frequent target of vandalism, allegedly by sexist co-workers.) Phillips is represented by Julie B. Porter and Kyle A. Palazzolo, of Salvatore Prescott & Porter PLLC, Evanston.

IOWA – Reversing a summary judgment granted by Crawford County District Judge Edward A. Jacobson against plaintiff Richard Christie on claims of sexual orientation discrimination and retaliation in violation of the Iowa Civil Rights Act, the Court of Appeals of Iowa noted as to each count that there were material fact issues that would preclude a summary judgment ruling and require resolution before a fact-finding. Christie v. Crawford County Memorial Hospital, 2018 Iowa App. LEXIS 628, 2018 WL 3471835 (July 18, 2018). Christie, a gay man, was employed by the Hospital as an EMT-Paramedic, driving emergency vehicles and assisting patients. He was terminated on January 27, 2014, after he called a supervisor a “fat fuck.” He filed a grievance with the union after speaking with his own supervisor, Bruce Musgrave, and a deal was worked out; the Hospital rehired Christie about a month later after he signed a “zero-tolerance agreement” that he would be subjected to immediate termination for “any defamation of character or profanity that is used to refer to any employee, patient or visitor within the Hospital or the county EMT system . . . without right to a grievance for the next 12 months.” But Christie couldn’t let go of the discharge and filed a discrimination complaint with the Iowa Civil Rights Commission in December 2014, claiming his discharge was due to his sexual orientation and that he was paid less than straight males working for the hospital. He based this complaint on information he received from both his supervisor and the human resources director, who told him that the hospital’s CEO, Bill Bruce, had made derogatory comments about Christie’s sexual orientation. In January 2015, Christie reported the hospital to the Iowa Department of Public Health (IDPH) for hiring a paramedic who lacked proper licensure. In May 2015, a patient complained that Christie made derogatory comments about his sexual orientation. The patient was very heavy, and Christie “made comments about her weight and referred to injuring his back while carrying the woman down the stairs.” Supervisor Musgrave asked the director of patient services to investigate the complaint, and she passed her findings to Musgrave, who also conducted his own investigation and ultimately recommended to CEO Bill Bruce that Christie be fire, which he was on May 28 for making “derogatory remarks” to a patient, contrary to the zero-tolerance agreement, and showing “continued lack of respect for others and insubordination.” Christie filed a new action, alleging the hospital subjected him to sexual orientation discrimination, had retaliated against him after he filed his earlier complaint with the Commission, and violated public policy by firing him for reporting the hospital the Health Department. District Court Judge Jacobson granted summary judgment to the hospital on all these claims. Writing for the Court of Appeals, Judge Gayle Nelson Vogel found that as to each of these claims, there were material factual disputes that precluded summary judgment. Most significantly, there were the allegations about comments concerning Christie by Bill Bruce, the CEO (who is also a named defendant), which go beyond mere negativity. “The court characterized Bruce’s derogatory sexual-orientation comments as ‘stray remarks’ that were insufficient to establish a discriminatory motive,” wrote Judge Vogel. “While this may be true, at summary judgment the district court must view the facts in the light most favorable to Christie, and it did not do so. Christie stated in his deposition that Bruce made his statements to Musgrave and Christie’s union representative, calling Christie a ‘fag’ and stating he ‘does not like his kind.’ The evidence shows that, although Musgrave performed the investigation into Christie’s comments to the patient, the firing decision was ultimately made by Bruce. Bruce’s statements are direct evidence of a possible discriminatory motive by the decision maker in violation of the ICRA.” Similarly, as to the retaliation claim, the court found that the pretext issue in the case really turned on Bruce’s comments, yet again, which requires a credibility determination at trial. As to the public policy claim, Christie asserts that after he complained to the IDPH about the licensing issue, “Bruce called the union representative and stated he wanted to terminate Christie and another employee for going outside the chain of command and filing a complaint directly with the IDPH. CCMH asserts the complaint and termination are not causally connected because Christie’s termination occurred approximately four months after the complaint; the alleged statements were made by Bruce, who was not at all involved in the patient-complaint investigation; and CCMH had an overriding business justification to terminate Christie, namely, that his derogatory comments about a patient were in direct violation of his zero-tolerance agreement with CCMH.”
The district judge bought the defense argument, but the court of appeals did not. “The union representative told Christie that Bruce was so upset that he wanted to fire Christie and two other employees involved in submitting the complaint. Although Bruce was dissuaded from firing the three employees at that time, Christie noted his relationship with Musgrave became more distant following the complaint. Both Musgrave and Bruce were integral in the subsequent investigation into Christie’s patient comments and the decision to terminate him.” Although Christie would face a high burden at trial to establish causation, “if there is a dispute, as here, over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute,” wrote Vogel, quoting from a prior decision by the state’s Supreme Court. If a reasonable jury could find for Christie that his “conduct in filing a complaint with the IDPH was the reason that ‘tipped the scales decisively’ towards terminating his employment,” then summary judgment should not have been granted against him on the public policy wrongful discharge claim. Christie is represented by Michael J. Carroll of Coppola, McConville, Coppola, Carroll, Hockenberg & Scalise, P.C., of West Des Moines (We pity the receptionist who answers the phone there . . . ), and Angela L. Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines. 

**CIVIL LITIGATION notes**

KANSAS – This is an odd little case. B.E., who tested positive for HIV in September, 2014, filed suit against G.G., claiming that he had infected her. She sued for negligence, intentional infliction of emotional distress, outrage, breach of a duty not to transmit HIV, failure to warn of HIV status, failure to warn of a sexually dangerous lifestyle, and other negligent and careless acts and omissions of conduct. In support of her claims, B.E. alleged that G.G. had admitted to her that while in Thailand, he had engaged in unprotected sex with both male and female prostitutes, that he had admitted to her that he tested positive for HIV, and that he had asked her if she “wanted to go through it together.” G.G. filed an answer and counterclaim. In the counterclaim, he claimed negligence, negligent infliction of emotional distress, defamation, violation of the right to privacy, outrageous and abusive conduct, and abuse of process. He admitted having gone to Thailand, but denied having unprotected sex with prostitutes there. G.G. later produced a note from a doctor confirming that he had tested negative for HIV sometime in 2013. After reviewing all the documents available, B.E.’s lawyer concluded that there were proof problems with her claim, and notified her that he could not pursue the case, but he would hold up on withdrawing from representing her if she would authorize him to negotiate a mutual release of claims with G.G.’s lawyer. He later testified that she authorized him to do so, such a release was negotiated, and she signed it before a notary, her lawyer’s secretary. The release was returned to G.G.’s lawyer and he subsequently signed it. But then B.E. decided she did not want to back out, but rather to continue pursuing the case. She claimed that there was fraud involved in procuring her signature on the release. G.G. moved to enforce the mutual release. The trial judge, Sedgwick District Judge Timothy G. Lahey, scheduled a hearing to determine whether there were any grounds to refuse enforcement of the release, but found that, it being established that the signatures on the release were genuine, that it was enforceable, as B.E. failed in her burden to show fraud or bad faith. In the event, representing herself in hearings before Judge Lahey (and with her former attorney and his secretary appearing as witnesses), B.E. faulted her attorney for ineffective representation. But that was between her and the attorney, and did not go to the enforceability of the release, which was valid on its face. So the trial judge ruled, and the Kansas Court of Appeals affirmed in a per curiam opinion. B.E. v. G.G., 2018 WL 4167678 (Kans. Ct. App., August 31, 2018). The opinion makes no mention whether G.G. has ever tested positive for HIV, or the precise dates, if any, on which B.E. claims he could have infected her through unprotected sex.

**KANSAS** – Do school board attorneys still not get it? Do they suffer from severe reading and analytical deficits? In S.E.S. v. Galena Unified School District, 2018 WL 3389880, 2018 U.S. Dist. LEXIS 116059 (D. Kans., July 12, 2018), defendant learns the hard way that when sued under Title IX by a teen male who was subjected to such unmerciful harassment that he had to transfer schools due to severe psychological injury, the school district is not going to win a motion to dismiss (in which plaintiff’s factual allegations are hypothesized to be true) by arguing that Title IX does not prohibit harassment because of sexual orientation – even in a school within the 10th Circuit, which has not yet embraced the arguments about sexual orientation discrimination being a form of sex discrimination under Title IX. There are just too many cases accumulating holding that the failure of schools to take effective action in such situations violates Title IX, even if one has to rely on gender stereotyping allegations to get there. The Trump Administration withdrew the Obama Administration’s interpretative guidance on this, because they support psychological and physical harassment of gay and transgender kids to pander to their “base,” but the momentum of case law beginning as far back as the 1990s and accelerating during the past decade has carried forward despite that. S.E.S. is, as usual, a mother suing on behalf of her persecuted son, J.M.S., who failed the gender stereotype test, as far as his classmates were concerned. Wrote
U.S. District Judge Daniel D. Crabtree [Do we remember his name from an excellent marriage equality decision during the interval between Windsor and Obergefell? Yes we do; see Marie v. Moser, 65 F. Supp. 3d 1175 (2014)]. “J.M.S. endured verbal harassment, physical threats, and physical contact. Due to his diagnosis of Idiopathic Thrombocytopenic Purpura (ITP) – a bleeding disorder in which the immune system destroys platelets – J.M.S. has greater risk of physical harm. Students and teachers knew about his diagnosis and enhanced risk to harm. Yet, fellow students nonetheless hit plaintiff in the head. Plaintiff S.E.S. saw the students subjecting her son to the harassment and physical conduct. She repeatedly reported the behavior to defendant’s employees but they did nothing to alleviate it. To avoid instances of ‘bullying, harassing, and gay-bashing’ at Galena Middle School, both J.M.S. and G.L.S. (his younger brother) have enrolled at school in Joplin, Missouri, for the 2017-2018 school year. The harassment has caused J.M.S. to incur actual damages in the form of extreme embarrassment, humiliation, anxiety, depression, and emotional pain. A medical evaluation diagnosed J.M.S. as a victim of psychological abuse, causing adjustment disorder with anxiety. Neuropsychologists prescribed individual psychotherapy for J.M.S. and he continues to participate in this treatment.” Against these allegations, the school district “argues that plaintiff states a viable Title IX claim is premised on sexual orientation. Instead, the court concludes that plaintiff states a viable Title IX claim of harassment based on sex.” Judge Crabtree politely refrains from emphasizing the intellectual dishonesty of the lawyers for the school district, who cited Medina in support of their argument, a case which, at an earlier point in his opinion, the judge cited in support of the following statement: “Courts have held that gender stereotyping is another method for proving that same-sex harassment is based on sex,” with a pinpoint citation to the same page cited by the defendant in its argument, while noting that the Medina decision cited Price Waterhouse v. Hopkins for this point to that page, Price Waterhouse being the very Supreme Court opinion that courts rely upon to protect gender-nonconforming people, whatever their sexual orientation or gender identity, under Title VII and Title IX. The defendant also argued that the complaint failed to plead facts sufficient to prove actionable harassment, providing only 16 examples of harassing conduct. Judge Crabtree rejected this argument, specifically refuting the relevance of several of the cases cited by the defendants which described cases involving far milder conduct by harassers than J.M.S. was alleging in this complaint. Plaintiffs had also asserted a negligent supervision claim against the school district, but had agreed to have that claim dismissed, satisfied to rest their case entirely on Title IX. Plaintiffs are represented by Arthur A. Benson, II, and Jamie Kathryn Lansford, of Arthur Benson & Associates, Kansas City.

KENTUCKY – 6th Circuit precedent rejecting sexual orientation discrimination claims under Title VII and the Kentucky Civil Rights Act was relied upon by Senior U.S. District Judge Thomas B. Russell to dismiss a sexual orientation discrimination claim brought by pro se plaintiff Elaura Settles, an African-American lesbian who was discharged by her employer under circumstances that could certain support a prima facie claim of sexual orientation discrimination. Settles also alleged race discrimination, but Judge Russell found that she had failed to allege facts sufficient to sustain a prima facie case, reaching the same conclusions regarding her hostile environment and retaliation claims. In Russell’s estimation, this was really a sexual orientation discrimination case, not actionable under federal or state law. Settles v. MSSC U.S., Inc., 2018 WL 3745829, 2018 U.S. Dist. LEXIS 132233 (W.D. Ky., Aug. 7, 2018). Wrote Russell: “Thus, at the outset, the Court must dismiss any claims Settles has purported to bring for sexual orientation discrimination under Title VII, the KCRA and/or Sec. 1981 [which only applies to race and national origin discrimination claims]. Settles has made statements in her Complaint, and provided certain testimony during her deposition, that other employees at MSSC made unsavory and lewd comments to her on the basis of her sexuality, and while
the court does not condone any such abhorrent alleged statements, the Court must still dismiss any proffered claims of sexual orientation discrimination brought under Title VII, the KCRA, and/or Sec. 1981, as they are not cognizable in this circuit.” Russell did not mention, unlike some other federal district judges in circuits with similar adverse precedents, that the EEOC and at least two federal circuits, the 2nd and 7th, have decided that sexual orientation discrimination claims are cognizable under Title VII. Furthermore, from the court’s description of the allegations in Settles’ complaint, it seems clear that she might be able to assert a gender-stereotype sex discrimination claim invoking the Supreme Court’s Price Waterhouse decision, of a type that has been recognized in some circuits that have not yet accepted explicit sexual orientation claims under Title VII. But it is not surprising that a pro se plaintiff might not be aware of the possibility of making such an argument or have the ability or resources to construct such an argument out of the facts of her case.

KENTUCKY – In another case relying on adverse 6th Circuit precedent towards sexual orientation claims under Title VII, Chief U.S. District Judge Joseph H. Mckinley, Jr., granted a motion for summary judgment on a hostile work environment harassment claim brought by a heterosexual firefighter who was subjected to grossly homophobic harassment because he was wrongly perceived by other firefighters as gay. Queen v. City of Bowling Green, 2018 WL 3520132, 2018 U.S. Dist. LEXIS 121299 (W.D. Ky., July 20, 2018). Jeffrey Queen also heard and was disturbed by homophobic comments by his coworkers concerning gay members of the public, and an incident where firefighters refused to give medical care to a man suffering chest pains after learning the man was gay. He filed complaints about some of these incidents, but management did not follow up with them, and they stimulated retaliation against him. Wrote the judge, “Within its Response brief, Plaintiff acknowledges that ‘Courts in the Sixth Circuit have confirmed repeatedly that men can raise sexual harassment claims as long as the claim is not intended to mask a claim of sexual orientation harassment.’” Indeed,” continued the judge, “the Sixth Circuit has categorically held that ‘sexual orientation is not a prohibited basis for discriminatory acts under Title VII.’ Further, the Sixth Circuit, in applying Title VII precedent to the KCRA, has held that the KCRA also does not protect individuals from discrimination based on sexual orientation. Besides harassment based on sexual orientation, there are no other allegations that Queen was harassed for failure to conform to male norms. This is also not a case of harassment based on sexual attraction by another male, such as the case that Plaintiffs cited, Oncale v. Sundowner Offshore Services . . . Therefore, summary judgment is granted as to Queen’s claim of hostile work environment based on gender in Count II.” But Queen’s case continues, as the court denied summary judgment on Count I, which alleged hostile work environment based on Queen’s atheism, which had provoked his coworkers to subject him to continuing scorn and ridicule. The judge found that discrimination against somebody because of their lack of religious belief could violate Title VII’s ban on discrimination because of religion. Several other counts of Queen’s complaint also survived summary judgment. He is represented by Aaron J. Bentley and Michele Henry of Craig Henry PLC, Louisville.

LOUISIANA – Clarence Dean Roy is a self-described “full gospel” Christian who, accompanied by his wife and others, likes to preach in downtown Monroe, Louisiana, at night preferring to station himself near places where he believes sinful activity is going on, such as night clubs. On the night of July 15, 2017, he and his small retinue were in the area of north Third Street, between Pine and Olive Streets, in the proximity of three commercial establishments, Corner Bar, Club Beat, and Live Oaks Ballroom & Lounge, of which Corner Bar (now closed) was a well-known gay gathering spot, or, as described in Roy v. City of Monroe, 2018 U.S. Dist. LEXIS 147777 (W.D. La., Aug. 29, 2018), a “gathering spot for homosexuals.” Roy believes homosexuality is a sin, and he was engaged in “expressive activity.” “On this night,” writes U.S. District Judge Terry A. Doughty (a Trump appointee who assumed office in March 2018), “they were gathered at a telephone pole across the street from the Corner Bar. Roy was wearing an orange jump suit to demonstrate that he is a ‘prisoner of Christ’ and to pose the question to others: ‘Whose prisoner are you?’ At various times, he was also carrying a six-foot cross made of cedar 4x4s. He normally approaches people and says something short to ‘startle’ them or ‘stop’ them. He cannot ‘afford to’ be concerned about other peoples’ feelings because it might alter his message. Roy tells people that they are ‘going to Hell,’ uses the terms ’homosexual’ and ‘whore,’ and will tell people that ‘their father is the devil.’ He raises his voice, shouts, and uses ‘strong Biblical language’ to convey his message. His wife, Trish, has heard him refer to women as ‘little lesbo,’ although Lyde [one of the other people accompanying him] has not. During the time Roy and Manning preached, Lyde and Trish Roy remained across the street and prayed.” There was an incident between the owner of Corner Bar and Manning [one of Roy’s other acolytes] that resulted in the police receiving a breach of peace complaint, to which several officers responded, including Sergeant James Booth, a supervisor. As Booth was observing the scene, Jessica
Falcon, who had been in one of the other clubs in the area, approached Booth and complained about Roy having followed her and “said certain things” to her. Booth later testified that Falcon was “visibly upset” and said she was “afraid of Roy,” who she said was stalking her. Booth questioned Roy, who said he was “preaching.” Booth decided that Roy was violating the city’s breach of the peace ordinance and issued a summons and citation to Roy. In his written narrative accompanying the summons, Booth wrote that “Jessica stated the man called her a homosexual and because of this she was going to hell. Jessica also stated the man told her that her father was the devil. Jessica stated this offended her and it scared her the way he was following her across the street.” Judge Doughty notes that the police department had received complaints from other individuals in the area about Roy’s conduct in the past, but he had never been arrested or issued a citation. Roy was subsequently indicted for violation of the ordinance, but after a bench trial, the city court judge acquitted him, and Roy has continued his activities. But concerned about future problems with the police, he brought this action in federal court about future problems with the police department and none of the other department officers have ever summoned or arrested Roy for his continuing conduct. Roy’s case was dismissed with prejudice and with no fee award. His attorney team included a lawyer from the American Liberties Institute (Orlando, Florida), affiliated with you guessed it, Alliance Defending Freedom!!

LOUISIANA – Darius Brown was employed as a bus driver by Transdev Services, Inc., from January 25, 2016, until he was discharged on June 23, 2016. Prior to his termination, he had a series of four absences, culminating in what he characterized as an unpreventable driving accident (as to which the police concluded he was not at fault) for which the company blamed him. The absences were all for medical reasons, including surgery, but the employer treated them as unexcused. According to the opinion on this partial dismissal motion by Senior U.S. District Judge Ivan L. R. Lemelle, describing the third such absence: “On May 10, 2016, Plaintiff notified Defendant that he would miss work, again in anticipation of a previously scheduled surgery . . . Plaintiff followed the protocol established by Defendant and provided relevant medical paperwork ten days prior to his surgery. This paperwork, in addition to the paperwork provided on April 9th, disclosed Plaintiff’s HIV-positive status. In spite of Plaintiff’s compliance with Defendant’s policy, Plaintiff was marked with another unexcused absence.” In his complaint filed in Brown v. Transdev Services, Inc., 2018 WL 3773438 (E.D. La., Aug.
9, 2018), Brown alleges that he was discharged because of his HIV-positive status, in violation of the Americans with Disabilities Act. He also notes that only one medical note was found in his company medical file, even though he submitted documents in connection with several of his absences. In a second count, Brown alleges that the employer “failed to properly retain Plaintiff’s medical records” in violation of another provision of the ADA. In this motion, the employer seeks dismissal of the Medical File Retention claim. In granting the motion, Judge Lemelle found that 5th Circuit precedent requires the plaintiff to describe any medical records policy with some specificity, and to allege an actual injury as a result of the employer’s failure to retain medical records, and concludes that the complaint falls short in these respects. “Plaintiff alleges that he provided various medical documents to excuse certain absences, all pursuant to ‘company policy.’ But Plaintiff does not describe the company policy and, importantly, does not explain what type of medical information, if any, Defendant requested as part of that company policy. Plaintiff’s ‘Medical File Retention’ claim also fails because Plaintiff does not allege that the failure to preserve medical records caused him damage. Plaintiff’s complaint alleges that he was wrongfully terminated, but it does not explain how the alleged failure to preserve medical documents caused the termination.” The 5th Circuit has said that a cause of action must assert with specificity how a violation of ADA has caused injury to the plaintiff; a violation without an injury is not actionable. Thus, Brown’s second claim was dismissed, but without prejudice, and the court gave him until August 27, 2018, to amend the claim to address pleading deficiencies if he wanted to revive this claim. Brown is represented by Galen M. Hair, John Eric Bicknell, Jr., or Scott, Vicknair, Hari & Checki, LLC, and Joshua L. Holmes, Crescentcare Legal Services, New Orleans.

MARYLAND – On August 28, two discharged military personnel brought suit in federal district court against the Defense Department, seeking declaratory and injunctive relief on the grounds that they were discharged “solely because they are living with the human immunodeficiency virus.” Plaintiffs are Kevin Deese and an anonymous John Doe. Named defendants are Defense Secretary Mattis, Navy Secretary Spencer, Naval Academy Superintendent Carter, Naval Academy Commandant Chadwick, Air Force Secretary Wilson, and the Department itself. The complaint in *Deese v. Mattis*, CaseNo. 1:18-cv-02669-RDB (D. Md., Northern Div.), asserts that the discharges are unconstitutional and unlawful. Although the Services officially allow some personnel living with HIV to serve, the argument is that the policies, which require individuals to get a medical waivers, are administered in an arbitrary way by medical personnel who in some cases (including those of plaintiffs) are insufficiently knowledgeable about HIV, current treatments, and the capabilities of people living with HIV to make appropriate decisions. Plaintiff Deese was about to graduate from the Naval Academy when he was informed that medical screening he had undergone in order to be admitted to an “elite dive program” had revealed him to be HIV positive, and a decision was made to deny him a commission in the Navy, even though he was not given any option to get a medical evaluation or request a waiver. The John Doe plaintiff served in the Air Force for several years before winning appointment to the Air Force Academy, but was diagnosed HIV positive during a routine medical exam while a student and, although being found fit to serve and getting a waiver to complete the program, his commission was revoked shortly after taking the officer’s oath, solely because of his HIV status. The detailed complaint asserts violations of the Administrative Procedure Act because of various inconsistencies and ambiguities in the relevant regulations and how they are interpreted and enforced, as well as the Due Process and Equal Protection requirements of the 5th amendment. An estoppel claim is also asserted. Plaintiffs are represented by Outserve-SLDN, Inc., Lambda Legal, the National Veterans Legal Services Program, and pro bono attorneys from the D.C., Chicago and New York offices of Winston & Strawn LLP.

MARYLAND – Giving a broad reading to *Conover v. Conover*, 146 A.3d 433 (Md. 2016), which recognized de facto parental status for the same-sex partner of a lesbian mother, the state’s Court of Special Appeals, the intermediate appellate court, ruled in *Kpetigo v. Kpetigo*, 2018 WL 4162790 (Aug. 30, 2018), that the *Conover* holding was not limited to same-sex parents, and could support a custody and visitation claim by an adult whose relationship to a child could fit the tests articulated by the Court of Appeals (the state’s highest court) in *Conover*. In this case, the *de facto* mother, Rebecca MacVittie Kpetigo, was married to the child’s father, Hale Kpetigo, for several years, during which she treated the child, identified in the court’s opinion as F, the same as the children that were conceived during their marriage. The child was born in Ivory Coast, Africa, to a woman with whom Hale had a relationship before he came to the U.S. and began dating Rebecca. From the time F was four months old, he visited Hale in the United States. Hale and Rebecca married when the child was about three years old. By that time he was living with them “practically full time” and both Hale and F gained U.S. citizenship through Hale’s marriage to Rebecca. Rebecca expressed interest in adopting F, but Hale was “reluctant to risk disrupting the relationship between F and his mother,” but the evidence, as found by the trial court, was that
Rebecca cared for F “as if he were her own child,” was involved in all aspect of his life, and developed a close sibling relationship to the children born to Rebecca and Hale during their marriage. They separated in December 2015, after which the parent-child relationship continued until Father restricted Rebecca’s access to F, and insisted on excluding any mention of F from their separation agreement. Rebecca filed for divorce, seeking visitation rights with F, which were granted by the trial court, giving rise to one of the reasons for Hale’s appeal, which also raised other issues concerning the trial court’s ruling regarding the children of the marriage. Writing for the Court of Special Appeals, Judge Douglas Nazarian stated that the trial court “read and applied Conover correctly;” as the trial record supported the court’s conclusion that Rebecca “easily” met the burden of the tests established in Conover as a de facto parent. The court referred back to the path-breaking decision by the Wisconsin Supreme Court, In re Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995), which “was decided twenty-three years ago, before any U.S. state recognized same-sex marriages,” wrote Nazarian. “And over the years, all sorts of people have qualified as de facto parents: grandparents, opposite-sex step-parents, boyfriends and girlfriends, aunts and uncles, and even, in at least one instance, a neighbor. What matters, elsewhere and now here, is the relationship between the putative de facto parent and the child and the child’s best interests, not the relationship’s title or consanguinity.”

MASSACHUSETTS – In Nantume v. Smith, 2018 WL 3518500, 2018 U.S. Dist. LEXIS 120817 (D. Mass., July 19, 2018), U.S. District Judge F. Dennis Saylor IV found that he was without jurisdiction to issue equitable relief to the petitioner, a Ugandan citizen who seeks to avoid a removal order issued by an immigration judge, based on her newly-discovered lesbian identity. Petitioner “has an extensive history of immigration fraud,” wrote Judge Saylor. “In 2002, she entered into a sham marriage with a United States citizen. She used that ‘marriage’ to obtain permanent residency status in 2007; she later applied to be naturalized as a citizen. Before that could happen, however, she was indicted for conspiring to defraud the United States.” That case turned out badly for petitioner, who was convicted after a jury trial in the U.S. District Court in Maine, and served a year in prison. Upon completion of her sentence, she was taken into custody by ICE (Immigration Control & Enforcement), and on May 12, 2014, an immigration judge ordered her removal. On July 30, 2014, she moved to reopen the removal proceeding. “She claimed, for the first time, that she had recently realized that she was a lesbian,” wrote Saylor, “and sought asylum on the ground that gays and lesbians are subject to persecution in Uganda.” The IJ denied her motion to reopen, and the Board of Immigration Appeals (BIA) dismissed her appeal. “However,” wrote Saylor, “ICE was unable to secure necessary travel documents from the Ugandan government to effectuate the removal order at that time. Accordingly, she was released in November 2014, subject to various reporting conditions.” She apparently lived in the U.S. without incident until May 31, 2018, when ICE arrested her, having recently been notified that Uganda would issue the travel documents once she was in custody, and she filed a petition for habeas corpus in the U.S. District Court, meanwhile also filing a renewed motion with the BIA to reopen her immigration case. She contends in district court that her detention is unconstitutional, and asks the court to order that she not be removed pending a ruling by the BIA on her motion to reopen her asylum proceeding. Judge Saylor, while conceding that “the persecution and mistreatment of gays and lesbians in Uganda, and throughout much of Africa and the Middle East, is well-documented,” pointed out that under U.S. law the district courts have no jurisdiction to rule on the immigration law issues the petitioner is putting before the court. Congress, which has plenary power in this area, has given exclusive jurisdiction to executive branch agencies, including the BIA, with appeals going directly to the circuit courts of appeals, and being possible only on limited grounds. “Someone has to decide whether [petitioner] is telling the truth in connection with her claim for asylum; whether she will be subject to persecution if she returns to Uganda; whether she should be granted asylum in the United States; and whether her removal should be stayed pending those decisions,” wrote Saylor. “By law, those questions are not to be resolved by a United States District Judge; they are to be resolved by the immigration authorities (in this case, the BIA), subject to judicial review by the United States Court of Appeals.” Saylor expressed unwillingness to defy the law and intervene on those questions, no matter how sympathetic petitioner’s case may appear. He pointed out that he did have jurisdiction to consider the question whether the petitioner was being unconstitutionally detained. The petitioner’s counsel raised a variety of due process and procedural claims, but Saylor rejected them all, concluding: “In short, the Court concludes that ICE did not violate any relevant regulation, statute, or constitutional requirement, and that even assuming that a technical violation may have occurred, there is no basis for ordering release from detention as a remedy. And to the extent that [petitioner] seeks to stay or prevent her removal based on the merits, this Court is without subject-matter jurisdiction to consider such a claim.” In a footnote, Saylor observed that there are “ample reasons to question [petitioner]’s story,” in light of her immigration fraud and
perjury under oath. In another footnote, he quotes from the 2017 Department of State Human Rights Report on Uganda, which concludes that gays “faced discrimination, legal restrictions, societal harassment, violence and intimidation” in that country. But, he said, “Whether she is telling the truth as to her sexual orientation and other circumstances of her life is not for this Court to decide.” The petitioner is represented by Harvey Kaplan, Greater Boston Legal Services, and Melanie Shapiro, of Dedham, MA.

MICHIGAN – U.S. District Judge Linda V. Parker has dismissed a 1st Amendment challenge to the University of Michigan’s anti-bias code and establishment of a Bias Response Team (BRT) to deal with complaints about conduct violating the code. The plaintiff in Speech First, Inc. v. Schlissel, 2018 U.S. Dist. LEXIS 131432, 2018 WL 3722809 (E.D. Mich., Aug. 6, 2018), is a non-profit advocacy organization that specializes in attacking institutional policies that Speech First contends violate the free speech rights of individuals by imposing requirements of “political correctness.” The plaintiff put forth three anonymous Michigan students who claim that their speech on various controversial subjects has been chilled by the existence of the University’s anti-bias policies and the formation of the BRT, but Judge Parker found that the plaintiff lacked standing to mount this case based on their hypothetical claims of chilled speech, in light of the efforts taken by the University to craft definitions that would preserve protection for free speech by tracking statutes and case law that attempts to draw a line between protected and unprotected speech. The opinion makes interesting reading, as it exemplifies a widespread controversy over the degree to which educational institutions may “police” expressive activities that may have adverse effects on the equal educational opportunities of other students, while preserving their function as places where controversial issues can be debated and discussed openly. The University, unlike the state of Michigan, lists sexual orientation and gender identity as forbidden ground for discrimination, which is relevant to the anti-bias policy, as it authorizes higher penalties if speech that is found to be harassing or bullying is also found to be discriminatory on grounds listed in the University’s anti-discrimination policies. One of the three anonymous students cited by the plaintiff expressed concern that he would risk discipline if he expressed his views about gender identity issues. Judge Parker found these and similar allegations insufficient to confer Article III standing for a facial challenge to the University’s policies. She noted, among other things, that the BRT is not authorized to adjudicate complaints or recommend or impose penalties, but merely to undertake educational activities and to attempt to resolve conflicts through voluntary participation. Judge Parker was nominated to the bench by President Barack Obama in 2013 and confirmed early in 2014.

MICHIGAN – Planet Fitness is a New Hampshire-based health club chain with more than 900 locations across the United States. On July 26, the company suffered a setback when the Michigan Court of Appeals, responding to a remand from the state’s Supreme Court, concluded that a woman whose membership was cancelled by the defendant has stated a potentially viable claim under Michigan’s Consumer Protection Law; the chain failed to reveal to her when she joined that it had an unwritten policy allowing transgender members to use whichever locker room facilities accorded with their gender identity. Plaintiff Yvette Cormier complained to staff at PF Fitness-Midland, LLC, about having encountered a transgender woman in the women’s locker room, or, as she characterized it, a man in the women’s locker room. She was told that PF’s “no judgment policy” allowed individual members to decide which locker room they would use based on their gender identity. Ms. Cormier disagreed with this policy, and came back to the gym several times to “warn” women members that they might encounter “men” in the locker rooms. After a few days of this, she was informed that her membership had been cancelled. According to the Per Curiam opinion released by the Court of Appeals on July 26, Cormier v. PF Fitness-Midland, LLC, 2018 WL 3594443, 2018 Mich. App. LEXIS 2938, Cormier may have a viable claim under MCL 445.903(1), which is concerned with failure of sellers to disclose material facts in commercial transactions. “Although the use of the gym for exercise and fitness activities appears to have been the central aspect of the transaction,” wrote the court, “defendants’ provision of locker rooms and restrooms is also part of the transaction given that gym members obviously may wish to change clothes or shower in a locker room in connection with their fitness activities, and restrooms are also needed. Therefore, although defendants’ policy regarding the locker rooms and restrooms was not the sole or major reason for the transaction, a policy regarding such facilities could still be viewed as important to the transaction. Also, a reasonable inference arises from plaintiff’s allegations that defendants’ failure to inform her of the unwritten self-identification policy concerning locker rooms and restrooms affected her decision to join the gym. After joining the gym, plaintiff saw an assignment male [sic] individual in the women’s locker room and then complained to an employee at the front desk and to defendants’ corporate office. Upon being informed of defendants’ written policy on the matter, plaintiff verbally warned other women at the gym about
it. Plaintiff’s actions indicate that she strongly preferred a locker room and a restroom in which individuals who are assigned biologically male are not present, and it is thus reasonable to infer that defendants’ failure to inform plaintiff of the unwritten policy affected her decision to join the gym.” Does this mean that the gym’s policy is unlawful, or that it has a right to exclude transgender members from using the locker room consistent with their gender identity? No, it just means that they should make their policy clear and conspicuously communicate it to people who apply to join and to current members. In this case, the Midland Circuit Court had ruled against Cormier on all her claims – invasion of privacy, sexual harassment and retaliation in violation of the Civil Rights Act, breach of contract, intentional infliction of emotional distress, and violation of the Consumer Protection Act. In her first appeal, the Court of Appeals had found that the briefing of her CPA claim had asserted a general complaint about non-disclosure of the policy without tying it in to particular provisions of the statute, and found that the statutory claim had been waived because it was not sufficient for a party “simply to announce a position or assert an error and then leave it up to this Court to discover and elaborate for him his arguments,, and then search for authority either to sustain or reject his position.” The court of appeals affirmed the trial court’s ruling on all Cormier’s other claims. She took the case to the Supreme Court, which agreed with her that she had not waived her CPA claim, and remanded to the Court of Appeals to address it. Now the Court of Appeals has remanded the case back to the Midland Circuit Court for “proceedings not inconsistent with this opinion.” The Court’s opinion concludes: “Plaintiff sufficiently sets forth claims of violation of the MCPA under MCL 445.903(1)(s), (bb) and (cc).” It will now be up to the trial court to determine whether she can prove her claims. Cormier is represented by David Kallman, who indicated he will file a motion for summary judgment with the trial court, claiming that the Court of Appeals decision essentially holds that PF Midland violated the statute. Kallman indicated to the Detroit Free Press (July 27) that they will seek attorney’s fees and an order that Planet Fitness advertise its policy in the gym’s contracts and on notices around the gym, thus alerting members of the possibility that they may encounter transgender people in the locker rooms. Interestingly, the three-judge panel of the Court of Appeals consisted of three women.

**MI** 

**CHIGAN** – Should a transgender employee who transitions in a public sector workplace and then encounters discriminatory and hostile treatment from co-workers be allowed to proceed anonymously as “Jane Doe” in her subsequent hostile environment case against the employer? In *Doe v. City of Detroit*, 2018 U.S. Dist. LEXIS 118787, 2018 WL 3434345 (E.D. Mich., July 17, 2018), U.S. District Judge Mark A. Goldsmith answered in the affirmative, over the protest of counsel for the defendant, City of Detroit. Doe, presenting as male, began working in a city agency in January 2016. In April, she informed her bosses that she would be undergoing gender reassignment surgery to transition to the gender with which she identifies, and took medical leave, returning to work in June 2016 presenting as female. “Shortly thereafter,” writes Goldsmith, “Doe was informed that two complaints had been filed against her regarding her attire at work, despite the City’s lack of dress code. After returning from a second medical leave in December 2016, Doe began experiencing a pattern of harassment, including having her office nameplate defaced to identify her as male, receiving a male sex toy, and several notes that admonished her for her transition, along with threats of physical violence.” Although she informed her supervisors about these occurrences, “the City took no action to protect her” and she filed her EEOC charge and, eventually, this federal lawsuit, alleging violations of Title VII and the Michigan Elliott-Larsen Civil Rights Act. (Elsewhere in this issue of Law Notes, we report on the dispute between the state’s Civil Rights Commission and the Attorney General over whether the Civil Rights Act, which does not mention sexual orientation or gender identity, can be construed to cover such claims.) Doe moved to proceed “pseudonymously” as “Jane Doe.” Under the Federal Rules of Civil Procedure 10(a), the complaint is supposed to name all parties, but the 6th Circuit has identified circumstances under which parties can use pseudonyms, two of which potentially apply here: “in order to challenge governmental activity” or “whether prosecuting the suit will require the plaintiffs to disclose information ‘of the utmost intimacy.’” “Courts have also considered whether the plaintiffs would risk suffering injury if identified and whether the defendant would be prejudiced if the plaintiffs were permitted to proceed pseudonymously,” wrote Goldsmith. The issue requiring some judgment here was the “utmost intimacy” point. “Several courts have held that an individual’s transgender identity can carry enough of a social stigma to overcome the presumption in favor of disclosure,” Goldsmith wrote, followed by a string cite. But the City argued that Doe had already exposed her transgender identity by transitioning on the job. “However,” wrote Goldsmith, “while her employer and coworkers are aware that she has transitioned from male to female, a disclosure that was necessary because her transition began after she had already started working for the City, the general public is not necessarily aware that Doe is transgender. While she publicly identifies as female, the fact that she previously presented as male, and had a procedure to reassign her gender, certainly qualifies as information ‘of
the utmost intimacy.’” And as to risk of injury, she had alleged several instances of harassment and threats, so this was not merely hypothetical, or merely some general reference to violence against transgender people, which was noted in a case cited by the defendant. Doe had already alleged specific instances of harm arising from her transition, and fears that “copycats” within and outside her office “may harm her if they learn that she is transgender. The Court believes this fear is justified, and takes judicial notice of the increased threat of violence to which transgender individuals are exposed.” The judge rejected the City’s argument that it would be prejudiced in mounting its defense, pointing out that “Doe’s counsel has indicated that she only wishes to shield Doe’s name from the public docket, but that she does not object to defense counsel using Doe’s real name (to which counsel is privy) in order to obtain records, or during the course of depositions, provided that such records, if filed on the docket, redact Doe’s true identity.” There was also a promise by plaintiff’s counsel to facilitate document production, “and the Court believes a protective order to this effect can be fashioned.” The court found no prejudice to the City, and granted the motion, instructing the parties to prepare a proposed protective order “regarding how to protect Doe’s identity in accordance with this order.” Doe is represented by Carol A. Laughbaum, Sterling Attorneys at Law, P.C., Bloomfield Hills. This writer took some joy from noting that Judge Goldsmith, who was appointed by President Obama, is his law school classmate!

MISSOURI – Another set of school administrators have blundered into being defendants in a transgender restroom access lawsuit. One wonders whether administrators confronted by a request from a transgender high school student and his parents to allow him to use appropriate restroom facilities bother to consult the school district’s legal counsel for advice? And whether legal counsel bothers to do research and tell them that just about every school district that has been sued about this issue by the transgender student has lost its case? Or is it, perhaps, that with the advent of Trump and his appointees at the U.S. Departments of Education and Justice, who have rescinded the trans-affirmative policies espoused by the Obama Administration, as well as his court nominees, who might be presumed to disagree with the case law developed over the past several years, that some counsel for school boards are advising their clients to ignore the court decisions and, if they prefer, to refuse to allow the students to use the restroom congruent with their gender identity? In any event, we have learned of a new lawsuit, J.R.M. v. Joplin R-8 School District, filed in Jasper County Circuit Court on August 10, 2018, alleging discrimination because of sex and disability, as well as retaliation against J.R.M., a transgender boy, for his request for an accommodation under Section 504 of the Rehabilitation Act, and naming as defendants the school district and several of its administrators. The suit was filed by the student’s mother on behalf of the student, still a minor, represented by transgender attorney Mary Madeline Johnson of Kansas City. Since J.R.M. stopped attending Joplin High School as a result of the administration’s refusal to allow him appropriate restroom access as of October 14, 2016, the suit is seeking monetary damages, costs and fees, but not equitable relief, as far as we can tell from the news release. The news release doesn’t explain the choice of state court for this action, and we have some questions, considering the lack of gender identity protections under Missouri state law and the lack of a municipal public accommodations law in Joplin, about why the suit was not filed in federal court? The news report mentions a “Section 504 Meeting” at which administrators formally denied J.R.M.’s request to be able to use the boys’ rooms at the high school, but does not specify whether the complaint’s sex discrimination claim relies on Title IX, the Equal Protection Clause, and/or state or local statutes and ordinances? The question whether gender dysphoria is covered under Section 504 or the federal Americans with Disabilities Act is unsettled, because of an exclusionary floor amendment to the original ADA and some recent trial court rulings finding the exclusionary provision inapplicable to discrimination claims brought by transgender individuals diagnosed with gender dysphoria.

MISSOURI – The National Center for Lesbian Rights and the ACLU of Missouri, assisted by cooperating attorneys Michael Allen and Joseph J. Wardenski (Relman, Dane & Colfax, PLLC, Washington, D.C.) and local counsel Arlene Zarembka (St. Louis), have filed suit in the U.S. District Court for the Eastern District of Missouri on behalf of a married lesbian couple whose application to live in a senior housing community in St. Louis County was turned down. Walsh and Nance v. Friendship Village of South County, Civ. Action No. 4:18-cv-1222 (E.D. Mo., filed July 25, 2018). The plaintiffs allege that they are “financially and otherwise qualified for residency in the community,” but were turned down in a July 29, 2016, latter, on the basis of the defendant’s “Cohabitation Policy” which defines marriage as “the union of one man and one woman, as marriage is understood in the Bible.” (This presumably means the “New Testament,” because there are polygamous marriages described without
disapproval in the “Old Testament.”)
The defendants are not denying that they are discriminating. In addition to the letter citing the Cohabitation Policy, the defendant submitted a “Statement of Position” to the U.S. Department of Housing and Urban Development in response to the plaintiffs’ Fair Housing Act charge, confirming that they denied them housing because they are a same-sex couple. Plaintiffs are seeking declaratory judgment, permanent injunctive relief, and damages, as well as reasonable attorneys’ fees and costs. They allege violations of the Fair Housing Act and the Missouri Human Rights Act, both of which prohibit housing discrimination because of sex. Since the federal court is bound to follow state court precedents in applying the Missouri Human Rights Act, the claims on that statute might falter, as Missouri courts have not construed their statutory sex discrimination provisions as encompassing claims of sexual orientation discrimination. As to the federal claim, the Obama Administration published statements supporting sexual orientation discrimination claims under the FHA, but all indications are that the Trump Administration has backed away from such interpretations of federal sex discrimination laws – but without necessarily convincing federal courts, which in some parts of the country have accepted the argument that sexual orientation discrimination and/or discrimination against married same-sex couples, is sex discrimination. This will be an important case to watch when the court has to rule on an anticipated motion to dismiss for failure to state a claim.

NEW JERSEY – Even though it was poorly drafted and contained significant typographical errors, the New Jersey Appellate Division agreed with a Passaic County Superior Court Judge that an on-line arbitration agreement assented to by a newly-hired employee precluded her pursuit of an employment discrimination claim in court. D.M. v. Same Day Delivery Service, Inc., 2018 N.J. Super. Unpub. LEXIS 1973, 2018 WL 401660 (Aug. 23, 2018). D.M. responded to an internet notification of potential employment with Same Day, met with an employee who offered her a driver position, and was directed to a website to complete various employment forms. One of the forms was an Arbitration Agreement consisting of sex paragraphs, which included signification of her agreement that “any or all controversies, claims or disputes with anyone . . . arising out of, relating to, or resulting from my assignment and/or employment with the Company” would be subject to individual arbitration, and that she waived any right to a trial by jury, including any statutory claims under state or federal law.” She began work on June 12, 2017, and was discharged on August 21, 2017, a month later filing a complaint in Superior Court against Same Day and one of its managers, alleging that the manager made “sexually provocative comments about plaintiff’s body” and subjected her to a “hostile work environment based on her sex and sexual orientation.” She also claimed that she was subjected to unfair criticism and was fired for rejecting her manager’s sexual advances.” Immediately upon service of the complaint, defendants moved to dismiss and compel arbitration, and the trial court granted the motion and dismissed the complaint. The Appellate Division affirmed this decision, finding that the Arbitration Agreement “was clear in stating that plaintiff was agreeing to arbitrate any disputes concerning her employment or termination of her employment with Same Day.” D.M. argued that some of the sentences in the Agreement were unclear, “thereby making the entire agreement incomprehensible,” and pointing out “vague” and “ambiguous” language as well as incorrect statutory citation to Title VII. She also argued that the Agreement did not explain the difference between arbitration and a trial by jury or other aspects of the effect of waiving civil trial rights. The court was unimpressed, finding that the language agreeing to arbitrate disputes and waive the right to jury trial was clear and unambiguous. Although conceding that some sentences were “poorly drafted,” the court said that “those sentences do not make the agreement ambiguous because the remainder of the document is clearly written.” The court also rejected the argument that there was no consideration to make the agreement to arbitrate binding, asserting that “an offer of employment or continued employment is adequate consideration for an arbitration agreement,” and the fact that she executed the agreement after being offered the job was “not material on this record.” The court also noted that it was her choice not to consult a lawyer before signing, as the on-line form stated that she had a right to do so. “In short, although the arbitration agreement in this case was not a well-crafted document, it was sufficiently clear in explaining that plaintiff was agreeing to arbitrate and that she was giving up her right to pursue a claim in court,” wrote the court. “Thus, by dismissing her complaint and directing arbitration, plaintiff will be able to pursue her claim in the forum she agreed to; that is, an arbitration.” Mark Mulick represented D.M. in this appeal, which resulted in a Per Curiam opinion from the panel of Judges Sumners and Gilson.

Aug. 8, 2018). K.C. is a biracial, openly lesbian high school student. She claims that after she and some other students were overheard having a conversation about guns and violence, she was summoned to the office of Assistant Principal Kevin O’Leary, who upon confirmation that K.C. had been discussing the “Black Lives Movement” concerning confrontations between police officers and African Americans, said to her “all lives matter,” from which she understood that she was being told not to talk about the Black Lives Matter movement in school. Also, she alleged, during this conversation O’Leary (who, if the allegation is true, needs some remedial instruction about what to say to students) commented that “some individuals are lucky to have light-colored skin and pass as Caucasian,” which K.C. took as an insult. Five days later, during an English class where students were picking roles for a reading of a play involving a corrupt police officer, K.C. volunteered to read the part of the police officer, whom she referred to as “the pig,” drawing admonishment from her teacher. She apologized for the remark, but the teacher obviously communicated it to the administration, because her mother, J.G., received a phone call half an hour later from the principal, who told her K.C. was the subject of a Harassment, Intimidation, and Bullying investigation (HIB) for using the word “pig” in class to refer to a police officer. It was alleged that this would be harassing a fellow student whose father was a police officer, although K.C. insisted that the student in question wasn’t in class when K.C. made this remark. Later that day, K.C. was summoned into the investigation with Assistant Principal O’Leary and an HIB Investigation Specialist, Jennifer Spuckes. During the meeting, K.C. said her use of “pig” did not reflect her view of law enforcement, and that the classmate whose father was a police officer was not present when she said it. But, according to the complaint, “Mr. O’Leary and Ms. Spuckes analogized the use of the term ‘pig’ to the use of the term ‘nigger’ and, later, the term ‘fag.’” “Apparently,” writes Judge Sheridan, “both of them asked her how she would feel if someone called her by either name. Despite objecting to these slurs, Defendants O’Leary and Spuckes continued to utter them in front of her,” criticizing her “for continuing to discuss the Black Lives Movement, which they compared to someone overhearing a sexually degrading conversation between two teachers.” O’Leary then contacted K.C.’s mother and told her that K.C. “had committed an ‘unintentional HIB offense’” and would get a one-day in-school suspension (which presumably means sitting in detention for a day). This ruling was not appealed internally, but is the basis for the 1st Amendment free speech claim. The use of the terms “nigger” and “fag” repeatedly in the meeting with this biracial openly-lesbian student are the basis for the claims of violations of Title VI of the Civil Rights Act (race discrimination in public accommodations) and the New Jersey Law against Discrimination, which bans sexual orientation discrimination and has been interpreted, in its public accommodations coverage, to apply to schools. Judge Sheridan rejected the motion to dismiss, writing that “the Court is satisfied, at this stage, that Plaintiff’s ‘pig’ comment may constitute protected speech that was allegedly wrongfully infringed;” and that there was nothing in the complaint to support defendant’s contention that her punishment “was based on complaints of bullying and the school’s overall concern for preventing disruptive behavior.” And, any suggestion that she could not talk about the Black Lives Movement in school raised freedom of speech issues, as “it can hardly be argued that discussions involving political or social justice matters do not fall within the protections afforded under the First Amendment.” As to the hostile environment claims under Title VI and the NJLAD, the court found that the complaint sufficiently set forth allegations giving rise to such claims. “Plaintiff was subjected to what could be interpreted as racially charged slurs,” including O’Leary’s stupid “lucky enough to have light enough skin” remark and the repeated use of the word “nigger” in the HIB investigation. As to the sexual orientation hostile environment claim, during the HIB investigation the complaint alleges that O’Leary and Spuckes “purportedly uttered homophobic slurs (‘fag’) towards K.C.” This was sufficient at the pleading stage, wrote Sheridan. “According to Plaintiff’s Complaint, K.C. is a homosexual individual, O’Leary and Spuckes directed homophobic slurs towards her and no measures have been taken by the District to reprimand this type of behavior.” However, under the NJLAD this claim runs only against the school, not the individual employees. Judge Sheridan found that it was premature at this stage to dismiss the claim for punitive damages, so the motion to that effect was denied without prejudice. Plaintiffs are represented by Donald A. Soutar and John Douglas Rue, of John Rue & Associates, LLC, of Bloomfield, NJ.

NEW JERSEY – In Belfort v. Morgan Properties, LLC, 2018 WL 3201787, 2018 U.S. Dist. LEXIS 109027 (D.N.J., June 29, 2018), U.S. District Judge Renee Marie Bumb granted summary judgment to the employer on discriminatory discharge and retaliation claims by a straight male employee who alleged discrimination against him because of his sex. The court found no evidence in the record to show that Kevin Belfort’s termination had to do with his sex, noting the testimony about deficiencies in his performance. However, Belfort’s hostile environment claim survived the motion practice, as the judge found that based on allegations of Belfort’s supervisor’s misconduct, a jury could
CIVIL LITIGATION notes

conclude that he had been subjected to a hostile environment because of his sex. The supervisor, Jerry Peek, was alleged by Belfort to have engaged in much sexually-charged misbehavior towards Belfort, which Peek characterized as “horseplay” but Belfort alleged was worse than that. “Granting all reasonable inferences to Plaintiff, the Court finds that the evidence of hostile work environment harassment is such that a reasonable jury could find for Plaintiff. The court finds that the record establishes legitimate disputes of fact regarding the severity or pervasiveness of Peek’s conduct. Plaintiff cites to evidence that Peek nearly constantly mocked him and touched him without his permission for a period lasting at least five months.” The touching ceased after Belfort complained to management, which then issued a warning to Peek after conducting an investigation, but other verbal harassment continued. “Moreover, Plaintiff has presented sufficient evidence from which a reasonable jury could find that such conduct detrimentally affected him and that such conduct would have detrimentally affected a reasonable person,” wrote the judge. The employer contested the conclusion that this was sex discrimination in what was essentially an all-male workplace of apartment maintenance crews. “Whether Peek’s behavior was directed at Plaintiff because of his sex is a jury question,” the judge responded, finding “that Plaintiff has pointed to enough evidence that a reasonable jury may find that Peek singled him out for particularly harsh treatment because Peek did not consider him to conform to the stereotypes of his gender. Morgan [the employer] argues that Plaintiff cannot make this showing because there is no evidence that Plaintiff is gay, he never did anything to make anyone believe that he is gay, and he never did ‘any of the stereotypical things that a gay male may do.’” The opinion is no more informative than that about what those “stereotypical things” are. But the court pointed out that Morgan “paints with too broad a brush,” as “there are male stereotypes that have nothing to do with sexual orientation: things such as ‘being aggressive, assertive, and non-compliant.’” and Belfort had pointed to evidence relevant to these characteristics in the record, as well as illustrative incidents, which led the judge to conclude that there was “enough to demonstrate that Peek singled Plaintiff out because he did not conform to Peek’s gender stereotypes.” The court also rejected Morgan’s attempt to characterize Peek as an equal opportunity harasser, and thus non-discriminatory on the basis of sex. The company also sought to raise a Faragher defense (i.e., under Title VII precedent that shelters an employer from hostile environment liability if the employer took several steps to show its seriousness towards preventing hostile environments, including investigation and follow-up on hostile environment complaints from employees). The court considered that this defense raised disputed questions best decided by a jury. Belfort is represented by Caroline Hope Miller of Derek Smith Law Group, PLLC, Philadelphia.

NEW YORK – Lambda Legal announced on August 23 that it had negotiated a settlement with the Oswego County Department of Social Services and Oswego County of its lawsuit on behalf of Sean Simonson, a retired employee who was denied health care for his transition-related care. *Simonson v. Oswego County*, Case No. 5:17-CV-1309-MAD-DEP (N.D.N.Y., Stipulation filed Aug. 23, 2017). After working for the DSS for nearly 30 years, Simonson retired on October 31, 2015, under a retirement benefits package that includes continued insurance coverage under the Oswego County Health Benefit Plan, which by its terms categorically prohibited coverage for “sex change surgery, transsexualism, gender dysphoria, sexual reassignment or change or to any treatment of gender identity disorders including medications, implants, hormone therapy, surgery, medical or psychiatric treatment.” Total wipe-out!! Simonson filed a charge with the EEOC’s Buffalo office, which issued its determination of reasonable cause of a Title VII violation on June 26, 2017, and he then went to the U.S. District Court for the Northern District of New York, suing the Department and the County, supplementing his Title VII claims with claims under the New York State Human Rights and Civil Rights Laws and the Affordable Care Act, as well as the 14th Amendment. His claim rests on the contention that he has suffered sex discrimination, drawing on the mounting precedents finding coverage under such laws for gender identity discrimination claims. After years of advocacy by Simonson and Lambda Legal, the County rescinded these exclusions in November 2017, but it took until August 23 to negotiate a final settlement and stipulation of voluntary dismissal. The case is pending before District Judge Mae A. D’Agostino. Lambda attorneys working on the case include Omar Gonzalez-Pagan, Demoya Gordon, and Richard Saenz.
co-worker after an investigation, but a jury acquitted him on criminal charges. Williams was diagnosed with PTSD after the assault, which led him to take a leave of absence. When EEOC failed to conclude a settlement agreement with Metro-North, it issued a right to sue letter to Williams, and her complaint was filed May 22, 2017. The Court held a settlement conference before substantial discovery had taken place, which did not result in a settlement, but shortly after the conference, “Metro-North served an Offer of Judgment,” which stimulated negotiation of a settlement in the amount of about $250,000.00 to Williams. But the parties did not reach agreement on attorneys’ fees, which they submitted to the Court. District Judge John G. Koeltl referred the fee matter to Magistrate Judge Katharine H. Parker, who produced a lengthy and detailed report, culminating in a recommendation that the court award plaintiff $354,780.85 in attorneys’ fees. 

Williams v. Metro-North R.R. Co., 2018 U.S. Dist. LEXIS 109422 (S.D.N.Y., June 28, 2018). Judge Koeltl adopted the report and recommendation quickly, as the parties informed the court that neither party would be filing any objections. See 2018 U.S. Dist. LEXIS 114363, 2018 WL 3368713 (S.D.N.Y. July 10, 2018). In her report, Judge Parker stated that Plaintiff’s counsel was entitled to a “relatively high hourly rate . . . because this case mostly certainly involved novel and evolving legal theories – the extent to which discrimination on the basis of being gender non-conforming or transgender is covered by Title VII’s prohibition on sex discrimination. Very few cases have addressed this issue,” she wrote, “although recent decisions certainly point to a trend recognizing that transgender bias is synonymous with sex stereotyping, long ago found by the U.S. Supreme Court to be evidence of gender discrimination in a case where a woman ‘failed’ to conform to society’s ‘gender norms’ such as wearing make-up and jewelry,” citing Price Waterhouse v. Hopkins. “The decisions reason that transgender bias is discrimination based on a person’s ‘failure’ to conform to his/her gender assigned at birth and societal expectations that the person should accept his/her assigned gender by displaying outward manifestations of the assigned gender.” The court also noted the important service that Outten & Golden “does for its clients, the community at large, and the bench and bar by taking on contingency matters to advance the law in important areas like transgender rights,” and described the extensive credentials of the lawyers who worked on this case from both O&G and TLDF in determining appropriate hourly rates to award.

NEW YORK – In a lengthy “he said, he said” case that is frustrating to read, U.S. District Judge Paul A. Engelmayer ruled against a Title VII hostile environment claim by Otis A. Daniel, a 37-year old African-American man from the Caribbean, who identifies as gay but “did not disclose his sexual orientation to his supervisors or co-workers.” 

Daniel v. T&M Protection Resources, LLC, 2018 WL 3388295, 2018 U.S. Dist. LEXIS 116303 (S.D.N.Y., July 12, 2018). Daniel worked as a security guard in New York beginning in 2005. In 2010, he responded to an on-line advertisement for a fire safety director position with T&M, a New York based firm that provides security and investigations staff, inter alia, for office buildings. Daniel worked at 590 Madison until his discharge in May 2012. He filed a complaint with the EEOC of discrimination based on race, national origin, sex, and sexual orientation, and also asserted a retaliation claim, naming T&M and Minskoff, the company that manages the building, as defendants. EEOC referred his case to the New York State Division of Human Rights, because at that time EEOC had not yet ruled that sexual orientation claims were actionable under Title VII. But after investigating his charges, DHR concluded that T&M had legitimate business reasons for firing Daniel that were neither “pretextual nor otherwise unworthy of credence,” and issued a “no probable cause” finding, which was subsequently adopted by EEOC, which closed its file and issued a right to sue letter. Daniel then filed his federal complaint. The court granted summary judgment to T&M in February 2015, in an exhaustive opinion rehashing all the factual evidence presented in support and opposition to the motion. Daniel v. T&M Prot. Res. Inc., 87 F. Supp. 3d 621 (S.D.N.Y. 2015). Ultimately, the court found that “measured against the standards set by case law,” the mistreatment that it found of Daniel “does not rise to the level of severe or pervasive harassment so as to create a ‘hostile or pervasive’ work environment.” The court also found against Daniel on his discriminatory discharge claim, and a claim under the Family and Medical Leave Act. The court rejected a state law negligence claim as well. But the Second Circuit thought that the district court got some things wrong, vacating and remanding just as to the hostile environment claim. See 689 F. App’x 1 (2nd Cir. 2017). Judge Engelmayer’s new opinion takes into account the 2nd Circuit’s reasons for remanding, of course, but, even so, he concludes at the end that Daniel has failed to meet the proof requirements for a hostile environment case, partly for credibility reasons. On the one hand, the company had what continues to sound like legitimate work-related reasons for letting Daniel go. On the other hand, while the numerous incidents he describes of offensive or disturbing conduct, mainly by one supervisor, sound like the sorts of things that could make the workplace very uncomfortable for a closeted gay man of color, Judge Engelmayer emphasized that this part of the case rested in large part on Daniel’s allegations of things
that took place without any witnesses apart from the alleged harasser (who denied many of the allegations), there was little in the way of credible corroborative testimony from co-workers, and, perhaps because of the cautiousness of a closeted man, Daniel had not actively pursued complaints or been particularly explicit in describing what was going on in his charges to civil rights agencies. Focusing on the sexual orientation component of the hostile environment claim, Engelmayr comments, “Although Daniel is gay, he has treated his sexuality as an intensely private matter, and never discussed his sexuality with any colleagues at 590 Madison. In July 2011, Daniel alleges that [John] Melidones [his supervisor] approached him at his podium, came behind him at the podium, whispered in his ear, ‘Are you gay?’ and ‘brushed up against my buttocks with what had to have been his penis.’ Daniel responded, he alleges, by turning away and saying, ‘What do you think you are doing?’” Over the next few months, Daniel alleges, Melidones “repeatedly” harassed him because of his sexual orientation. “Almost every day,” according to Daniel, “Melidones would stand next to Daniel’s podium and mock the name of Daniel’s co-worker, Manny Perdomo. Melidones would call Perdomo ‘Manny the homo.’ Melidones would also whisper the word ‘homo’ to Daniel.” Daniel also claimed that Melidones would come into the locker room when Daniel was resting on break and stare at him, also watching Daniel changing his clothes. He testified to receiving a phone call while on duty from Melidones, who was attending a Broadway production of Mary Poppins and repeatedly said to Daniel, “You’d make a good Mary Poppins.” He also said Melidones frequently told him to “man up” or “be a man,” which Daniel said made him “self-conscious of his level of masculinity.” “How was I not manly enough? What is it about me that makes me less of a man? You know, again, not only was he saying that to me because—maybe because as a Black man I don’t portray that hyper-masculine, you know, toughness that stereotypically one expects an African American or Black American male to behave, but he also—because of his perception of me being gay, I am somehow less of a man.” The problem, in terms of liability of the company, is Daniel’s failure to sufficiently articulate complaints about this behavior, reflected also in the scanty detail in his NYSDHR charge. “Daniel, in articulating his grievance, nowhere references the most explosive allegations he later came to make [during the trial process] against Melidones. The omission of these allegations from the complaint Daniel filed with the DHR is particularly consequential,” Engelmayr continued. “Daniel there had every incentive and opportunity to explain his basis for claiming harassment on the basis of race, sexual orientation, and national origin, and indeed took the time to flesh out his claim. Daniel testified that he did not appreciate the significance of this form and that he lacked the opportunity to fill it out in more detail. For various reasons, the Court does not find that excuse credible or persuasive as a reason for Daniel to have omitted his most sensational allegations, were they true.” As a result, Engelmayr ended up finding that Daniel had not established “the claims as to the most serious acts of misconduct.” Thus leading, yet again, to a conclusion that the record of his treatment, combined with his reticence in complaining to the company, was not severe or pervasive enough to establish company liability under Title VII or the NYSHRL. Among other difficulties we perceive in reading this opinion, although the court had appointed pro bono counsel to represent him, ultimately Daniel made the decision to reject counsel and represent himself, which is usually a drastic mistake. Pro se cases are so painful to read.

NEW YORK – Gay man acting badly? That is the gravamen of a Title VII/New York Human Rights Act suit filed by Wayne Rice in the U.S. District Court for the Eastern District of New York (Central Islip courthouse) against Smithtown Volkswagen and Joe Bindels, his former boss. Rice v. Smithtown Volkswagen, 2018 U.S. Dist. LEXIS 136323, 2018 WL 3848923 (E.D.N.Y., Aug. 13, 2018). Rice, who identifies as heterosexual, was employed as a general sales manager by the defendant automobile dealership from September 21, 2015, until he was discharged on September 4, 2016. His complaint alleges that beginning on February 20, 2016, Joe Bindels, owner of the dealership, began to subject Rice to unwanted sexual advances and a hostile environment. District Judge Arthur D. Spatt, summarizing the allegations of the complaint, does not spare explicit details. The harassment began when Bindels sent Rice, using his office email address, “several full body naked pictures of himself masturbating. These pictures,” continue Spatt, “include a close-up enlarged picture of the head of Bindel’s penis with white fluid dripping down, as well as pictures of Bindels lying totally naked on his back with his legs spread and his penis fully erect.” Rice alleges that a week later Bindels went to Rice’s office and “asked him if he liked the pictures. The Plaintiff responded by asking Bindels why he sent the pictures, telling Bindels he did not like them, and expressing his desire for Bindels to leave him alone.” But, according to the complaint, Bindels continued making sexual advances despite Plaintiff’s objections . . . . Specifically, Bindels told the Plaintiff on several additional occasions that he wanted to have sex with him. Each time, the Plaintiff refused and told Bindels to stop.” But Bindels was not dissuaded, and this kept up, with Bindels adding comments about how Rice’s job at the dealership “would be secure if he had sex with Bindels.” According to the complaint, “on August
24, 2016, Bindels told the Plaintiff that he would make more money and have a secure future at Smithtown Volkswagen if he succumbed to Bindel’s advances.” Finally, Rice was sufficiently fed up to complain to somebody else, the newly-hired general manager, David Hovell, “imploring him that something needed to be done to stop the harassment.” Something was done, promptly. On September 4, Hovell called Rice “and told him that ‘they’ were going to go in a different direction, and that his services were no longer needed. When the Plaintiff asked why he was fired, Hovell did not describe any performance issues or other business reasons for the decision. Rather, Hovell simply stated: ‘Joe (Bindels) no longer wants you here.” Rice filed a charge with the EEOC, obtained his right to sue letter, and filed suit against the dealership and Bindels, as well as Volkswagen Group of America (which was voluntarily dismissed as a defendant). Defendants responded by filing a motion to dismiss, attaching to the motion various documents purporting to show that they had performance reasons for discharging Rice and that the decision was made by Hovell, not Bindels. Judge Spatt properly ruled that these documents would be ignored in deciding the motion to dismiss, since such a motion goes to the question whether the Plaintiff’s allegations, if true, state a claim for relief, and the court has no obligation to consider any factual allegations beyond those stated in the complaint. Turning to the merits of the motion, Judge Spatt easily found that a cause of action had been stated. Indeed, viewed on their own, Rice’s allegations easily meet the test for a hostile environment as well as quid pro quo sexual harassment. (There is Title VII precedent going back to the 1980s binding actionable sex discrimination under Title VII when a male boss solicits sex with a male employee and premises job security on the employee’s positive response to the proposition, although Spatt doesn’t go that far back in his citations of precedent. This kind of quid pro quo cause of action was recognized even before there was general acceptance of the hostile environment theory under Title VII.) Furthermore, that Hovell called Rice to discharge him just days after Rice complained about Bindel’s conduct was sufficient to allege a retaliation claim for engaging in protected activity; Rice’s complaint was clearly protected activity under Title VII, and his allegation that Hovell said he was fired at Bindel’s direction was sufficient to show motivation and causation. Thus, the motion to dismiss was denied. Rice is represented by Scott M. Mishkin and Paul A. Carruthers of Scott Michael Mishkin, P.C., Islandia, N.Y. The defendants are represented by John B. Zollo of Nesconset.

NEW YORK – U.S. Magistrate Judge Henry Pitman ruled on July 19 that Osvaldo Boves, who had filed suit against his employer and his boss in federal court alleging discrimination against him because of his sexual orientation in violation of New York State and City law, must “resolve his claim through arbitration.” Boves v. Aaron’s Inc., 2018 WL 3475469 (S.D.N.Y.). According to evidence presented in support of the defendants’ motion to dismiss and compel arbitration, the company sent an email to all employees on March 1, 2017. The subject line of the email said, in all capital letters, “MANDATORY ACTION REQUIRED,” and the text set forth a detailed arbitration agreement, under which both the employee and the Company agree that all Claims between would be “exclusively decided by arbitration governed by the Federal Arbitration Act before one neutral arbitrator and not by a Court or Jury.” The agreement defined claims to include those arising under state or local law, and required that the proceedings by private and confidential. Thus making this a voluntary agreement, despite the ‘MANDATORY ACTION REQUIRED’ subject line. However, the court did not dismiss the action, instead directing the Clerk to mark the action “closed,” but concluding: “This matter is stayed pending the outcome of the parties’ arbitration,” thus leaving the door open for Boves to come back to court if he has a legally sufficient reason to contest the arbitrator’s decision or, of course, if the employer after all this refuses to cooperate with the arbitration procedure. Generally, arbitrators’ decisions are not subject to judicial review on the merits unless they are clearly repugnant to the law.

PENNSYLVANIA – In Semian v. Department of Military and Veterans’ Affairs, 2018 WL 4038116, 2018 U.S.
Claims. Within the 3rd Circuit there is no federal court under Title VII and 42 USC §1981, supplemented by various state law protections, with defendant arguing that these allegations were advanced in his brief opposing the employer’s dismissal motion, not in his complaint! “A brief submitted in opposition to a Motion to Dismiss is not a Complaint nor a substitute for absent allegations,” wrote Mariani, “and the Court agrees that these allegations were advanced in his brief opposing the employer’s dismissal motion, not in his complaint.” The problem, pointed out the judge, is that these allegations were advanced in his brief opposing the employer’s dismissal motion, not in his complaint! “A brief submitted in opposition to a Motion to Dismiss is not a Complaint nor a substitute for absent allegations,” wrote Mariani, “and the Court agrees that these allegations were advanced in his brief opposing the employer’s dismissal motion, not in his complaint.” The court dismissed a Section 1981 claim for the obvious reason that Semian made no factual allegations related to race discrimination, and dismissed a tortious interference with prospective contractual relations claim on sovereign immunity grounds. However, the court denied defendant’s motion to dismiss a state Whistleblower Law claim, and allowed discovery to proceed on that claim, even there was a plausible argument that it was time-barred, because in discovery the issue of when Semian learned that his staffing-related complaints may have been the cause of his discharge could dissipate the timing issue of his complaint on this count. It seems that he was discharged in a letter that did not state any reasons, and he might be able to plausibly allege that he first acquired information necessary to be aware of this claim at a later date than his discharge. Semian’s counsel is Harry T. Coleman of Carbondale.

TENNESSEE – U.S. District Judge Thomas L. Parker dismissed a class action complaint against BlueCross BlueShield of Tennessee by an anonymous plaintiff complaining about the defendant’s unilateral modification of pharmaceutical coverage under its health plans to require that insureds purchase “specialty medications” either through BCBS’s mail-order service or through a “designated specialty brick-and-mortar pharmacy” (referred to by the insurer as “B&M specialty pharmacies”). Doe v. BlueCross BlueShield of Tennessee, Inc., 2018 WL 3625012, 2018 U.S. Dist. LEXIS 126845 (W.D. Tenn., July 30, 2018). Doe, a person living with HIV who obtains his insurance from defendant insurer through a plan provided by his former employer, had been getting his medication, Genovay, through a local pharmacy, but the pharmacy rejected his refill order in March 2017, informing him that BCBS deemed Genovay a “specialty medicine” and would no longer cover its purchase through community pharmacies. Doe spent about six months in communications with BCBS trying to persuade them not to require him to obtain Genovay through the BCBS mail-order program or one of their designated pharmacies, none of which were located in convenient proximity to Doe’s residence, but to no avail, and then brought this action, represented by a bevy of consumer rights lawyers, seven of whom are listed in the court’s opinion. Doe alleged that the insurer’s insistence on this program was motivated by greed (i.e., Genovay is an expensive medication, and BCBS can make more money by dispensing it directly or through its small network of cooperating pharmacies), and works a
hardship on people with HIV. He points out the importance to him of dealing with a local pharmacist who is familiar with his condition, can counsel him personally about side effects, and can avoid possible deleterious effects on the medication when it is transported through mail or parcel delivery. He also emphasized the significant dangers if his supply is interrupted as a result of misdirected or delayed mail delivery, and emphasized the physical hardship of having to travel significant distances if he wants to get his medication through one of the designated B&M specialty pharmacies. He claimed violations of the Affordable Care Act, Sec. 1557; Title III of the Americans with Disabilities Act, as well as common law claims of breach of contracts and unjust enrichment. Judge Parker concluded that his complaint did not state a viable cause of action under either statute or the common law theories. Parker, who has been on the bench for about a year since his nomination by President Trump and confirmation by the Senate, concluded that the anti-discrimination statutes invoked by Doe require a showing of intent by the insurer to discriminate against people living with HIV, but the insurer’s establishment of its “specialty medicines” program included a large list of medications for a wide variety of illnesses and symptoms, not restricted to HIV. Furthermore, although there is disagreement among the circuit courts as to this, it appeared to Judge Parker that the 6th Circuit was dubious about the use of a disparate impact theory in this sort of case and, even if that theory could be used, Doe had not presented the kind of statistical evidence that the 6th Circuit usually demands in disparate impact cases. He found that the allegation that BCBS’s unilateral modification of its pharmaceutical coverage polices constituted a breach of contract was not viable, so long as they were not refusing to cover this medication, just changing the method of coverage, and he pointed out that “unjust enrichment” is a cause of action reserved for situations where the dispute is not covered by a contract. He wrote: “The Court’s analysis and holding are not questioning the difficulty experienced by Plaintiff’s [sic] and other patients with HIV/AIDS who obtain their medications through Defendant’s Program. The Court also recognizes that despite advances in education and medicine, being HIV/AIDS positive [sic] still carries a stigma. Those diagnosed with either condition face significant challenges, including the discrimination they encounter in many aspects of their daily lives. Perhaps the Program here makes that reality even more painful for Plaintiff. All the same, the Court finds that the Amended Complaint stops short of alleging that Plaintiff’s insurer has completely deprived him of access to his HIV/AIDS medication. This is particularly compelling when considered whether Plaintiff has stated a claim for disparate impact under the Rehab Act.”

TENNESSEE – A lesbian couple then residing in Tennessee, Carla Scarborough and Michelle Anderson, “merged their assets with the intent to reside as domestic partners” in June 2004, and moved together into “the same residence,” wrote U.S. Bankruptcy Judge Marian F. Harrison in Limor, Trustee v. Anderson, 2018 WL 3218849, 2018 Bankr. LEXIS 1974 (U.S. Bankruptcy Ct., M.D. Tenn., June 29, 2018). During the course of their domestic partnership, which did not have any legal status under Tennessee or federal law at any time during its duration, they acquired real property, vehicles, and artwork. They ended their relationship in 2014, entering into a Dissolution of Partnership Agreement, under which they stated their intent to “separate and dissolve the same domestic partnership, whereby the parties will equitably dissolve all assets bought with co-mingled funds. This dissolution is hereby written as the intent of both parties.” The document states that the two residences they owned were purchased with mutual, co-mingled assets; Michelle would live in one and Carla would live in the other, but Michelle would have the right to sell either property at any time and retain all the proceeds. Next it states that all art purchased during the relationship belongs to Michelle. They had lots of vehicles, which were divided up between the two of them. The net of it was that Michelle walked away with ownership of the lion’s share of assets that had been purchased with “co-mingled funds,” and Carla was left with relatively little. This voluntary Chapter 7 proceeding was filed on June 8, 2015, at which time Carla owed several years of federal taxes, an unpaid American Express card balance, and medical bills, for total debt of at least $170,449.26, for outweighing her meager assets. The Bankruptcy Trustee sued to recover assets from Michelle, alleging that the transfers of assets under the Dissolution of Partnership Agreement, which was signed fewer than two years before the bankruptcy petition, should be deemed constructive fraudulent conveyances to shelter the partnership assets from Carla’s creditors (including the government to the tune of $32,800.00). “The parties had a domestic partnership before the law recognized same sex marriages in Obergefell v. Hodges,” wrote Judge Harrison. “Therefore, the Court is to review the dissolution of the Parties’ relationship under the same standards as a marital dissolution agreement under state law. The court found that the record would supported a finding that Carla’s interest in the real property and artwork at the time of the Transfers was worth a total of $87,445.10, but she received effectively zero, only getting ownership of some of the vehicles. The court found that “the Debtor was insolvent on the date of each transfer or became insolvent as a result of each transfer,” wrote Judge Harrison, continuing, “In the present case, the
record reflects that the Debtor (Carla) has a history of not paying her debts and of filing for chapter 7 bankruptcy. Such history supports the fact that the Debtors was unable to pay her obligations as they became due.” On the date that assets were transferred under the Dissolution Agreement, Debtor had liabilities totaling at least $124,800.00, which far exceeded the value of the assets the Debtor received,” which the court puts at $7,800.28. The Defendant “asserts that the Dissolution Agreement took into account the value of the Debtor’s interest in the partnership assets,” but, said the court, “the Defendant failed to support the allegedly contested facts with competent summary judgment evidence.” The Court granted summary judgment to the Trustee on her claim for the value of the assets to be attributed to Carla at the time of the Transfer. The Debtor is represented by Laura Tek, Nashville; the Trustee by Erica R. Johnson, her partner in Limor & Johnson, Nashville, Anderson, the Defendant, is represented by Steven L. LekfKovitz.

TEXAS – The gender stereotype workaround has kept alive Kyle Berghorn’s Title VII claim against Xerox Corporation, which dismissed him as a senior manager of a team of auditors. The court is bound by Fifth Circuit precedent required dismissal of the sexual orientation claim, District Judge Karen Gren Scholer, who ruled on December 16, 2017, refocusing his Title VII claim solely on gender stereotyping. The 5th Circuit has specifically approved gender stereotyping claims in EEOC v. Bob Brothers Construction Co., LLC, 731 F.3d 444 (5th Cir. 2013). Xerox, quick on the draw, filed a motion to dismiss that claim four days later! On March 8, per “Special Order 3-318” (the meaning of which is not explained in the court’s opinion), the matter was transferred to the docket of District Judge Karen Gren Scholer, who ruled on the motion on July 3. She wrote, “Xerox moves to dismiss Berghorn’s claim for failure to state a claim, arguing that Berghorn’s allegations all relate to his sexual orientation and not a failure to conform to gender norms. Given the procedural and pleading history of this case, Xerox’s motion may indeed have merit. Regardless, accepting all well-pleaded facts as true and construing the complaint in the light most favorable to the plaintiff, Berghorn pleads sufficient facts to state a plausible claim that Xerox terminated his employment allegedly due to his failure to conform to gender stereotypes. The Court notes that many of the facts alleged by Berghorn to support his gender stereotyping claim in his Second Amended Complaint appear to be a recasting of his sexual orientation claim from his Amended Petition; however, whether or not Berghorn has sufficient evidence to support his Title VII claim may be determined at either the summary judgment stage or at trial. The Court is bound by Fifth Circuit law. As the Court has stated previously, “[U]nless and until overruled by the Fifth Circuit or the Supreme Court, or Congress elects to extend Title VII protection to sexual orientation, the Court cannot disregard Fifth Circuit precedent.” Lindsay Order 8. Likewise, contrary to the urging of Berghorn, this Court will not legislate from the bench and expand the law. Accordingly, only Berghorn’s Title VII claim based on gender stereotyping survives as a potentially viable claim, and only that claim will be considered at future stages of this litigation.” The court’s opinion does not recite or summarize Berghorn’s factual allegations in support of his gender stereotyping claim, but a law firm client letter summarizing the holding found on-line indicated that Berghorn’s gender stereotyping argument is essentially that Xerox discriminates against men who form close attachments to other men rather than women, not that he is effeminate or unmanly in his presentation. So who knows where this is going, but it is, after all, in Texas, where apart from a few municipal ordinances, there is no protection against sexual orientation discrimination in private sector workplaces (and public sector workers need to resort to constitutional arguments). This is one of a long line of cases reinforcing the need to pass the Equality Act in Congress or to get the
Supreme Court to agree with the EEOC and the 2nd and 7th Circuits that Title VII forbids sexual orientation discrimination. Meanwhile, the Bloomberg/BNA Daily Labor Report account of this ruling, published July 5, noted that an appeal is pending in the 5th Circuit seeking reconsideration of the Circuit’s precedent rejecting sexual orientation claims, O’Daniel v. Industrial Service Solutions. Berghorn is represented by Roger Elliott Topham, Evan Bradley Lange, and Rob J. Wiley, of the Law Office of Rob Wiley PC, Dallas, and Kalandra Nicole Wheeler of the Wiley firm’s Houston office.

**VIRGINIA** – Above, under “Maryland,” we report on a lawsuit filed by Lambda Legal in U.S. District Court on August 28, representing two military service members discharged because of their HIV-positive status. In a earlier case on file in the U.S. District Court for the Eastern District of Virginia, the same counsel had moved on July 19 for a preliminary injunction in Harrison v. Mattis, Case 1:18-cv-00641-LMB-IDD, complaint filed in May 2018, which is pending before District Judge Leonie Brinkema. This suit was filed in response to the Defense Department’s publication of a new policy under which HIV-positive service members, who are considered by the Department to be categorically “non-deployable,” would be subject to discharge. The “Deploy or Get Out” Policy, which was stated to be effective upon its issuance, provides that “the Military Services have until October 1, 2018, to begin mandatory processing of non-deployable Service Members . . .” The plaintiffs’ motion argues that the policy is subject to heightened scrutiny because being HIV-positive is, at present, an immutable characteristic, and that actual service experience shows that people living with HIV-infection controlled through currently available anti-retroviral medication are successfully serving and capable of serving, such that a categorical rule to discharge them is not supported by an important governmental interest. Plaintiffs argue that a soldier’s HIV diagnosis “bears no relationship to his or her fitness, military readiness, effectiveness, or lethality.” Asserting irreparable harm if plaintiffs are processed for discharge, the motion seeks a preliminary injunction while the case is litigated. The motion mentions reports that DoD has already moved to discharge some service members on this basis who are fully capable of serving, as reported in the action filed in late August in Maryland. The government responded to this Virginia lawsuit with a motion to dismiss, and plaintiffs filed a responsive brief on September 4.

**CRIMINAL LITIGATION NOTES**

By Arthur S. Leonard

**U.S. COURT OF APPEALS, 8TH CIRCUIT** – An 8th Circuit panel has affirmed a decision by District Judge Karen E. Schreier (D. South Dakota) to deny a petition for a writ of habeas corpus filed by Charles Russell Rhines, a gay death row inmate awaiting execution in the South Dakota State Penitentiary. Rhines v. Young, 2018 U.S. App. LEXIS 21536, 2018 WL 3685515 (8th Cir., Aug. 3, 2018). This ruling came several weeks after the United States Supreme Court rejected without comment a petition for certiorari, in which Rhines was particularly contesting decisions made by his trial and appellate counsel, including failed attempts to get the courts to vacate the death penalty based on evidence of juror bias. However, for a variety of complicated reasons, the courts will not now address that issue on the merits. After the Supreme Court denied the latest cert petition, the pending appeal on the habeas petition was Rhines’ last hope, which is now snuffed out at the court of appeals level, although Rhines might take one last run at a petition for en banc reconsideration, or a new cert petition. The question at this point is how quickly South Dakota officials will move to execute him, or whether he might succeed on a petition to commute his sentence to life without parole based on the evidence of juror bias in the penalty phase.

**ALABAMA** – The 11th Circuit’s rejection of the claim that discrimination because of a person’s sexual orientation is prohibited by Title VII came back to bite Kristal Brakeman in Brakeman v. BBVA Compass, 2018 WL 3328909, 2018 U.S. Dist. LEXIS 112262 (N.D.
July 16th, with Alderson present, with Edwards in HR. The next day, Alderson, who, in turn, consulted about what Talmadge had said. Greer [a supervisor] and complained five. On July 15th, Plaintiff approached was 'unsure' whether it was more than Plaintiff couldn't recall and that she heard Talmadge make the comments, when asked how many times she taking the comments as harassment is married to a woman, was offended, getting a man in her life.' Plaintiff, who and other employees 'need[ed] to talk to the company's conclusion (perhaps incorrect) that she was threatening to blackmail a supervisor who had gotten into trouble with the law in another county by writing a bad check, filed a suit claiming violations of the Family and Medical Leave Act, the Americans With Disabilities Act, and the anti-retaliation provision of Title VII of the Civil Rights Act. Brakeman, a lesbian who had married a woman, premised her retaliation claim on an incident involving a co-worker, evidently a conservative Christian who was apparently grossed out about working in proximity to a married lesbian. The incident occurred shortly after the Supreme Court's Obergefell ruling was announced at the end of June 2015, a point of considerable controversy in Alabama, where the state's Chief Justice was noisily rallying the county surrogate judges to refuse to issue marriage licenses to same-sex couples. Anyway, over the course of a few days in July 2015, writes Magistrate Judge John E. Ott, “a co-worker in Plaintiff’s area, Susan Talmadge, made several remarks to Plaintiff and in her presence to the effect that Talmadge and other employees ‘need[ed] to talk to [Plaintiff] about Jesus’ and ‘about getting a man in her life.’ Plaintiff, who is married to a woman, was offended, taking the comments as harassment based on religion and sexual orientation. When asked how many times she heard Talmadge make the comments, Plaintiff couldn’t recall and that she was ‘unsure’ whether it was more than five. On July 15th, Plaintiff approached Greer [a supervisor] and complained about what Talmadge had said. Greer responded by contacting his supervisor, Alderson, who, in turn, consulted with Edwards in HR. The next day, July 16th, with Alderson present, Greer verbally counseled Talmadge on Compass's policy of ‘diversity and inclusion,’ cautioning her to keep her workplace discussions ‘professional and respectful.’ Plaintiff acknowledges that, after she complained to Greer, she experienced no further problems with Talmadge.” Ott notes that another supervisor who was subsequently involved in the termination decision was on vacation when this happened, but was later notified about it. The retaliation claim asserts that Compass fired Brakeman in retaliation for her complaint about Talmadge’s remarks. For this to be actionable under Title VII, the first thing Brakeman would have to prove is that her complaint was protected activity under the Title VII retaliation clause, which means she was making a complaint about conduct that comes within Title VII's categories of race, color, religion, sex or national origin, and that would constitute actionable harassment. But, of course, the 11th Circuit does not recognize sexual orientation claims as actionable under Title VII. “Plaintiff’s complaint to Greer is not protected activity for purposes of [Title VII] because Plaintiff could not have had an objectively reasonable belief that Talmadge’s comments amounted to an unlawful employment practice under Title VII,” wrote Judge Ott. “First, while Talmadge’s statements appear to have been motivated by Plaintiff’s homosexuality or same-sex marriage, under the law of the 11th Circuit, Title VII's prohibition against discrimination ‘because of sex’ does not reach adverse treatment motivated by sexual orientation,” citing Evans v. Georgia Regional Hospital, 850 F. 3d 1248, cert. denied, 138 S. Ct. 557 (2017), a case that post-dates these events by two years (!) but was relying on a 1979 5th Circuit precedent. In addition, Ott points out, a handful of comments along these lines would not be sufficient to create a hostile environment in any event. “While perhaps something less than entirely benign,” he wrote, “Talmadge's conduct was not at all either severe or pervasive and did not approach the stuff of a hostile work environment.” Brakeman also suggested alternatively that in light of the tenor of Talmadge’s remarks, this could be dealt with as condemnation of Brakeman “on the basis of her perceived failure to conform to Christian morals and traditional gender roles.” Rejecting the “gender roles” aspect, Ott recurred to his own unpublished decision in a recent case where a lesbian plaintiff sought to use the gender stereotyping theory to survive a motion to dismiss a sex discrimination claim, and Ott had written that, in effect, allowing such a claim where the only stereotype involved was preferring same-sex to different-sex partners would in effect give every gay plaintiff a cause of action under Title VII. (Exactly, as the 2nd and 7th Circuits have ultimately concluded, en banc, that it should . . . .) But this is not the law in the 11th Circuit, where real women are not lesbians? Anyway, Ott also rejected the religious stereotyping claim: “Likewise, because it is not disputed that Talmadge’s remarks were motivated by her concern or disapproval of Plaintiff’s homosexuality, that Talmadge’s expression invoked her own Christian beliefs is insufficient to establish that she was harassing Plaintiff because of Plaintiff’s religion within the meaning of Title VII.” Thus, Ott awarded the employer summary judgment on the Title VII retaliation claim. Brakeman fared no better on her FMLA and ADA claims, for reasons not apparently having to do with her sexual orientation. She is represented by Jon C. Goldfarb and L. William Smith of Wiggins Childs Pantazis Fisher & Goldfarb, Birmingham.

DELAWARE – The Delaware Supreme Court rejected an appeal from a conviction for first-degree assault and resisting arrest by an HIV-positive individual who bit a police officer who was trying to restrain her as she resisted arrest for refusing to show a ticket on an Amtrak train. Bradley v. State, 2018 WL 4039527, 2018 Del. LEXIS 391 (Aug. 24, 2018). Zamarianne Bradley (also
known as Jonathan Bradley,” according to the court, boarded an Amtrak train south of Delaware headed to Boston, but declined to show a ticket when requested by the conductor, and then declined the conductor’s request to show identification. When the train arrived at Wilmington, the conductor pressed her further, ordering her to leave the train, and when she refused the conductor called Amtrak police. In the ensuing altercation as they sought to remove her, she bit one of the officers, who suffered a bleeding puncture wound on his arm. She was also injured in the altercation, resulting in two ambulances – one transporting her and the other the police officer to the hospital. Emergency care for him included HIV prophylaxis, which induced unpleasant side effects. When it was subsequently determined that Bradley was infected with HIV and hepatitis C, the officer’s period of prophylaxis was extended, although as of trial he had not tested positive for these infections. The officer testified about the uncomfortable side effects of his treatment at the trial. The conviction of first degree assault required a finding by the jury that the defendant caused “serious physical injury” to the victim. On appeal, she complained about the jury charge and argued that she had not caused a serious physical injury to the police officer. The trial judge instructed the jurors: “The term ‘serious physical injury’ means any physical injury which creates a substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.” Bradley complained that this charge omitted to include the definition of “physical injury” contained elsewhere in the state’s criminal code, which she argued would be more favorable to her and the judge should have read to the jury, despite the lack of any motion to that effect by her lawyer. However, as no objection to the charge was lodged during the trial, the court would only order a new trial if the charge as given “compromised the defendant’s right to a fair trial,” and the Supreme Court found that the charge as given did not seriously mislead the jury. Indeed, the court pointed out that Bradley’s own attorney had, during closing arguments, agreed that the victim “suffered a physical injury,” but argued. “I can’t tell you that it’s not a serious physical injury.” However, he argued to the jury that they had to “decide whether, in fact, it meets the substantial risk of death, prolonged disfigurement, prolonged impairment or function of bodily organ.” In light of that argument, the Supreme Court wrote, “we do not believe that the jury failed to intelligently perform its duty or that the instructions that were given compromised Bradley’s right to a fair trial.” Bradley argued that the trial judge should have given a more detailed charge sua sponte, that could have opened to the jury the possibility of convicting on a lesser charge, but, said the court, “Delaware follows the ‘party autonomy’ approach to lesser-included offenses, where ‘the burden is entirely on the parties, rather than the trial judge, to determine whether an instruction on a lesser-included offense should be considered as an option for the jury.’” Thus, said the court, “we reject Bradley’s attempt to undo her strategic calculation by arguing that the trial court committed plain error by not sua sponte issuing a separate jury instruction on ‘physical injury.’” A public defender, Nicole M. Walker, represented Bradley on this appeal.

LOUISIANA – Gay man acting badly, but prosecution acting worse? Mario T. Willis, then in his mid-20s, pled guilty to having sex with a minor male, about ten years his junior, under circumstances suggesting that Willis infected his young partner with HIV. Willis met D.B. when Willis was volunteering at D.B.’s school, and D.B., upon testing HIV positive and identifying Willis as his only sexual contact, told a detective that they had sex about 5 times over a period of two years, starting when D.B. was 14. The potential sentence range under Louisiana law would depend on the period of time over which sexual contact took place. The state charged Willis under a provision applicable to a course of molestation exceeding a year but, he points out, the young victim testified at trial to sexual contact covering a period of about six months. Willis even objected at the hearing, at which he and the victim and relatives testified, that the testimony presented at hearing would only support a finding of six months, and thus he was charged under the wrong statutory provision, but the trial court denied his motion to reconsider the sentence. On appeal he is claiming that the sentence imposed of 20 years prison at hard labor, with at least 5 years to be served without benefit of probation, parole, or suspension of sentence, to be followed to registration as a sex offender upon release, was too severe, because the factual allegations in the charge to which he pled overstate the period of time of the sexual contacts. He claimed the maximum hard time
imposed should have been 10 years. No sympathy from the Louisiana 2nd Circuit Court of Appeals, which observed that having pled to the charge, he could not get appellate review of the sentence on this contention. It is up to a jury to find facts when there is a dispute, but he waived his right to a jury by pleading to the charge. And it made no difference that his plea was *nolo contendere* rather than guilty; either way, he waived a jury trial so could not dispute the facts. *State of Louisiana v. Willis*, 2018 WL 3863389, 2018 L.a. App. LEXIS 1571 (Aug. 15, 2018).

NEW JERSEY – This one is too gruesome to relate at length, so we just report the per curiam New Jersey Appellate Division opinion from the court’s introductory summary. *State v. Garcia*, 2018 N.J. Super. Unpub. LEXIS 1652, 2018 WL 3370847 (July 11, 2018). “Defendant, Pedro A. Garcia, confessed to police that he and a co-defendant, Wilfredo Sanchez, stabbed to death, decapitated, dismembered, and dispersed the body parts of the gay man with whom they lived. For those offenses, a jury convicted defendant of murder, desecrating human remains, and other crimes, and a judge sentenced him to an aggregate sixty-year prison term with forty-two and one-half years parole ineligibility. Defendant appeals. He argues he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights before confessing to police, and thus the trial court erred by denying his suppression motion. He also argues that separately or cumulatively, the improper and prejudicial testimony of three witnesses, the admission of gruesome photographs, the prosecutor’s misconduct, and the trial court’s refusal to charge the jury on manslaughter, deprived him of a fair trial. Last, he argues his sentence is excessive. We reject defendant’s arguments. The motion record amply supports the trial court’s finding that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights and confessed his crimes. With the exception of his request for a jury instruction on manslaughter, defendant preserved for appellate review none of the alleged trial errors he now complains of, and none were clearly capable of producing an unjust result. And defendant’s sentence is neither illegal nor conscience shocking. For these reasons, we affirm defendant’s convictions and sentence.” Those with strong stomachs and morbid curiosity may look up the court’s opinion for themselves.

NEW MEXICO – A gay man who pled guilty to defrauding investors and diverting more than $1 million in other people’s money to himself in a scheme reminiscent – on a smaller scale – of Bernard Madoff’s famous Ponzi schemes, managed to persuade a federal district judge in New Mexico to reject the government’s recommendation, pursuant to the Sentencing Guidelines, of 78 to 97 months in federal prison. Instead, the district judge (not named in the 10th Circuit’s opinion) imposed five years of probation with some lifestyle restrictions and a prohibition on acting in a fiduciary capacity. The judge was persuaded that restitution of the defendant’s victims took priority, and since at the time of sentencing the defendant was holding down a six-figure job, letting him continue working would make it possible for him to begin paying back his victims, and made more sense than locking him up and delaying any payment to his victims. Outraged, the government appealed the sentence, and found a receptive 10th Circuit panel in *United States v. Sample*, 2018 U.S. App. LEXIS 24164, 2018 WL 4056013 (Aug. 27, 2018). In seeking to excuse his financial misconduct, which involved one investment fund that collapse in Illinois and another that Matthew Dale Sample started after moving to New Mexico and operated until that collapse, leading to a bankruptcy filing, “Sample argued that he should receive consideration for probation based on his unblemished record in the securities industry before 2008, his charity and volunteer work during that time, and his previous financial support of his family and friends. Sample construed his crimes as an aberration resulting from stress. That stress arose from, in part, the 2008 financial crisis, the collapse of his financial practice, his divorce, acceptance of his gay identity, and his move to New Mexico. He began using alcohol, cocaine, and ecstasy, which he claimed contributed to his reckless behavior.” Wrote Circuit Judge Carlos Lucero, “Essentially, Sample rationalized that he swindled his clients in order to provide for his family and entertain his friends. He sought acknowledgement that at the time of sentencing, he was gainfully employed, engaged, and was free of drugs and alcohol. Continued employment with a six-figure annual income, Sample told the court, would allow him to make significant restitution payments to his former investors.” And the district judge bought this argument, hook, line and sinker. Credit his attorney, Ray Twoghi of Albuquerque, for persuasiveness. The 10th Circuit was as displeased as the government with this result. “We are puzzled by the court’s implicit suggestion that if defendant were poor and unemployed, he might get a prison term,” wrote Lucero. “Our court has previously explained in an unpublished decision that courts should not rely on a defendant’s wealth in fashioning a sentence.” While acknowledging that providing “restitution” to victims of fraud is a legitimate factor for a sentencing court to consider, in this case, wrote Lucero, “the district court’s reliance on Sample’s salary as overriding all other sentencing considerations exceeded the bounds of permissible choice.” Sample’s offense was serious, and in the usual course of these sorts of cases he would spend several years in
CRIMINAL LITIGATION notes

prison. “For an individual with Sample’s particular characteristics,” wrote Lucero, “the Guidelines suggest a range of 78 to 97 months’ imprisonment,” as the government had requested. Indeed, even though the district court, reflecting on how Sample lived when he was stealing the money, indicated that it would not “look favorably” upon his “living the high life” while on probation, by the trial court’s order “he is not legally prohibited from any number of leisure activities by any condition of his sentence.” Harrumph!! “Our system of justice has no sentencing discount for wealth.” Really? Well, the court concluded, “it is not possible to conclude that the probation Sample received, with its lenient conditions [Lenient? He’s not allowed to consume alcohol or drugs for five years!! As a gay man engaged to marry his boyfriend, he won’t even be able to drink at his wedding!!! Or share ecstasy on the honeymoon, for which he’ll need to get the probation officer’s permission to travel, assuming the he'll need to get the probation officer’s permission to travel, assuming the happy couple doesn’t want to confine their celebrations to Albuquerque!!!!], was a reasonable sentence.” The court vacated the sentence and remanded for resentencing, to, one suspects, a suitably chastened district judge.

OHIO – U.S. District Judge Michael R. Barrett granted a motion by the government to dismiss a negligent infliction of emotional distress claim filed by Army veteran David L. Hill, finding that a recorded misdiagnosis of HIV-infection in a Veterans e-benefits website does not give rise to such a claim. Hill v. United States, 2018 WL 3496385, 2018 U.S. Dist. LEXIS 121688 (S.D. Ohio, July 20, 2018). Hill suffers from service-connected PTSD and has a 30% disability rating. He sought a change in his rating due to chronic fatigue syndrome, and logged on to the Department of Veterans Affairs E-benefits website, where he saw listed for his a diagnosis of HIV infection. “Plaintiff asserts that he was previously unaware of any exposure or tests for HIV.” Seeing this listing, he “believed that he was HIV positive and contacted his doctor for testing; the subsequent testing came back negative for HIV.” In the interval between when he saw the HIV listing and got the negative test results from his doctor, he claims to have suffered “extensive damages, pain and suffering, extreme distress, and other damages.” In response to the government’s motion to dismiss, he claimed in his responsive brief that the “misdiagnosis generated ‘actual physical peril’ because the VA knew Plaintiff’s disability status, and the information ‘did not come from a medical professional,’ but rather from the E-benefits website.” Too bad. Under the Federal Tort Claims Act, the issue for the court was whether these facts would support a claim for negligent infliction of emotional distress under Ohio tort law, and Judge Barrett found Ohio precedents dating back more than twenty years and reiterated several times that an HIV-positive misdiagnosis does not give rise to a claim for negligent infliction of emotional distress under Ohio tort law. Citing back to Heiner v. Moretuzzo, 73 Ohio St. 3d 80 (1995), Judge Barrett wrote, “Although the HIV misdiagnosis likely caused Plaintiff sincere emotional distress, Ohio law requires a real physical harm, experienced or threatened, to establish a valid NIED claim . . . Furthermore, Plaintiff makes no attempt to demonstrate that he was actually in peril of contracting HIV or at risk of any other physical injury at any time between the misdiagnosis and the corrected test results.” Barrett is represented by Maxwell Douglas Kinman, of Mason, Ohio.

OHIO – U.S. Magistrate Judge Kimberly A. Jolson relied on the statute of limitations to recommend denial of a habeas corpus petition and dismissal of an action by Wayne Christian, an HIV+ man serving a lengthy prison term, having been convicted on nine counts of felonious assault in Jefferson County, Ohio, Court of Common Pleas, for violating Ohio R.C. 2903.11(B)(3). Christian v. Bracy, 2018 WL 3546811, 2018 U.S. Dist. LEXIS 123487 (S.D. Ohio, July 24, 2018). The statute “criminalizes conduct between a person who has knowledge of their HIV status and a minor, defined as a person under the age of eighteen,” wrote the Ohio 7th District Court of Appeals in ruling on his direct appeal of his conviction. “Appellant was charged with engaging in sexual conduct with a sixteen-year-old girl on at least ten occasions without informing her that he is HIV positive and without using protection.” His sentence, pronounced on May 17, 2008, aggregated to about 40 years. He filed a direct appeal, which was unsuccessful, and failed to perfect a further appeal to the Ohio Supreme Court, which also denied his subsequent motion for the right to file a delayed appeal. From 2009 through the present he has continued to file papers in the Ohio courts seeking judicial review, focusing on the question whether the Ohio statute violates Equal Protection by treating people living with HIV differently from people who know that they are infected with other types of sexually transmitted diseases. But Judge Jolson found the federal one-year statute of limitations on filing habeas corpus petitions to be controlling here. “The appellate court affirmed the trial court’s judgement on December 28, 2007,” she observed, and Christian’s judgement of conviction became final on February 11, 2008; his delays in filing lost him a chance of a hearing with the Ohio Supreme Court, and his time to file a federal habeas petition then began to run, expiring on February 12, 2009. He did not file this new habeas petition until June 20, 2018, so Judge Jolson found it to be time-barred, because the Equal Protection issue has been available for him to raise throughout his prosecution
and direct appeals. There is no basis for equitable tolling here.

**PENNSYLVANIA** – Ruling on a motion *in limine* by a gay defendant being prosecuted on charges of travel with intent to engage in illicit sexual conduct, Senior U.S. District Judge James M. Munley held that the government may not introduce in evidence videos captured from defendant’s iPhone depicting adult homosexual activity, on grounds of lack of relevance. *United States v. Senke, 2018 WL 3707284, 2018 U.S. Dist. LEXIS 146903* (M.D. Pa., Aug. 3, 2018). Defendant Charles Senke was arrested in an on-line sting operation conducted by the Pennsylvania Attorney General’s office. An agent “masquerading as a minor on an LGBT website, Gay.com,” engaged Senke in chat. The agent represented himself as a gay youth seeking sexual contact. Through text messages Senke and the agent decided to meet, and law enforcement agents arrested Senke when he arrived at the agreed meeting site. Although charges were originally brought in Pennsylvania state court, two years later the federal government instituted this case and the state charges were dismissed. A federal public defender was appointed to represent Senke, but the public defender withdrew with the court’s consent and Senke represented himself *pro se* on this motion *in limine*, although new appointed counsel is representing him in proceedings after the decision of this motion. The government filed its own motion *in limine* to preclude Senke from using an entrapment defense, which the court denied. Two weeks later, the government filed a superseding indictment adding the charge of attempted transfer of obscene material to a minor. “As with the other counts,” wrote Munley, “this count does not relate to an actual minor but rather involves an undercover law enforcement officer.” The government’s trial brief indicated that if Senke raised the entrapment defense, it would seek to present at trial videos of explicit sexual activity found on his iPhone, going to the issue of propensity to commit the crime. An entrapment defense fails if the prosecution shows that the defendant had a propensity to commit the offense with which he was charged, and was not doing it solely due to enticement by the undercover agent. The government’s description of “the evidence at issue” is quoted by Munley: “A search of the defendant’s iPhone subsequent to his arrest revealed obscene videos created by the defendant involving sexual conduct with a young male. One such video depicts a young male on his knees, wearing a dog collar, with the defendant holding him by a leash. During the video, the defendant commands the male to eat and drink from dog dishes, and then commands him to perform oral sex on the defendant, which is also captured on the video.” Senke challenged the admissibility of this video on relevance grounds, pointing out that the “young man” in the video is not a minor, and thus the video is not depicting the kind of conduct described in the charges against him. “The defendant argues that the videos at issue show two adult men engaging in sexual acts. They have no relevance in a criminal case in which all the charges relate to a minor. We agree,” wrote Munley. “Although the court has not viewed the videos at issue, we have no reason to [believe] they involve criminal conduct. The government states that the videos show a ‘young male’ rather than a minor. The defendant states that ‘the video depicts Defendant engaging in sexual behavior with an adult male. No reasonable juror could find that it depicted behavior with a minor.’ A willingness to engage in sexual conduct with an adult does not demonstrate a willingness to engage in sexual conduct with a fourteen-year-old minor. Thus the evidence is irrelevant to demonstrate defendant’s predisposition to commit the crimes with which he is charged.” The government alternatively argued that because the other person in the video “looks young,” that is enough to establish propensity evidence. Munley was not convinced, writing: “Merely because someone would have sexual relations with someone who looks young does not mean that that person would have sexual relations with a minor,” so it is not permissible as propensity evidence. The videos may not be introduced at trial.

**TEXAS** – An HIV-positive man who was thrice convicted on child molestation charges and then adjudged as a “sexually violent predator” in a civil commitment proceeding tried to argue on appeal that the trial court erred by admitting evidence about his HIV status. The court says nothing about the sex of the minors with whom defendant had contact, but the opinion also mentions testimony that he was having sex in prison. *In re the Commitment of Bill Don Ratliff*, 2018 WL 3829264, 2018 Tex. App. LEXIS 6329 (Tex. Ct. App., Dallas, Aug. 13, 2018). Wrote Justice Craig Stoddart for the Court of Appeal, “Ratliff’s HIV status was discussed at a pretrial hearing on motions in limine. The trial court ruled it would allow evidence that Ratliff is HIV positive and the defense could bring out on cross-examination that he only engaged in sex with other inmates who had HIV. The State mentioned Ratliff’s HIV status in opening statement without objection. Ratliff’s counsel also mentioned HIV during opening and asserted the diagnosis has “truly impacted his life going forward.” During expert medical testimony, Dr. Price testified “that Ratliff disclosed during their interview that he was diagnosed as HIV positive in 1997.” [1997 was several years *after* the last of his molestation convictions.] “Dr. Price testified that Ratliff believe the diagnosis would reduce the risk he would re-offend and inhibit his sexual arousal. Dr. Price disagreed, saying it was inconsistent with Ratliff’s behavior.
in prison, because Ratliff said he engaged in sex after he was diagnosed as HIV positive. Dr. Price later agreed with defense counsel that a HIV diagnosis can be a life changing event.” But, unfortunately, Ratliff conceded that he had failed to preserve an objection to the evidence regarding his HIV status, so under Texas evidence rules he could not raise it on appeal unless it rose to the level of a “fundamental error.” He argued, “To aver that Ratliff is partially motivated by his HIV seropositive status to sexually re-offend gives rise to fundamental error.” The court wasn’t buying this argument, pointing out that it was Ratliff who initially raised the issue of his HIV status pretrial, trying to use it “as a factor that would reduce the risk of his re-offending,” and the State’s mention of it was to rebut that argument. “The alleged error does not fall within the narrow scope of the fundamental error doctrine as recognized by the Texas Supreme Court,” wrote Justice Stoddart. “Having failed to preserve his rule 403 objection in the trial court, Ratliff may not now revive that objection on appeal in the guise of ‘fundamental error.’”

PRISONER LITIGATION notes

By William J. Rold

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Batchelder (Clinton), John M. Rogers (G.W. Bush), and Richard A. Griffin (G.W. Bush). Medlock told a key defendant (Lieutenant Barry Freed) that he was gay and under threat by his cellmate, who was a member of a gang. Although Medlock asked to be moved off the unit, the response was to move his cellmate to a different cell in the same unit, which Medlock claimed only made the former cellmate (and his gang) angrier. Medlock complained that he continued to be in danger, but the court found his appeals to be too vague to present a jury question, even when he said unnamed gang members brandished knives to threaten him. He ultimately sustained multiple deep puncture wounds after an attack. [Note: In the first case, the state characterized Medlock as “manipulative” and as an inmate who was involved in numerous fights. Although this was not mentioned by the 6th Circuit panel, one can assume these characterizations continued to be pressed by the state on appeal.] The 6th Circuit examines the “subjective intent” of each of three remaining defendants separately under qualified immunity. It finds that a jury could not find deliberate indifference on the part of the officer defendant who moved the gang cellmate to a new cell, writing: “This arguably shows that Freed inferred that there was a risk to Medlock. But it also undermines Medlock’s claim that Freed was indifferent to the risk of harm.” In this writer’s view, this is an almost classic formulation of a jury question. Favorable inferences should have gone to the non-moving party (Medlock) on summary judgment. The court took it upon itself to resolve it, under the guise of qualified immunity, selectively quoting Farmer and its progeny, noting that the record did not show that Medlock was either transgender or frail. While liability cannot be fixed retrospectively because an attack occurred, the court omits other language from Farmer, such as: “[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk.” 511 U.S. at 843. Medlock also argues as to Freed and the other defendants, including the one whom he told about the knives, that their experience as officers should have been have been given more weight in analyzing their subjective intent. Two of the officers reassured Medlock that something would be done, according to the pleadings and summary judgment papers. Of course, there were no depositions in this pro se case. The court found no jury question as to any of the remaining defendants. It also affirmed denial of counsel, so there was no advocate to explain that the acts that prison officials may have characterized as “manipulative” behavior were actions designed to survive as a gay man in a hostile environment.

U.S. COURT OF APPEALS – NINTH CIRCUIT – CALIFORNIA – Transgender inmate Shiloh Heavenly Quine had sex affirming surgery as part of the settlement of her case, which also required California to revise its regulations about transgender inmates. She is now confined in a women’s facility. Quine negotiated the right in the settlement to comment on the revised regulations before they were final. Also, as part of the systemic changes, California created transgender “hubs,” where pre-surgery transgender inmates would generally be confined, although some would remain in non-hub facilities. In November 2017 Law Notes, we reported (at page 460) that U.S. District Judge Jon S. Tigar denied a stay of his order enforcing the judgment and directed the state to provide transgender inmates such items as pajamas, nightgowns, rovers, scarves, bracelets, earrings, hair brushes, and hair clips, and he directed the state to pay for compression tops and binders for inmates who cannot afford them. Quine v. Beard, 2017 U.S. Dist. LEXIS 169100, 2017 WL 4551480 (N.D. Calif., October 12, 2017). In a split decision, the Ninth Circuit granted a stay pending appeal. Quine v. Kernan, 2017 U.S. App. LEXIS 26580 (9th Cir., December 26, 2017). Now, in Quine v. Kernan, 2018 U.S. App. LEXIS 17923, 2018 WL 3195801 (9th Cir., June 29, 2018), the Circuit issues its decision (again split, unsigned, and not selected for publication), reversing in part, affirming in part, and vacating and remanding in part. The appeal was decided by Senior Circuit Judge Michael R. Murphy (sitting by designation from the Tenth Circuit (Clinton appointee)), and Circuit Judges Richard A. Paez (Clinton appointee), and Sandra S. Ikuta (George W. Bush appointee). Judge Paez concurred in part and dissented in part. All members of the court agreed that: (1) for purposes of the settlement, only medical and mental health staff could identify an inmate as transgender (i.e., no self-declaring); (2) Quine had standing to enforce the agreement but no standing to bring Equal Protection arguments about transgender conditions because she had waived this right in her settlement, which now defines those rights. (This was the affirmance.) The court then turned to the issue of what items should be provided to transgender inmates under the settlement. All again agreed that the record was inadequate to determine the appeal as it applied to transgender inmates in non-hub facilities. (This was the “vacate and remand for further factual development.”) The majority found that Judge Tigar had exceeded his authority under the settlement agreement by allowing Quine to comment about the regulations after they became final, other than to argue that the regulations were contrary to the settlement. In short, she could argue that the settlement required otherwise, but she could not make legal or policy arguments about the regulations after they were final. (This is the “partial reversal.”) Applying this
test, the Circuit affirmed Judge Tigar on most items he ordered to be available to transgender inmates under the settlement, finding that the state either had complied in its list or Judge Tigar had made reasonable interpretations of the settlement. The court reversed Judge Tigar on compression binders for transgender men. These are not on the list or mentioned specifically in the settlement, and extrinsic evidence (here, counsel colloquy at time of signing) should not have been considered to add terms to the settlement. Moreover, in an observation that in this writer’s view limits Quine’s enforcement standing, the majority said that Quine “has access to all of the items that are denied to inmates housed in male institutions. Therefore, [California’s] policies do not inflict a concrete or specifically injury on Quine.” Judge Paez dissented on both the parole evidence point, referring to California’s “liberal” standard, and on the compression binders. He criticized the majority for reading the settlement too narrowly in the duty to provide “equivalent” clothing to transgender inmates, writing that the issue was not between male and female but between transgender and cisgender and that California was still forcing pre-surgical transgender men to show their breasts by denying compression binders. Quine has state-issued underwear consistent with her identity (a bra to support her breasts), but transgender men do not have state-issued underwear consistent with their identity (binders to conceal their breasts). He said that the “equivalent of bras for transgender male inmates are compression tops.” It is silly and sad that a United States Court of Appeals panel would divide on taking the next step in looking past binary sexual identity, but such is the nascent state of the law for transgender people in Corrections.

California – Pro se California bisexual state inmate James Anthony Rainone brought a civil rights suit against five state officials – a psychologist, a counselor, two officers, and a sergeant – alleging that they had ignored his reports of fear of harm from another identified inmate, who had threatened and assaulted him. He included what he had told each defendant and what each had done or failed to do. He quoted some of the defendants’ responses as telling him to “man-up” and fight back, or telling him that there was nothing they could do until he was actually assaulted, even though he reported to one of the named defendants that the inmate had “gassed” him by throwing urine and feces at him. He was finally directly physically assaulted by that inmate, during a group therapy session, after the psychologist had refused to allow the two not to sit near each other. Rainone also alleged that the defendants had retaliated against him for complaining, tearing up his grievances, threatening him with false charges, and attempting to “cover up” the incident. In Rainone v. Paz, 2018 U.S. Dist. LEXIS 106839, 2018 WL 3197745 (C.D. Calif., June 26, 2018), U.S. Magistrate Judge Paul L. Abrams recommended dismissal of the entire case, with leave to amend. In so doing, Judge Abrams got the law wrong on almost every legal point. First, Judge Abrams applied Monell theory – Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 694 (1978) – to the claims against the individual defendants, citing numerous Ninth Circuit cases on the liability of local government entities for unconstitutional policies and practices and faulting Rainone for not pleading same, when the case has nothing to do with local government practices and policies. It involves claims against state officials for what they did or did not do themselves. Monell does not apply to individuals or to state defendants in their personal capacities. All of this discussion is wrong. Next, Judge Abrams found that Rainone had failed to specify with sufficient particularity what each defendant had failed to do in retaliation, although Rainone identified by name what each defendant threatened. He wrote that Rainone had failed to tie the threats to protected activity, although it seems clear to this writer that “all favorable inferences” means that Rainone was referring to retaliation for his complaints about the harassing and assaulting inmate and the defendants’ failure to address it, which complaints have First Amendment protection. This writer fails to see how the threshold for screening failed on the First Amendment claim, obviating the need for a responsive pleading. Finally, in dismissing what he called the “third count” (which included Rainone’s allegations of a “cover-up”), Judge Abrams conflated the First Amendment and cover-up allegations; and he dismissed the whole “count” under F.R.C.P. 8, for not being concise. He saw the cover-up allegations as premature, since Rainone had to prove that the cover-up succeeded before he could raise a constitutional claim about it. In short, Rainone had to show that he failed in the lawsuit that Judge Abrams had just recommended should be dismissed without the cover-up, before he could bring a lawsuit about the cover-up. The court does not address the fact that the cover-up evidence would likely be admissible on the question of state of mind on the subjective element of protection from harm claims and the balancing of correctional interests on First Amendment claims. This is another example of a Magistrate Judge using gatekeeping authority to do the weighing and balancing without benefit of responsive pleadings. Worse, it is one of the more glaring examples of a federal judge being wrong on an entire area of civil rights law when he found a pleading failed screening. Altogether the case lasted in federal court for 18 days, and Rainone has 4 weeks (expired as of this writing) to respond to Judge Abrams’ erroneous Monell discussion. Judge Abrams directed the clerk to send a form to Rainone “for his convenience” to file if he decides to drop the case.
CALIFORNIA — This is an inmate “protection from harm” case that has been bouncing around procedurally (including an appeal and remand from the Ninth Circuit) for over five years on the issue of exhaustion of administrative remedies under the Prison Litigation Reform Act [PLRA]. Now, in Williams v. Cates, 2018 WL 3129817 (E.D. Calif., June 22, 2018), U.S. Magistrate Judge Sheila K. Oberto’s Report and Recommendation recommends that defendants’ motion for summary judgment on PLRA exhaustion of the protection claims of Horace Mann Williams, pro se, be denied. Briefly, Williams, a disabled black inmate, alleged that officers called him a gay child molester who was also a snitch, in order to entice other inmates to assault him, and that he was actually assaulted, including being thrown from his wheelchair, injuring his spine. The R & R only addresses exhaustion, not the merits of the case. Williams denies that he is gay; but the record at this point remains undeveloped as to whether he is, is perceived to be, or is a victim of falsehood designed to put him at risk. The case is notable for the further adoption of the PLRA exhaustion concept of “putting defendants on notice” of the nature of the grievance without requiring detailed particularity or the naming in the grievance of each defendant ultimately sued. This is often referred to as the Strong standard from the Seventh Circuit decision in Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). See Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (adopting Strong test). Judge Oberto also found sufficient evidence to deny summary judgment on the issue of whether the defendants actively thwarted Williams’ efforts to file a grievance (which he also grieved), to raise a factual issue as to whether the grievance system was “available” to him under Ross v. Blake, 136 S. Ct. 1850, 1858 (2016). Finally, Judge Oberto found that defendants’ failure to respond to Williams’ grieving of non-response to his grievances was sufficient notice of retaliation that he could keep his First Amendment claim in the case. Thus, the case goes forward to trial on exhaustion and then perhaps to the merits under the Eighth and First Amendments. Hurry, once again, for the efficiency goals of the PLRA!

CALIFORNIA — Gay inmate Clifton D. Harris was incarcerated at the Sacramento County Jail when he was beaten and assaulted so badly that his head injuries left him in a “vegetative” state, unable to communicate. A civil rights and state tort lawsuit was commenced on his behalf by a guardian ad litem, Cathy Lester, in California Superior Court, suing the County, the Sheriff’s Department, the Sheriff, John Doe 1 (the assaulting inmate), John Doe 2-25 (jail employees) and John Does 26-50 (county employees). The complaint alleges that the John Doe jail defendants told other inmates, including Harris’ cellmates, that they could receive better housing if they assaulted Harris. It also alleges that the governmental defendants have been found liable in the past or have settled damages cases for inmate injuries, showing inadequate policies, training, supervision, discipline, and the like. The defendants removed the case to federal court and moved to dismiss for failure to state a claim. U.S. District Judge Morrison C. England, Jr., granted the motion in part, with leave to amend, and denied it in part in Harris v. County of Sacramento, 2018 U.S. Dist. LEXIS 133935 (E.D. Calif., August 8, 2018). Judge England first addressed whether the Sheriff’s Department was a defendant entity that could be sued independently in a suit that also names the County and the Sheriff. Judge England found that the Sheriff’s Department could be sued independently under California law, citing Streit v. County of Los Angeles, 236 F.3d 552, 555 (9th Cir. 2001) [Ninth Circuit string citations omitted]. This is true even if the local charter (here, Sacramento County’s) says that local departments cannot be sued separately, since the localities cannot legislate to supersede state law. See Shaw v. Cal. Dept. of Alcoholic Beverage Control, 788 F.2d 600, 604-605 (9th Cir. 1986) (City of San Jose and San Jose Police Department). Defendants argued that because Harris has been hospitalized since the assault, he no longer has standing to request injunctive relief. Judge England ruled: “Where defendants have repeatedly engaged in injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the ‘realistic repetition’ requirement necessary to demonstrate an actual injury, quoting Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001). Although Harris has standing, the plaintiff did not plead sufficiently specific allegations to sustain a Monell [v. Dept. of Soc. Svcs.], 436 U.S. 658, 694 (1978) claim. Judge England found that five verdicts against the county or sheriff’s department in the previous 6+ years did not show a pattern or practice without specifying how the liability was similar to what happened to Harris or how the defendants similarly failed to protect him. Supervisory claims against the Sheriff also lack sufficient specificity or showing as to what he personally did or failed to do. Judge England also ruled that claims premised on liability because of a special relationship (county jail and inmate) and “state-created danger” effectively collapsed into a failure to protect claim and are not separate causes of action. This is done without citing the deliberate indifference standard for protection from harm claims enunciated in Farmer v. Brennan, 511 U.S. 825, 833 (1994). In this writer’s view, there may be some space between Farmer liability (deliberate indifference to known or obvious risk) — applicable whether or not the defendant took affirmative actions to create the risk, rather than...
not responding to it once it is known or obvious – and “state-created danger” liability – where the defendants are alleged to have acted affirmatively to cause or create the danger and this is a factor in assessing their state of mind. See Henry A. v. Wilder, 678 F.3d 991, 1002 (9th Cir. 2012) (placing foster children in home known to be broken); and L.W. v. Grubby, 92 F.3d 894, 900 (9th Cir 1996) “supervisor who participating in creating the danger” by placing plaintiff with violent predatory cellmate). That the defendant affirmatively created the danger inevitably affects the jury’s evaluation of the defendants’ state of mind under the second arm of the Farmer test. Judge England continues to rule on several California state law claims, which are omitted from this report; but they may interest California practitioners who face similar facts. The problem with this decision, however, is more fundamental. Harris is totally unable to assist his counsel or communicate with him. Thus, not even the identity of attacker John Doe One (or his propensity) is known – and Judge England does nothing about it. This information and identification of other John Does and witnesses is wholly within the defendants’ knowledge. Law Notes has reported numerous cases where district judges have ordered defendants who may not be liable to assist in their official capacity with identifying John Does. There are undoubtedly incident reports about the attack on Harris that should be produced. There may even be videotape and requests for protection by Harris. Giving counsel twenty days to flesh out what happened sufficient to establish Monell and supervisory liability, when the John Does remain unidentified (but some are most likely identifiable from defendants’ records), strikes this writer as an abuse of discretion. The plaintiff’s life has been destroyed while in custody, and his remedy, if he has one, has been put outside the reach of the F.R.C.P., per Judge England’s ruling.

CALIFORNIA – The San Bernardino Sun reported on August 15, 2018, that a tentative settlement had been reached in a civil rights lawsuit involving housing and other rights and protections for LGBT inmates in the county jail. The case, McKibben v. McMahon, 14-cv-02171 (C.D. Calif.), was filed as a class action about the existence and conditions of incarceration in the jail’s “Alternative Lifestyle Tank” [the “Tank”], in which LGBT inmates were confined to their cells for up to 22 1/2 hours per day, were denied programs and religious services, and were subject to verbal and physical abuse. The Tank and its restrictions were the only option offered to class members for a modicum of safety other than protective custody and its stigmatizing reputation of housing “snitches.” The proposed settlement, which requires approval by U.S. District Judge Jesus G. Bernal after notice to the class, provides for damages and injunctive relief. An estimated 600 people are present or past members of the class (between the years 2012 and 2018), according to court papers in PACER. They will receive damages from a million dollar fund created by the county defendants, according to a formula setting a range of damages based on time spent in the Tank and other factors, with a cap of $10,000 per person. Unnamed class members are permitted to “opt out” per F.R.C.P. 23(b)(3). The fifteen representative class members (plaintiffs) will each receive an additional “incentive” bonus of a several thousand dollars. The settlement creates a committee – jointly with the Prison Rape Elimination Act [PREA] coordinator – to handle class member housing, safety, programming, religious, and job issues. The committee must meet monthly and maintain minutes of its actions. The exact terms of the injunction are not detailed in the settlement. Rather, they are to be adopted according to guidelines attached to the settlement, with Judge Bernal resolving disputes. The guidelines include inmate election to remain in population or live in a “GBTI Unit.” They include protections to prevent the GBTI Unit from becoming the Tank by another name. Class members in the GBTI Unit will have the same out-of-cell time as they would have in population for the same security classification. Those in the GBTI Unit will also have equivalent access to inmate jobs, education, programming, and congregate religious observation. Regardless of where housed, all class members are promised safety, including access to an outside PREA hotline; and the jail is required to adopt “zero tolerance” for homophobic and transphobic behavior or verbalizations by staff, who will be required to undergo sensitivity training. Class members shall be addressed by their preferred names and pronouns and, absent exigent circumstances, searched by officers of the gender of their choice. They shall be provided with privacy for showering and personal hygiene and dressing. Monitoring will continue for three years, including outside audits by a PREA official unconnected with the jail. Judge Bernal has scheduled a hearing for mid-September for further proceedings incident to approval of the settlement. The plaintiffs and class are represented by Kay McLane Bednarski & Litt, LLP, Pasadena; and the ACLU of Southern California, Los Angeles. Costs will be paid by the fund. Attorneys’ fees will be awarded separately.

CALIFORNIA – U. S. Magistrate Judge Karen E. Scott dismissed without prejudice the pro se complaint of Tommy Varnado, with leave to amend, because “it appears possible that the defects in the complaint could be corrected,” in Varnado v. Unknown, 2018 U.S. Dist. LEXIS 115606 (C.D. Calif., July 11, 2018). Varnado alleged that he is a “gay gang member,” who sustained serious injuries after a homophobic attack by seven other inmates. He said he sought
protective custody prior to the incident, but it was denied by “prison officials” because he was not “gay enough.” He requests that the court send him the “paperwork needed to file a pro se claim.” Judge Scott ordered the clerk to send Varnado the papers for filing a suit in forma pauperis and the form pleadings for prisoner civil rights claims. Unfortunately, there are no other instructions in the opinion about what constitutes a protection from harm claim, whom to sue (Varnado named only “unknown” the first time), how to plead personal involvement, and the like, so this one will probably come back and be found inadequate on second screening as well.

CALIFORNIA – U.S. District Judge Yvonne Gonzalez Rogers (Obama) dismissed the pro se complaint of transgender former inmate Lajazz A. Smith, who claimed verbal harassment by officers while she was an inmate at Salinas Valley State Prison. In Smith v. Benefield, 2018 U.S. Dist. LEXIS 134794, 2018 WL 3816734 (N.D. Calif., August 9, 2018), Judge Rogers found that the verbal harassment was not by itself enough to violate the constitution. The harangue, stripped of distracting brackets and ellipses, was as follows: “Defendant stated I am as man in a mans prison. I got a dick between my legs and until I get it cut off Im not transgender. Defendant states I’m a sin cause of my gender – to get a dick up my ass – die cause that’s what happens to fags like me.” It is unclear whether this statement would even meet the “verbal abuse” test of the Seventh Circuit, but a string of Ninth Circuit cases indicates Judge Rogers found the pleading insufficient here to state a constitutional claim. She found amendment to be futile – without the usual incantation of how repulsive, unprofessional, etc. the oration was. Appeal in forma pauperis was certified as not taken in good faith because the claim was frivolous.

CONNECTICUT – Pro se gay inmate Freddie Trowell brought suit against a Correction officer for homophobic harassment, sexual orientation discrimination, and placing him in danger of assault/rape by other inmates in Trowell v. Theodarakis, 2018 U.S. Dist. LEXIS 109673, 2018 WL 3233140 (D. Conn., July 2, 2018). U.S. District Judge Michael P. Shea dismissed all claims, with leave to amend one of them. The events occurred in November 2017 and “on a previous occasion.” The officer, identified only by the last name Theodarakis, allegedly called Trowell a “faggot” and other slurs in the hearing of other inmates; and he threatened Trowell with punishment. There were no allegations of sexual or physical touching of Trowell by the officer. Trowell was released from custody in May of 2018, but Judge Shea performs a screening under the Prison Litigation Reform Act [PLRA], because Trowell was a prisoner when the case was filed. [Note: This is the universal rule – but if Trowell had waited until after he was released from custody before filing, the PLRA would not apply, although he would still need to meet the requirement for in forma pauperis, which has a frivolous component. See McGann v. Commissioner, 96 F.3d 28, 29-30 (2d Cir 1996).] Trowell had 3 years to bring a 42 USC § 1983 damages case in Connecticut. Walker v. Jastremski, 159 F.3d117, 119 (2d Cir. 1998.) Judge Shea found it “well-settled” that verbal harassment and threats unaccompanied by physical touching do not violate the Eighth Amendment. He distinguishes the recent Second Circuit case of Crawford v. Cuomo, 796 F.3d 252, 257 (2d Cir. 2015), which limited the multiple incident requirement of Boddie v. Schnieder, 105 F.3d 857, 860-61 (2d Cir. 1997), where single incidents are sufficiently serious, and unwanted touching is done for gratification and without penological purpose. Here, two verbal incidents with no touching (sexual or otherwise) do not suffice, regardless of how “despicable,” to ground a constitutional claim, according to Shea, who also disallows a claim of sexual orientation discrimination because Trowell does not allege discriminatory “treatment.” Although sexual orientation discrimination involves a quasi-suspect class in the Second Circuit, subject to “intermediate judicial review” – Windsor v. U.S., 699 F.3d 169, 185 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013) – there are no allegations that Theodarakis’ harassing comments “treated him differently than similarly situated prisoners. The facts as alleged do not state a plausible violation of the plaintiff’s equal protection rights,” wrote the judge. Judge Shea also dismisses Trowell’s claim that Theodarakis’ comments subjected him to risk of assault and rape by other prisoners, asserting that these are bare allegations without any claim that such assaults or rapes occurred. Trowell is permitted to amend on this point if he can plead details, but an appeal on the first two dismissals is certified as frivolous. This writer does not agree that the second Equal Protection claim is necessarily frivolous – or even that it was decided correctly on screening. Trowell should have been permitted to amend it as well. Judge Shea does not bother to frame the class of “similarly situated” for Equal Protection purposes. A fair reading of the complaint is not that Theodarakis called all inmates “faggots” but that he directed slurs to Trowell specifically because he is gay or perceived to be. A member of the LGBT community is entitled to challenge discriminatory action by a state actor, and state action does not have to violate the Eighth Amendment to violate the Equal Protection Clause. Yet, Judge Shea appears to conflate the two in this case. What justification does the state have for singling out LGBT inmates for slurs, when sexual orientation discrimination is subject to heightened scrutiny? LGBT inmates could be denied certain jobs, given less frequent
showers, poorer rations, etc., without the conditions necessarily violating the Eighth Amendment, but the Equal Protection Clause protects against discriminatory behavior that does not rise to the level of cruel and unusual punishment, when there is no important state interest in discriminating. An argument that words can do that, especially in the charged environment of a prison, is not frivolous.

DELAWARE – Transgender prisoner Hermione Winter failed in her efforts to obtain a new criminal sentence in Delaware Superior Court, and the Supreme Court of Delaware (the state’s sole appellate court) affirmed, in Winter v. State, 2018 WL 3569960, 2018 Del. LEXIS 350 (Del., July 24, 2018). Writing for himself and Justices James T. Vaughn and Gary F. Traynor, Justice Collins J. Seitz, Jr., rejected Winter’s claim that she was entitled to a sentence that did not include a requirement that she complete a “Transitions Sex Offender Program.” Her argument was that her transgender female status and her housing in a mental health unit in the men’s prison precluded her completion of the program. Alternatively, she sought transfer to the women’s prison. Officials said the program would be available to her at either prison before she completed her 15-year minimum sentence in 2029, so there was no basis for correction of sentence now. The Supreme Court accepted this argument.

Since Winter had taken no direct appeal from her sentence, she had to show extraordinary circumstances to bring this application, which the court found not to exist. Also, because she had not submitted her alternative relief (transfer to the women’s prison) to the superior court, the Supreme Court would not hear it.

FLORIDA – Twelve days after pro se gay Muslim plaintiff Yesir Mehmood filed his lawsuit, U.S. Magistrate Judge Patrick A. White searched his litigation in California sua sponte, and he found enough prior dismissals under the “three-strikes” rule of the Prisoner Litigation Reform Act to dismiss the Florida case currently before him. When Mehmood objected and pointed out that the PLRA could not be applied to him, since he was no longer a prisoner but was in ICE (immigration) custody facing civil deportation, Judge White vacated his recommendation. Mehmood’s objection was supported by a 16-year-old Eleventh Circuit case directly on point, Toville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002). In less than three weeks, however, Judge White recommended dismissal of the case on the merits in Mehmood v. Guerra, 2018 U.S. Dist. LEXIS 108376 (S.D. Fla., June 27, 2018), without leave to amend and with the placement of Mehmood on a list of “abusive” litigators. Judge White spends more space in his 7000-word opinion discussing the standards for dismissal than in reciting the allegations of the complaint, which he persistently minimizes. A review of the complaint on PACER shows a typed narrative of events, basically challenging the fact that Mehmood was strip-searched and his body cavities inspected by female hospital employees in front of female patients when he was taken by ICE to the hospital for examination of his condition during a hunger strike. He says ICE refused to intervene “in hospital policy” regarding the searches, but ICE did not themselves perform them (nor did ICE routinely perform such searches on its civilian detainees). He says his genitals were fondled sexually in front of others, that his rectum was penetrated by an ungloved finger, and that the searches by hospital staff were accompanied by comments about his ethnicity and sexual orientation. Mehmood’s complaint is not, as Judge White says, a “formulaic recitation of the elements of a cause of action” or replete with “conclusory statements.” It is certainly not a document drafted by a lawyer, but the gist is that a hospital took it upon itself to search Mehmood intrusively, while belittling him, without any medical reason, while ICE staff, who had the security duty and power, were bystanders. If true, the hospital violated medical ethics going back to Hippocrates. Would the hospital perform surgery over the patient’s objections? This confusion of roles itself is enough to give this case a further look, since the hospital officials are state actors under West v. Atkins, 472 U.S. 42, 51-2 (1988). Moreover, Judge White writes that the Complaint is “clearly baseless,” that the strip searches and body cavity searches were conducted in a “reasonable and non-abusive manner,” and that the deference by ICE to the hospital’s decision to search meets the balancing test of Turner v. Safley, 482 U.S. 78, 89 (1987). Judge White cannot possibly apply Turner balancing to these searches without requiring the justifications to be put before the Court. Turner balanced prison security versus constitutional protections, not the intervention of hospital regulations. Turner assumed that it was Corrections, not a hospital, whose conduct was being balanced and that Corrections was the moving force and not a bystander. Here, the burden is on both ICE and the hospital to show the reasonableness of the searches. It is not for Judge White to dispense with requiring them to make any showing at all. Standards for accreditation of the National Commission for Correctional Health Care, the American Correctional Association, the American Public Health Association, the American Nurses Association, and many others, all forbid, if it is true, the conduct alleged of the nurses in this case. Security is not the realm of health care professionals. Judge White found “conclusory” Mehmood’s equal protection claim of discrimination against him by race, ethnicity, religion, sexual orientation, and immigration status, although Mehmood alleged that other patients not brought to the hospital
by ICE were not similarly searched. Finally, Judge White recommends that Mehmood be labeled an “abusive” litigator, presumably based on another sua sponte search of federal dockets that reveal some 22 other cases. He attaches a list of them to the docket, but they are not cited in the opinion. This case lasted in federal court for 31 days.

ILLINOIS – U.S. District Judge J. Phil Gilbert screened the pro se complaint of Brandon Lee Chittum in Chittum v. Hare, 2018 U.S. Dist. LEXIS 106657, 2018 WL 3127060 (S.D. Ill., June 26, 2018) – and he allowed Chittum to proceed on two civil rights counts: sexual harassment by an officer at the jail where he was incarcerated; and retaliation for Chittum’s complaining about it. According to the exhibits to the complaint, Officer Michael Hare has sexually harassed numerous inmates at the Madison County, Illinois, jail; but, despite “investigation,” supervisors have done nothing. At this point, however, Chittum is suing only Hare. He alleges that Hare has made “verbal sexual threats,” commented about Hare’s body, called him a “fagbrot,” simulated oral sex by “gestures,” and fondled his genitals. When Chittum complained to Hare, he caused him to be placed in “lockdown.” The alleged conduct also included Hare’s drawing doodles in Chittum’s cell of Chittum and Hare having sex, commenting on Chittum’s physique and slapping his buttocks, refusing Chittum access to his clothes unless he dropped his towel after showering, and telling him to “come around . . . and let it happen.” Chittum says Hare told him he “wanted him” because he was a combat veteran. Chittum says this conduct has continued for years. Recently, Hare tried to force his mouth onto Chittum’s, which Chittum resisted. According to Chittum, Hare thereafter “engineered” an “aggravated battery” charge against Chittum. Although the Fourteenth Amendment’s Due Process Clause applies to pre-trial detainees, the protection against sexual harassment by staff is analyzed similarly to cases under the Eighth Amendment for prisoners. Judge Gilbert began by applying “excessive force” standards to the claims against Hare, but he found that “[a]n unwanted touching of a person’s private parts, intended to humiliate the victim or gratify the assailant’s sexual desires, can [also] violate a prisoner’s constitutional rights whether or not the force exerted by the assailant is significant,” quoting Washington v. Hively, 695 F.3d 641, 643 (7th Cir. 2012). He noted, again quoting Washington, “Sexual offenses forcible or not are unlikely to cause so little harm as to be adjudged de minimis, that is, too trivial to justify the provision of a legal remedy. They tend rather to cause significant distress and often lasting psychological harm.” Judge Gilbert also applied Beal v. Foster, 803 F.3d 356, 357 (7th Cir. 2015), to the part of Hare’s conduct that did not include physical touching, noting that the Seventh Circuit recognizes what some call “verbal abuse+,” where the verbal harassment included physical contact, was sexual in nature and “arguably placed plaintiff at greater danger of assault by other prisoners.” Judge Gilbert had little trouble finding that Chittum stated a First Amendment claim of retaliation, but he declined to interfere at this point with the pending state battery charges, citing abstention principles of Younger v. Harris, 401 U.S. 37, 41 (1971), refining the claim to one that seeks “injunctive relief to keep him safe from future harassment and assaults by Hare.” Judge Gilbert ordered service and an answer that could not be waived under 42 U.S.C. § 1997e(g). Notably, Judge Gilbert does not refer to the sexual orientation of either party. Wisely so, in this writer’s view. Sexual harassment and assault in this context is about abuse of power and humiliation, not the orientation of the harasser and the victim. While certain assumptions can be made, they are legally irrelevant.

ILLINOIS – Pro se transgender inmate Anthony Spoden, a/k/a Nina Spoden, brought multiple claims arising from her incarceration in Illinois’ Shawnee facility in Spoden v. Phelps, 2018 U.S. Dist. LEXIS 118141, 2018 WL 3427808 (S.D. Ill., July 16, 2018). U.S. District Judge Nancy J. Rosenstengel determined under the Seventh Circuit misjoinder rules, particularly as they apply to inmates – see George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (multi-claim, multi-defendant lawsuits cannot be used to circumvent the Prison Litigation Reform Act [PLRA]) – the 19 different claims must be severed into 5 separate actions, each allowed to proceed in forma pauperis, but with compliance with the PLRA as to each. [Judge Rosenstengel does not address whether or not withholding from Spoden’s commissary account to pay the fees in installments would be cumulative.] Briefly, Spoden alleged a series of events that began when an officer (Phelps) directed her to removed prison make-up (coffee grounds) she had applied to her eyebrows. Spoden was admittedly disrespectful in reply and was given privilege restrictions. A “campaign” of retaliation ensued when she grieved the matter, according to the complaint – particularly after the warden agreed the penalty was too severe and restored her privileges. Thereafter, Spoden complains about other bogus tickets, beatings by officers, assaults by staff and other inmates, and general discrimination against transgender inmates, including isolation from other inmates and from each other. Of particular note is failure to provide basic medical and dental treatment after one assault, in which she sustained injuries to her jaw and the orbit of an eye. She alleges that x-rays, pain medication, and antibiotics were delayed, causing her unnecessary suffering, infection, and inability to chew. She alleges that after an outside consultation and MRI (ordered by the dentist), it was confirmed that her jaw was fractured in

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Judge Rosenstengel found insufficient allegations for a conspiracy count to go forward, and she dismisses the count of inadequate provision of transgender care to Spoden for failure to specify a named defendant to be held liable. Claims against Warden Dennison for failure to provide services in general to transgender inmates and to respond to their grievances may go forward, and it is to remain under the original docket. Four new cases are severed, given new docket numbers, and grouped as follows: New Case #1: claims against defendant Phelps for retaliation by bogus disciplinary charges and beatings on a specific date (the latter of which included bystander officer defendants) and for excessive force and battery under state law; New Case #2: claims for retaliation (including bogus punishment and segregation) against named defendants for her complaints about their toleration of inmate peer counselors’ anti-LGBT remarks at mandatory training; New Case #3: claims for failure to protection from harm prior to the assault by another named inmate against defendants who allegedly had specific knowledge in advance; and New Case #4: claim for deliberate indifference to serious medical needs for failure to treat her jaw and eye injuries. The original and all four new cases will then be given preliminary review again. Judge Rosenstengel proceeded the next day to rule on the part of the case proceeding on the original docket in Spoden v. Dennison, 2018 U.S. Dist. LEXIS 119986 (S.D. Ill., July 17, 2018). She finds that there is no right to a grievance system and that the Warden was not responsible for the initiation of the grievances and had in fact reduced punishment on one occasion. This part of the case is dismissed with prejudice. As to the second part, it is dismissed without prejudice, because Spoden speaks of no policies of the warden that are actionable as practices. The single incident of the guard’s ordering her to wipe off her make-up was isolated (even though it apparently started other events), and the remarks of peer counselors are not shown to have been approved by the Warden. Spoden is free to replead the latter point. It is unclear whether the S.D. of Illinois assignment system will route all of the severed cases back to Judge Rosenstengel.

ILLINOIS – Pro se plaintiff Brent Phillips is openly gay and transgender. He alleges that he and five other “openly gay/transgender/bisexual” inmates were ordered by a Lieutenant Eldridge to perform a birthday “prank” for the Lieutenant’s Major by singing happy birthday to the Major wearing skimpy clothing in an “overly flamboyant” manner – “the more feminine the better.” The six inmates performed as ordered, but the Major was not amused, and Eldridge was given a “forced retirement.” Thereafter, Phillips complained about being used in this fashion for supposed amusement of supervisory officers. Her complaints resulted in retaliation by other staff, according to the complaint, including purposeful double celling with dangerous cellmates, false disciplinary charges, and refusal of any mental health treatment. U.S. District Judge Sue E. Myerscough allowed Phillips to proceed to on all claims in Phillips v. Hammers, 2018 U.S. Dist. LEXIS 127671, 2018 WL 3631880 (C.D. Ill., July 31, 2018). Without much ado or case analysis, Judge Myerscough found that, at least for screening purposes, Phillips had stated claims under the Eighth, First and Fourteenth Amendments for deliberate indifference to Phillips’ mental health needs and safety, for retaliation, and for violation of equal protection. The equal protection claim is allowed only against Eldridge, but the other claims will go forward against all defendants, including the warden, “until the record is further developed.” Many screening judges would have dismissed against the warden based on insufficient allegations of personal involvement. This writer surmises that Judge Myerscough may have hesitated because it is unlikely that a splash like this would have occurred at a birthday party for a Major or that a lieutenant would have been fired, without the warden’s knowledge. Judge Myerscough denied a TRO without prejudice, as well as a motion for appointment of counsel at this time, since Phillips did not show unsuccessful efforts to obtain counsel. Presumably to jump start things, she did order service of the order on the Illinois Attorney General. It is heartening to see a federal judge take abuse of LGBT inmates by staff seriously. As opposed to a summary green light, this case is basically a summary red light.

ILLINOIS – This is the second time Law Notes has reported on screening dismissals of pro se complaints filed by transgender plaintiff Roberta Nickie Ezell Quillman by U.S. District Judge Nancy J. Rosenstengel. The first report of Quillman v. IDOC, 2018 U.S. Dist. LEXIS 13936 (S.D. Ill., January 29, 2018) (February 2018 at page 93), concerned requested injunctive relief and damages arising from complaints of the need for emergency protective custody because of public humiliation, verbal abuse, bullying, discrimination, physical and mental abuse, rape, sexual assault and beatings by staff and inmates at Illinois’ Lawrence facility – but with no specific allegations against individual defendants and only “unspecified” tormentors. In dismissing, Judge Rosenstengel nevertheless ordered a
INDIANA – Pro se transgender inmate Anastaisa Renee, a/k/a Elmer D. Charles, Jr., filed a complaint alleging violation of her civil rights by male officers conducting searches of her person, refusing to use her chosen name or female pronouns, and denying her purchases of female garments and feminizing products from the commissary. She also alleges denial of sex reassignment surgery, but she implies in her pleading that she is not ready to take that step, according to Senior U.S. District Judge Robert Lowell Miller, Jr. (Reagan). Finally, she claims her right to be protected from danger and to equal protection of the laws is violated by defendants’ refusal to transfer her to a female facility. Judge Miller denies all of her claims in Renee v. Neal, 2018 U.S. Dist. LEXIS 137025, 2018 WL 3861610 (N.D. Ind., August 13, 2018). He finds that searches, including strip searches by members of the opposite sex, are allowed in the Seventh Circuit under Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003); and Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995). He applies the same reasoning to the searches of transgender females by male officers, so long as they are conducted for a proper purpose, which Renee does not raise as an issue. The defendants’ refusal to honor Renee’s name and pronoun request is “simple verbal harassment.” As such, it is not actionable under the Eighth Amendment, per DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000). [It would also seem not to meet the verbal abuse+ tests of the Seventh Circuit, although this is not addressed by Judge Miller.] Denial of purchases of female clothing, feminine hygiene products, and makeup is not a prohibition of the “minimal civilized measure of life’s necessities.” Townsend v. Fuchs, 522 F.3d 765, 773 (7th Cir. 2008). But see “Recognizing Humanity of Transgender Prisoners, Florida Federal Judge Permanently Enjoins ‘Freeze Frame’ Policy” in this issue of Law Notes, reporting on Keohane v. Jones, 2018 U.S. Dist. LEXIS 142640, 2018 WL 4006798 (N.D. Fla., August 22, 2018). Renee’s submission fails to explain why sex reassignment surgery is necessary, and the pleadings do not focus on earlier triad treatment, such as hormones. Finally, Judge Miller finds no adequate pleading of substantial danger to which defendants are indifferent, other than the normal incidents of prison life. The specificity — lacking allegations of actual assaults, putative assailants, threats, or reports of same — falls short of the detail required by Farmer v. Brennan, 511 U.S. 825, 834 (1994). Judge Miller does not see the allegations of denial of a transfer to a women’s prison as presenting an Equal Protection issue, writing that the denial of such a transfer was not taken by the defendants “for the purpose of causing harm to any plausible identifiable group, including transgender inmates,” citing Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). In Shango, another pro se inmate tried to raise a transfer without a hearing as an Equal Protection claim (when the theory probably should have been Due Process, which would also have failed); but Renee’s Equal Protection claim here is more plausible than the one in Shango, given the developments in Equal Protection law for transgender people in the last 36 years — an analysis of which was not undertaken by Judge Miller and is beyond the scope of this report. Judge Miller allowed Renee to file an amended pleading.

KENTUCKY – This is the second attempt by transgender pro se inmate Rodger Williams, a/k/a Willow Williams, to sue for instances in which her body is searched by male officers. U.S. District Judge David L. Banning had earlier this year dismissed her case under the Prison Rape Elimination Act and the Fourteenth Amendment (as a pre-trial detainee) in Williams v. Daley, 2018 U.S. Dist. LEXIS 68337 (E.D. Ky., April 24, 2018), reported in Law Notes (May 2018 at page 259). In that case, she named as defendant only the jailer. Now, she names the jailer as well as a lieutenant and a sergeant (who supervised the searches). The result is the same in Williams v. Fletcher, 2018 U.S. Dist. LEXIS 120750 (E.D. Ky., July 19, 2018). Judge Banning again finds no private cause of action under
PRISONER LITIGATION

PREA. While its regulations address searches by officers of the gender identity of the inmate, they do not provide relief, as it was Congress’ intent to achieve compliance through funding, not through private enforcement. There is also no constitutional right to be searched only by officers of the same gender or gender identity. This is basically a rehash of the April decision.

KENTUCKY – Pro se inmate Irfan Demirovic’s civil rights case for sexual harassment was dismissed on screening for failure to state a claim in Demirovic v. Moss, 2018 U.S. Dist. LEXIS 124907, 2018 WL 3594963 (E.D. Ky., July 26, 2018). Demirovic alleged that Officer Moss, of the county jail in which he was incarcerated, made sexually suggestive remarks and gestures (simulating fellatio) towards him and on two occasions touched him: once putting his finger on Demirovic’s nose, saying it has previously been on the officer’s “private parts”; and a second time grabbing Demirovic’s waist in a non-sexual way. U.S. District Judge Claria Horn Boom dismissed the case because verbal remarks and non-touching gestures are not actionable under the Eighth Amendment. This applies even when they exacerbate a previous mental health condition, such as the one she recounts at length concerning Demirovic, who had previously attempted suicide, had PTSD, and was (according to him) driven to attempt suicide again by the remarks and conduct of Officer Moss. The plaintiff also says he was stressed because Moss’s conduct “caused other inmates to call him a homosexual.” Judge Boom cites several Sixth Circuit cases like Johnson v. Unknown Delliatta, 357 F.3d 539, 546 (6th Cir. 2004) (holding harassment and verbal abuse, while “shameful and utterly unprofessional . . . do not constitute the type of infliction of pain that the Eighth Amendment prohibits”). She also cites a Seventh Circuit case – DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000), that may no longer be good law. As to the “touching” incidents, they were “troubling,” but they were too isolated and brief to state a claim. See Jackson v. Madery, 158 F. App’x 656, 661 (6th Cir. 2005) (correction officer’s conduct in allegedly rubbing and grabbing prisoner’s buttocks in degrading manner was “isolated, brief, and not severe” and so failed to meet Eighth Amendment standards); Johnson v. Ward, 215 F. 3d 1326 (6th Cir. 2000) (male prisoner’s claim that a male officer placed his hand on the prisoner’s buttock in a sexual manner and made an offensive sexual remark did not meet the objective component of the Eighth Amendment). Taken together, and given Demirovic’s history, it is possible he would have stated a claim under the “verbal abuse+” standard for remarks and conduct that the Seventh Circuit has developed since DeWalt. See Beal v. Foster, 803 F.3d 356, 358–59 (7th Cir. 2015); Perez v. Fenoglio, 792 F.3d 768, 783 (7th Cir. 2015). But not today, in this Circuit. It remains to be seen if “verbal abuse+” has legs.

NEVADA – Senior U.S. District Judge Robert C. Jones (George W. Bush) screened the civil rights complaint of pro se transgender inmate Kevin Rodriguez in Rodriguez v. State of Nevada 2018 WL 4094861, 2018 U.S. Dist. LEXIS 146515 (D. Nev., August 28, 2018). The crux of Rodriguez’ complaint is that Nevada DOC Medical Directive 121-01, which is not in the record, deters transgender women from seeking hormone treatment as a gateway to sex reassignment surgery. The problem here is two-fold. According to Judge Jones, Rodriguez did not plead that the defendants had actually diagnosed her as in need of hormones; that they had found she had gender dysphoria; or that they had refused to treat it. Although she refers to certain dates as constituting a “wrongful event,” she does not specify what happened on those dates or who did it. The second problem is that Judge Jones demonstrates at best a rudimentary knowledge of transgender people and gender dysphoria. After reciting boilerplate law, he states that Rodriguez has failed to plead that her needs are serious, a threshold predicate for Eighth Amendment deliberate indifference claims. He refers to “arguably appropriate treatment” with no knowledge of what the treatment has been. He states that California’s stipulation in other cases that gender dysphoria is a serious need – and the Ninth Circuit has so found in Rosati v. Igbinoso, 791 F.3d 1037, 1039 n.2 (9th Cir. 2015) (per curiam) – this does not mean that a serious need exists in Rodriguez’ case. Judge Jones writes: “It is controversial whether hormonal therapy is appropriate, safe, or effective in all cases—the plaintiff in Rosati had in fact received hormonal therapy but had still, as Plaintiff has, attempted to self-castrate.” He continues: “The Court cannot say that hormonal therapy is constitutionally required to treat gender dysphoria.” And, finally, there is this, which Judge Jones states without citation to authority: “Gender dysphoria is a psychological disorder, not a disorder of the endocrine system” – despite the nearly universal referral of transgender patients to endocrinologists for hormone evaluations. Judge Jones concludes by stating that gender dysphoria is “an objectively serious medical condition,” but Rodriguez has not pleaded a failure by defendants in her case to provide a “subjectively good faith, individualized assessment of appropriate treatment” or shown what in the Directive is preventing it. Judge Jones denied counsel, but he granted Rodriguez leave to amend.

NEW HAMPSHIRE – Transgender prisoner Crystal Beaulieu is a persistent, although not always successful, pro se litigator. This is the third Law Notes report on her civil rights suits while incarcerated. A detailed article, “Federal
Magistrate Recommends Denial of Preliminary Injunction Against Prison Rule Separating Romantic Inmates,” appeared in Law Notes (February 2017 at pages 148-9). Last spring, U.S. District Judge Joseph DiClerico, Jr., granted summary judgment against Beaulieu on her claims of excessive force and failure to protect her from harm, in large part because she failed six times to file answering papers. She also filed what he called “inconsistent” documents that charged her assailant (with whom she was romantically involved, but not the boyfriend in the previous article) with assault, then recanted and reconciled, and then later charged him with rape. Judge DiClerico also ruled that videotapes and medical records did not substantiate Beaulieu sufficiently to create a jury question in Beaulieu v. Orlando, 2018 WL 1280789, 2018 U.S. Dist. LEXIS 39694 (D.N.H., March 12, 2018) (“not for publication”), reported in Law Notes (April 2018 at page 207). The judge declined supplemental jurisdiction over state law claims. Now, having permitted Beaulieu to pass screening on some 13 new claims, Judge DiClerico rules on the state’s motion to dismiss for failure to state any claims in Beaulieu v. New Hampshire Governor, 2018 U.S. Dist. LEXIS 107964 (D.N.H., June 29, 2018). The extensive opinion addresses each federal claim separately on its merits and on qualified immunity. It also analyzes each state law claim. A comprehensive recitation is beyond the scope of this report. Judge DiClerico begins by addressing whether Beaulieu has more than 3 “strikes” under the Prison Litigation Reform Act and therefore that her permission to proceed in forma pauperis should be revoked. For those who follow such things, he notes that the 1st Circuit has not ruled on whether a refusal to hear state law claims without prejudice counts as a “strike” under 28 U.S.C. § 1915(g). He observes that the 4th, 9th, and D.C. Circuits have ruled that dismissals of federal claims accompanied by a declination to exercise supplemental jurisdiction over state law claims is not a strike, because the “whole” case was not dismissed. The 5th Circuit and district courts in the 7th and 10th Circuits have ruled to the contrary. Judge DiClerico adopts the majority circuit view and allows Beaulieu to keep her IFP status. Turning to the motion to dismiss, Judge DiClerico rules that the state can still move to dismiss, notwithstanding that Beaulieu’s claims passed screening, since such initial sua sponte review is not binding on defendants once they appear after the court authorizes service of the complaint. [Note: A great many magistrate judges apply a much stricter test to screening, and it certainly can be binding on pro se inmates.] Judge DiClerico rejects Beaulieu’s Equal Protection claim for denial of feminizing commissary items and the imposition of once-a-month shaving rules in segregation. He rules that, because she does not contest her confinement in a men’s prison, the test is whether she is being treated differently than other inmates at the facility or other inmates in segregation. The Equal Protection analysis is probably inaccurately framed – it differs from the usual presentation of transgender versus cisgender – or even transgender discrimination as sex discrimination – but Judge DeClerico declines even to apply class-of-one theory to Beaulieu. He notes that, notwithstanding their legal protests, defendants are now providing some of the contested commissary items. Claims 2 through 8 all concern failing to protect Beaulieu from harm and affirmatively placing her in harm’s way by knowingly placing her with dangerous cellmates, by housing her near them, and by corrections officers publicly calling her a “rat” or a “skinner” (prison slang for pedophile). In some cases, the allegations were sufficient only to state a New Hampshire state tort claim; in others, the opinion suggests that Judge DiClerico allows both Eighth Amendment and tort claims to proceed to discovery. He declines to find an Eighth Amendment claim in continuing to assign defendants whom Beaulieu sued to work near her, but he allows this tort claim to proceed to discovery. In this writer’s view, the court may have been influenced by allegations that defendants were exploiting Beaulieu’s admittedly fragile mental health condition, in allowing the tort claims to be fleshed out in discovery. For example, he finds insufficient Eighth Amendment allegations in a mental health worker’s response to Beaulieu’s request for treatment (“just kill herself”), but he allows the state tort action to proceed. On the Ninth Claim, Judge DeClerico lets First Amendment allegations proceed to discovery, including retaliation in the form of excessive force, bogus disciplinary charges, and an administrative order for other inmates to “keep away” from her – including her “boyfriend” discussed in the 2017 Law Notes article. Claims 10 through 13 detail excessive force by date, officer, and nature of force (e.g., kicking while down, slamming into wall while restrained, hours of confinement in restraint chair, and tasering). Judge DeClerico lets them all go to discovery on both Eighth Amendment and state tort theories. Both sides moved for reconsideration and additional relief following this decision. Beaulieu also sought a preliminary injunction and moved to amend her complaint. In Beaulieu v. New Hampshire Governor, 2018 WL 4158400, 2018 U.S. Dist. LEXIS 148086 (D.N.H., August 30, 2018) (“not for publication”), Judge DiClerico denied all applications by all parties. The state was “regurgitating” arguments already considered and better made at summary judgment after discovery, he found. Beaulieu was attempting to amend her complaint to raise new issues and add parties to a case filed years ago, which would not be allowed after two years had gone by, despite her “tumultuous” incarceration. Her requests for preliminary injunctive
relief were denied because: (1) the court had dismissed some of these claims, so she was unlikely to prevail on the merits; (2) her claims about conditions in segregation were mooted by her release from segregation; and (3) her request for an injunction against her transfer out of state was based only on her fear of being transferred, which was insufficient for preliminary relief. The state also objected under the Prison Litigation Reform Act’s provision requiring physical injury before hearing constitutional claims for mental distress – see 42 U.S.C. § 1997e(c) – because the PLRA is an affirmative defense and the state raised this issue for the first time on reconsideration. It can be raised on summary judgment; but it would not, in any event, apply to the non-constitutional supplemental state claims.

NEW YORK – Transgender inmate Sergey Shlitman, pro se, has her fourth amended complaint dismissed for failure to state any claims by U.S. District Judge Nelson S. Román (Obama) in Shlitman v. Makram, 2018 U.S. Dist. LEXIS 132177, 2018 WL 3745670 (S.D.N.Y., August 6, 2018). Shlitman filed what could be called shotgun pleadings, alleging discrimination against her in two different correctional facilities in personal searches, health care, verbal and physical harassment and abuse, and generalized claims that her civil rights were violated by ten different defendants. It is not possible to discuss all claims and rulings in this report. The complaints range from relatively trivial (confiscation of snacks) to potentially serious (attempted extortion of sexual favors by guards). In general, Shlitman fails in her fifth pleading to be specific enough about what each defendant did that violated her rights. Judge Román begins by ruling that inmates have no Fourth Amendment rights, citing Hudson v. Palmer, 468 U.S. 517, 530 (1984). He rules that any limitations on officer conduct in searches had to violate the Eighth Amendment to be actionable. Hudson, however, dealt with random cell searches, not bodily searches. Although it has been applied as broadly read as was done here, this writer is not aware of any precedent as such in the Second Circuit. Searches conducted to gratify the officer without any penological purpose can be actionable under the Eighth Amendment. See Crawford v. Cuomo, 796 F.3d 252, 257 (2d Cir. 2015) (limiting multiple incident requirement of Boddie v. Schneider, 105 F.3d 857, 859 (2d Cir. 1997)). Judge Román held that, even if the guards pressing their fingers between Shlitman’s clothed buttocks could be found to violate Crawford, the incident occurred during the time in which the Boddie test was in place and therefore the defendants were entitled to qualified immunity because the law was not settled. Judge Román found Shtilman’s allegations of denial of medical care to be “wholly conclusory.” The only denial she mentions in any detail is disallowance of a permit to eat in her cell, which he found not to have been arbitrarily denied and (in any event) not sufficiently serious. He then ruled that the generalized allegations amounted to a claim of denial of all medical care and allowed Shlitman to file a Fifth Amended Complaint to flesh out what specific care she was denied. Judge Román found verbal abuse (reference to putting all transgender inmates in the ovens at Auschwitz, and similar remarks) was not actionable, even when they accompanied abusive searches. There is no discussion of “verbal abuse” in this Second Circuit case, and Shlitman pleaded no actual physical injury. Judge Román found that threats were not actionable because they were not carried out. He does not discuss a substantive due process argument that attempted extortion of sex with the threat of bogus punishment may deprive an inmate of a liberty interest whether or not she accedes or is punished. Judge Román spends considerable time on Equal Protection, which Shlitman did not plead but he found to be present on a “liberal reading” of the complaint. Judge Román found that neither the Supreme Court nor the Second Circuit has found transgender people to constitute a suspect class for Equal Protection purposes. There is no discussion of developments elsewhere or recent cases in the Second Circuit on treating gay discrimination as gender discrimination under Title VII – see Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (passim) (en banc) – or requiring heightened scrutiny for sexual orientation discrimination as a quasi-suspect class in Windsor v. United States, 699 F.3d 169, 180-1 (2d Cir.), aff’d on other grnds sub nom. United States v. Windsor, 570 U.S. 12 (2013). Observing that he has difficulty on these pleadings finding a “comparator” from which to frame an Equal Protection claim, Judge Román fixes on class-of-one discrimination under Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Nevertheless, he allows Shlitman to replead on this claim against five of the ten defendants, noting that the “Auschwitz” remarks (and those calling her a “Russian she-male” – ethnic animus, anyone?), the extortion, and even the “denial” of medical care, could perhaps be shown to lack rational basis or to demonstrate discriminatory intent. Judge Román basically went off on his own on Equal Protection, because the state did not brief it. It strikes this writer as a backhanded approach to a fairly straightforward LGBT discrimination claim. Class of one theory is not a good theoretical framework for advancing Equal Protection for LGBT plaintiffs as a protected class. [Editor: It is worth noting that the district courts dealing with constitutional challenges to Trump’s transgender military service ban have used heightened scrutiny, treating gender identity as a quasi-suspect classification, and one of those judges, Marsha Pechman in Seattle, has treated it as a suspect class. Some transgender discrimination cases
OREGON – Pro se transgender inmate Coly Lee Aplin encountered administrative exhaustion problems under the Prison Litigation Reform Act [PLRA] when she sued for alleged rape and failure to treat in *Aspin v. Oregon DOC*, 2018 U.S. Dist. LEXIS 77951 (D. Ore., May 8, 2018) (reported in *Law Notes*, June 2018 at page 328). Now, in *Aplin v. Oregon DOC*, 2018 U.S. Dist. LEXIS 121391, 2018 WL 3521395 (D. Ore., July 20, 2018), she alleges that she has not received adequate medical care and that her constitutional rights were violated by the state’s “labeling” her as transgender or giving her a diagnosis of dysphoria, when “she has the right to express herself outside of ODOC’s labeling process.” This case is included because this writer has never seen a case making the later claim. U.S. District Judge Michael W. Mosman (who also had the earlier case) makes no comment on this theory, but he notes that Aplin has not exhausted her grievances on medical care and has filed no grievances on the labeling claim. Her case is thus dismissed. The case also stands for the standard proposition that a plaintiff is a “prisoner” under the PLRA if she is incarcerated. It does not matter the Aplin was a state inmate when her case started, then she was released, then she was incarcerated in a county jail while she continued her case about state conditions. She may have been able to avoid the PLRA by filing a new case during the window between incarcerations, but she did not do that (and this lasted only 7 days).

OREGON – U.S. District Judge Michael H. Simon granted summary judgment to defendants in *Leontiev v. Corbett School District*, 2018 U.S. Dist. LEXIS 135306, 2018 WL 3822460 (D. Ore., Aug. 10, 2018), in which the mother of a transgender teen alleged that her son’s school district and various teachers and other adults in the community who volunteered with the Corbett Performing Arts Club, in which her son participated, had violated her constitutional parental rights by assisting the son with living arrangements when he no longer wanted to live in his mother’s home. The bulk of Judge Simon’s lengthy opinion is taken up with a detailed narrative of the events giving rise to the lawsuit, which can be summarized as follows. The plaintiff is the mother of a transgender boy who was 15 years old when these events unfolded. The boy is identified as F.V. in the opinion. F.V.’s parents divorced in 2008, when F.V. was in elementary school, and both parents subsequently remarried. The plaintiff had full custody of F.V., who “for a time only saw his father infrequently.” F.V. wrote his mother a letter when he was in 9th grade, revealing his name change and male gender identity. Plaintiff claims that she was supportive of F.V. through his gender transition, but her current husband believes that F.V. “is young and doesn’t necessarily know what she is doing.” He also indicated that having known F.V. for years as a girl, he had trouble remembering to use F.V.’s preferred names and pronouns. F.V. was active in the Corbett Performing Arts Club, an extracurricular after-school theater program run by volunteer teachers and community members, who were evidently quite supportive of F.V. and his gender transition. On Saturday, November 19, 2016, F.V. participated in matinee and evening performances of *A Midsummer Night’s Dream* presented by the Club. Between shows, he told his father and sister, who were attending, that he “felt uncomfortable” living in his mother’s home, and was not planning to return there that evening. Earlier that day, he had told his sister that “he was considering getting emancipated or changing custody to his father.” After the show, F.V.’s father dropped off F.V.’s sister at plaintiff’s house, but F.V. stayed at the high school at a cast party. After the party he went home with an adult volunteer with whose daughter he was friendly, but the record does not clearly reflect where he spent that night. However, in the wee hours that Sunday morning, he sent an email to his mother, stating that he was “miserable at home.” He did not “feel like I am being supported,” and that “I am done with contorting myself to fit an image that you have created. You and Dad both refuse to accept that I am a boy, and that my name is [F.V.]. I am so tired of living in a place where I have to endure constant invalidation.” F.V. indicated that he would “take a break from living with you for a while.” Without telling them where he was staying, he expressed hope that eventually “we will get to a place where we share a strong relationship again, and we can continue working toward it.” There ensued a drama of several days where the plaintiff involved the police, Department of Human Service officials, and school authorities, in trying to track down F.V. and get him to come home, while F.V. was essentially “couch-surfing” among the homes of supportive teachers, adult volunteers from the theater club, and parents of his school friends. F.V. retained a lawyer to discuss how to keep his various hosts from sustaining liability for helping him through this period, and the lawyer advised not staying in the same place for consecutive nights. F.V. did not miss school, but his mother refused to accept the situation as appropriate, insisting that he did not have permission as a minor to live anywhere but with her. The judge’s opinion mentions a supportive teacher’s contention that F.V.’s mother and step-father were conservative Christians who could be expected to have difficulty accommodating to a child’s gender identity issues. Ultimately, custody was switched to his father, but F.V.’s mother filed this lawsuit against the school district and several individual adults who had provided assistance to F.V., including hosting him in their...
violated her 1st Amendment rights by beliefs, and the school district, had officers about plaintiff’s Christian teacher who made comments to police defendant, Carrie Church, a school parent-child relationship and that one process rights by interfering with her particular facts presented in this case,”

496 LGBT Law Notes September 2018

496 LGBT Law Notes September 2018

homes and providing him with food and transportation while his mother was insisting that he should come home. Plaintiff argued that the defendants violated her 14th Amendment due process rights by interfering with her parent-child relationship and that one defendant, Carrie Church, a school teacher who made comments to police officers about plaintiff’s Christian beliefs, and the school district, had violated her 1st Amendment rights by disparaging her religion. In granting the defendants’ summary judgment motion, Judge Simon found that the defendants did not interfere unconstitutionally with the parent-child relationship here. He focused on the evidence that F.V. initiated everything of his own will, eliciting the assistance and cooperation of others. The various defendants did not urge him to leave home, or do anything to prevent him from returning if he wanted to. “In summary,” he wrote, “there is uncontradicted evidence that: (1) the parent-child relationship was already strained; (2) Defendants made attempts, either through F.V. or through D.H.S., to keep Plaintiff apprised of F.B.’s whereabouts; and (3) Defendants at no time prevented F.V. from returning home.” In light of the legal principles established by a host of cases the court discussed, “such actions cannot be said to ‘shock the conscience’ or ‘offend the community’s sense of fair play and decency.’ Plaintiff has thus not been deprived of her right to raise and associate with her child.” Furthermore, since her claims did not rest on a “clearly established right” in this factual context, all the defendants, to the extent they could be labeled as “state actors” subject to 14th Amendment constraints, enjoyed qualified immunity from liability. “Plaintiff cites no controlling authority that articulates any specific legal principle that compels the conclusion that Plaintiff’s right to associate with her child was violated under the particular facts presented in this case,” wrote Judge Simon, the tone of whose opinion suggests empathy for all concerned. “Further, the ‘consensus of cases of persuasive authority’ supports the conclusion that Defendants’ non-coercive behavior does not rise to the level necessary to find a constitutional violation.” Although plaintiff asserted her 1st Amendment religious claim against just Carrie Church, who made the remarks about her religion, and the school district, she argued that all the defendants acted as they did “because they disapproved of Plaintiff’s religion.” Simon concluded, “There is no evidence in this case that the government penalized or discriminated against Plaintiff in a manner that violates her clearly established rights. Plaintiff cites no case that supports the legal principle that a school employee who expresses her personal opinion of the religious views of a person over whom she exercises no authority is an act of governmental discrimination . . . Defendant Church’s comments to law enforcement officers – who were called by Plaintiff – in Church’s own home in the middle of the night on a weekend do not come close to the degree of governmental interference with religious expression described by the Supreme Court” in the cases plaintiff relied upon. Indeed, Judge Simon suggested that a ruling in favor of plaintiff against Church “would come dangerously close to violating Carrie Church’s own 1st Amendment right to freedom of speech.” As to any liability of the school district, Simon wrote, “There is no evidence that any individual Defendant’s actions arose from a School District policy, custom, or practice,” and he rejected the argument that the school district could be held liable for failing to train the adult volunteers for the theater club to require students to go home to their parents. To get the full flavor of this case, one must read Judge Simon’s detailed narrative of the events as they unfolded over several days in November 2016.

Pennsylvania – Pro se gay inmate

Joseph Breeland was assaulted by a gang member cellmate (“Blood” member Gilbert) after Gilbert was mistakenly put into general population and into Breeland’s cell. U.S. Magistrate Judge Susan Paradise Baxter allows Breeland to proceed to trial on “protection from harm” claims against one defendant in Breeland v. Jones, 2018 U.S. Dist. LEXIS 120574, 2018 WL 3474635 (W.D. Pa., July 19, 2018). After receiving threats from his cellmate, Breeland informed the area sergeant that he was in danger and that Gilbert needed to be moved. According to Breeland, he was assaulted the next shift, sustaining a cut lip and a bone injury to his shoulder. Judge Baxter denied Breeland’s motion for summary judgment, and she granted in part and denied in part defendants’ motion for summary judgment. The assault occurred on the third shift, and Judge Baxter granted summary judgment to the third shift defendant because Breeland sounded his cell alarm during the second shift and told that sergeant about the threats. Breeland testified that he attributed the fault to the failure of the second shift to alert the third shift, as to which there were material disputed facts. It was clear, however, that the third shift defendant was not on duty when Breeland reported the threats. The second shift sergeant stays in the case because of the disputed facts. Moreover, his motion for summary judgment because Breeland’s injuries were de minimis also presented disputed facts. A video taken the next day was inconclusive as to injuries. There were no entries in Breeland’s medical records for the months preceding or following the incident. Yet, Breeland testified his lip was treated and his shoulder was x-rayed. He also presented a declaration from a witness (presumably another inmate) who said that Breeland’s lip was cut and that he had a bony protrusion on his shoulder. Judge Baxter found disputed facts as to the extent of Breeland’s injuries. There is evidence
on PACER that correction officials destroyed all of Breeland’s legal records pertaining to this case, and Judge Baxter directed the clerk to send Breeland copies of the documents on file with the court. This is an occasion, far too rare, where inmate testimony is used to deny summary judgment over the absence of corroborating medical records, perhaps because, without saying so, Judge Baxter took the unusual absence of medical records for two months with a grain of salt.

Pennsylvania – In 2017, this writer predicted that a reversal by the Third Circuit would have a “salutary effect” on remand in the treatment of this case, involving forcibly taking a prisoner’s blood for HIV and hepatitis tests after an altercation with a guard. This prediction proved to be unduly optimistic. Corey Bracey’s blood was forcibly taken in 2012 when he was strapped into a restraint chair after defendants got a state court judge to apply a statute allowing HIV testing for certain defendants, which they used for both HIV and hepatitis testing because the guard had blood exposure. Law Notes has reported on this case twice: the Third Circuit remand in Bracey v. Huntington County, 2017 U.S. App. LEXIS 11438, 2017 WL 2787619 (3d Cir., June 27, 2017) (Summer 2017 at pages 271-2); and the U.S. District Court opinion by Judge William W. Caldwell on remand in Bracey v. Huntington County, 2017 U.S. Dist. LEXIS 133821 (M.D. Pa., August 22, 2017) (September 2017 at pages 368-9). The case is now back before U.S. Magistrate Judge Martin C. Carlson for a Report and Recommendation [R & R] on the two remaining defendants, in Bracey v. Huntington County, 2018 U.S. Dist. LEXIS 119990 (M.D. Pa., July 19, 2018). These defendants argue that Bracey has no constitutionally cognizable claims; and, even if he does, they are entitled to qualified immunity. The R & R recommends dismissal of all federal claims and a declination to reach any state claims, without prejudice. Judge Carlson divides the constitutional due process claims into substantive and procedural. Although he finds that Bracey may have a “protected property interest in his own blood,” Judge Carlson wrote that the taking of it does not “shock the conscience” sufficiently to state a substantive due process claim, citing Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008). Speaking of the defendants, he writes: “Quite to the contrary, their resort to the rule of law, and legal process, is actually the antithesis of conscience shocking behavior.” Even if defendants misused the HIV testing statute to test the blood for hepatitis, they could have used another statute to test for that, so the additional act is “inconsequential.” As to procedural due process, Bracey had adequate protections in the state court proceeding, in which he participated. Addressing a claim of “malicious abuse of process” as an aspect of procedural due process (as he was told to do by higher courts), Judge Carlson finds that an element of this constitutional tort “under the umbrella of due process” is that the process be “perverted” to an improper purpose, citing Dunne v. Twp. of Springfield, 2018 WL 2269693 at *8 (D.N.J. Jan. 31, 2011), and Cameron v. Graphic Management Assoc., Inc., 817 F. Supp. 19, 21 (E.D. Pa. 1992). Bracey alleged that using an HIV statute to obtain fluids for a hepatitis test was just such a perversion. Judge Carlson was not persuaded, because the defendants made clear all along that they were going to try to get an order for both tests and a state judge allowed it. Their use of process was “transparent,” even if their legal authority was “incomplete.” Judge Carlson then turns to qualified immunity, finding no constitutional rights have been violated and also that there are no controlling cases that would show defendants acted illegally. The possibility that Bracey will prevail on state law claims in state court after a state judge approved the challenged conduct strikes this writer as more than unduly optimistic.

Washington – This case concerns restrictions on inmate same-sex marriage by the Washington DOC, except in the end it dodges the merits for now on procedural grounds. In Sandoval v. Obenland, 2018 WL 3629311 (W.D. Wash., July 31, 2018), U.S. District Judge Robert J. Bryan dismisses the claims of Bernadino Gino Sandoval, pro se, for declaratory and injunctive relief, because he has been released from prison. A magistrate judge had recommended a dismissal of the case for mootness, noting the release and the fact that Washington had changed its regulations, but Judge Bryan rejected this for two reasons: (1) Sandoval may still have a claim for damages for constitutional tort, or for retaliation for trying to exercise his rights, during the time that he was incarcerated; and (2) ripeness should have been applied, rather than mootness. On the first point, although Judge Bryan does not mention it, there would appear to be such a claim based on putting together Turner v. Safley, 482 U.S. 78, 96 (1987) (marriage rights as a liberty interest survive incarceration), and Obergefell v. Hodges, 135 S.Ct. 2528 (2015) (marriage equality). On the second point, while Judge Bryan rejects mootness, he also rejects as premature Sandoval’s argument that his situation is capable of repetition because he is currently facing new criminal changes, which would place him under the revised regulations if he is convicted and sentence to prison. Judge Bryan ruled that this argument, while not “moot,” was nevertheless not currently ripe for injunctive relief; and, in his discretion, it was also premature for declaratory relief. This ruling is without prejudice, and the case is not closed. Judge Bryan rejected the state’s argument that Sandoval
had “abandoned” his marriage plans, because Sandoval disputed that, and the state’s evidence (failure of Sandoval to correspond with his fiancé) was caused by the state’s own regulations.

**WISCONSIN** – This is the third Law Notes report of litigation by transgender inmate John H. Balsewicz, a/k/a Melissa Balsewicz, still proceeding pro se. In *Balsewicz v. Bartow*, 2017 U.S. Dist. LEXIS 89698 (E.D. Wisc., June 12, 2017), reported in Law Notes (Summer 2017 at page 279), U. S. District Judge Joseph P. Stradtmueller allowed her to proceed on two claims of deliberate indifference under the Eighth Amendment: failure to treat her gender dysphoria; and failure to treat her suicidal tendencies arising from her untreated condition. In *Balsewicz v. Blumer*, 2017 U.S. Dist. LEXIS 213176 (E.D. Wisc., December 29, 2017), reported in Law Notes (February 2018 at pages 94-5), Judge Stradtmueller allowed the claims to continue after the state’s answer and permitted Balsewicz to add a defendant and a claim for retaliation for filing the first case. Now, in *Balsewicz v. Pawlky*, 2018 U.S. Dist. LEXIS 111566, 2018 WL 3304632 (E.D. Wisc., July 5, 2018), Judge Stradtmueller screens a new case involving alleged failure to protect her from being beaten by another inmate, Denzel Samonte Rivers. Balsewicz alleges that Rivers threatened her with physical violence, which she reported to the area sergeant, John Pawlky, who ignored her plea for help. Rivers had apparently begun his harassment by using showers during a time reserved for transgender inmates. Two days later, Rivers assaulted Balsewicz in the dining hall by punching her in the head several times, rendering her unconscious. Pawlky admitted to Balsewicz that he had “not documented the incident” in the shower that she had reported earlier. The complaint also alleges that Balsewicz had previously been victimized by another inmate and that Rivers had a history of assaulting transgender inmates. On these facts, Judge Stradtmueller easily found the Balsewitz’ claims passed screening under *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), and what he called (in this writer’s view, correctly) the “low bar of screening” under the Prison Litigation Reform Act. Quoting *Mayoral v. Sheahan*, 245 F.3d 934, 938 (7th Cir. 2001), he wrote: “Because officials have taken away virtually all of a prisoner’s ability to protect himself, the Constitution imposes on officials the duty to protect those in their charge from harm from other prisoners.” He continued: “Once a prison official knows about a serious risk of harm, he has an obligation ‘to take reasonable measures to abate it,’” quoting *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006). “Plaintiff alleges that she put Defendant on notice of a threat of violence posed by a specific inmate, and that Defendant chose to do nothing to abate that threat.” The degree of knowledge and the reasonableness of the response “must be left for factual development.” Unfortunately, Law Notes is full of examples of District Court and Magistrate Judges who do not see their limited gate-keeping role under the Prison Litigation Reform Act in a similar way.

**WISCONSIN** – Wisconsin’s DOC Mental Health Director, Dr. Kevin Kallas, and the state’s Gender Dysphoria Committee are in hot water again in a pro se lawsuit by transgender inmate Charles Norwood, a/k/a Chelsy Norwood, in *Norwood v. Kallas*, 2018 WL 3575918 (E.D. Wisc., July 25, 2018). Screening an amended complaint, U.S. District Judge William Griesbach found that claims were stated against Dr. Kallas and the Committee for failing to continue Norwood’s hormone therapy because she was taking prior to arrest for parole revocation. She waited some four months for evaluation by the Committee’s expert (Dr. Osborne, again – see *Mitchell v. Kallas*, 7th Cir., reported in this issue of Law Notes, above), who recommended reinstatement of treatment on April 2, 2018. As of May 29, 2018, treatment had not been reinstated. Citing *Mitchell*, Judge Griesbach has little trouble finding a claim stated against Dr. Kallas and the Committee. Here, a reason given for the delay was resumption of treatment had to await the outcome of Norwood’s parole revocation hearing. There is no discussion of why an outside expert should be required for a hormone continuation case, even if the state insists on one for “gatekeeping” in an initiation case. Their reasoning on awaiting a revocation hearing and even on referring Norwood to Dr. Osborne in the first place, appears just as specious as declining treatment for inmates about to be released in *Mitchell*, which the 7th Circuit had found questionable at best. It is apparent that one circuit decision can have almost immediate effect.

**LEGISLATIVE & ADMINISTRATIVE NOTES**

By Arthur S. Leonard (except as noted in individual items)

**U.S. OFFICE OF PERSONNEL MANAGEMENT** – Effective September 30, the children of domestic partners of federal employees stationed outside the United States will lose their coverage for health, dental and vision under the Federal Employees Health Benefits Program. This is pursuant to an interim rule adopted in December 2016 that has now been made permanent. The benefits had been established in 2013, at a time when same-sex couples could marry in many fewer jurisdictions than they can now. After the Supreme Court ruled in June 2015 that same-sex couples have a constitutional right to marry, a ruling quickly implemented throughout the United States, OPM has been considering how to handle...
the situation of insurance coverage for partners and spouses, ultimately concluding that people who want benefits for spouses and children should get married. Recognizing that this could impose burdens on overseas employees stationed in jurisdictions where same-sex marriages are not available, OPM decided to allow children receiving such benefits to keep receiving them for a transitional period, during which federal employees would be given liberal leave to travel to jurisdictions where they can marry their partners. The announcement of the final rule emphasize that there is no change in coverage for children whose same-sex partners are married. The final rule is published in 5 CFR Parts 890, 892 and 894, published in the Federal Register on July 12. Bloomberg/BNA Daily Labor Report covered the story in its issue of July 11.

U.S. DEPARTMENT OF JUSTICE
– Attorney General Jeff Sessions announced on July 30 the establishment of a Religious Liberty Task Force. Claiming that there is a trend in American law and society of hostility to religion, Sessions announced the purpose of this Task Force is to help the Justice Department implement the Religious Liberty guidance document that Sessions issued in October, 2017. The co-chairs will be Associate Attorney General Jesse Panuccio (former an attorney for supporters of California Proposition 8) and Assistant Attorney General Beth Williams of the Department’s Office of Legal Policy. Sessions’ guidance was intended to implement President Trump’s Religious Liberty Executive Order, which directs the Executive Branch to give maximum play to religious liberty claims as against the requirements of statues and regulations, including an expansive interpretation of the Religious Freedom Restoration Act. Of course, as has been repeatedly noted, “religious liberty” within the understanding of Trump, Sessions, et al., consists of excusing people from complying with general laws and anti-discrimination requirements if they have Christian-evangelical religiously-based reasons for their non-compliance. As such, one might posit that the establishment of such a Task Force is, quite literally, inconsistent with the Establishment Clause of the 1st Amendment. This initiative is similar to one institute in the White House during the George W. Bush Administration, which ultimately proved to be innocuous and ineffective. Thus far, federal courts have been generally unreceptive to religious exemption claims, with the striking exception of the Hobby Lobby case. As the Trump Administration continues its agenda to fill the maximum number of judicial vacancies quickly with nominees approved by the Federalist Society, that may change as well.

U.S. CONGRESS
– Human Rights Campaign (HRC) reported on July 23 that more than 240 members of Congress from both parties have now endorsed the current version of the Equality Act, listing 199 U.S. Representatives and 47 U.S. Senators as co-sponsors. The measure was most recently reintroduced on May 5, 2017. It would add sexual orientation and gender identity as forbidden grounds of discrimination throughout the U.S. Code to existing lists of forbidden grounds for discrimination, and would correct an oversight by adding “sex” as a forbidden ground of discrimination in public accommodations under the Civil Rights Act of 1964.

CALIFORNIA
– The state legislature approved a resolution demanding that the medical community “halt nonconsensual medical procedures that try to cosmetically ‘normalize’ variations in intersex children’s sex characteristics;” USA Today.com reported on August 28. The resolution calls the practice a violation of human rights. Kimberly Zieselman, executive director of interAct Advocates for Intersex Youth, told USA Today that this was the first time a U.S. legislative body had affirmatively recognized the dignity of intersex newborns, estimated at up to 1.7% of the population. * * * Assemblyman Evan Low, sponsor of a bill to ban paid conversion therapy as a violation of consumer protection laws, has pulled the bill from the floor for revisions, even though there seemed to be majority support in both chambers. The bill will undergo redrafting to take into account various objections that have been raised by opponents of the measure. Low said it will be introduced again next year. AP Alerts, Sept. 1. * * * Governor Jerry Brown has signed into law AB 2719, adding sexual orientation, gender identity, and gender expression to the definition of elderly communities to be given priority consideration for programs and services administered through the California Department of Aging,” according to a press release from Equality California.

CONNECTICUT
– Law Notes previously reported – “Massachusetts Federal Judge Refuses to Dismiss Transgender Inmate’s Disability Act Claims Despite ‘Gender Identity’ Exception; Ramifications Go Far Beyond Corrections” (Summer 2018 issue) – that Massachusetts had passed a statute providing protection for transgender inmates, effective in December of 2018. We identified it as the nation’s first such legislation. We now report that Connecticut had beat Massachusetts to the punch. Section 8 of SB 13, effective July 1, 2018, as reported in Newsweek (May 29, 2018), provides that transgender inmates with a DSM-V diagnosis of “gender dysphoria” must be addressed with gender appropriate pronouns and names, have access to gender appropriate commissary, and be searched by security staff of the
same identified gender, absent request or exigent circumstances. Moreover, those with amended documentation reflecting their gender identity (such as a driver’s license, birth certificate, or passport – or, importantly, “can meet established standards for obtaining such a document”) must presumptively be housed in a facility with inmates of the identified gender. The full text of the new law can be found at https://www.cga.ct.gov/2018/BA/2018SB-00013-R01-BA.htm. William J. Rold.

**KENTUCKY** – The Fairness Campaign told the Lexington Herald-Leader that the adoption of an ordinance banning sexual orientation and gender identity discrimination in housing, employment and public accommodations by the city of Maysville made it the tenth city in Kentucky to pass such an ordinance, after Louisville, Lexington, Covington, Frankfort, Morehead, Danville, Vicco, Midway and Paducah. AP State News, Aug. 10.

**ILLINOIS** – Gov. Bruce Rauner (Republican) vetoed H.B. 4572, which would have extended the state’s anti-discrimination law to smaller businesses – those with fewer than 15 employees. The state’s anti-discrimination law forbids discrimination because of sexual orientation or gender identity, in addition to the other categories generally covered by state laws. Rauner declined to make a public statement of his reasons for vetoing the bill. Proponents plan to introduce the bill again when a new governor is elected. Impact, Aug. 13.

**ILLINOIS** – The Glenview Park District Board of Commissioner voted 7-0 on June 28 to approve a transgender employees policy and a transgender patrons and participants policy aimed at making restroom facilities available on a non-discriminatory basis to people consistent with their gender identity and presentation, whether employees or patrons. The policy also provides for employees who plan to transition to establish a transition plan by notifying their employer with 60 days notice so that any necessary logistics can be efficiently handled. Legal “proof of transitioning” will be required to change payroll and health insurance records, but is not a prerequisite to changing names on name tags, phone lists and other internal Park District documents. “In the event that a co-worker objects to using the same restroom or locker room facility that is being used by a transgender employee,” says the policy, “the park district shall designate a different restroom or locker room facility for that co-worker.” The policy mandates that co-workers and supervisors be supportive of employees who are transitioning. Evanston Review, July 5. *** Oak Park District 97 School Board unanimously approved equal education protections for all students regardless of gender identity or sexual orientation at its July 17 meeting, following up on similar policies that had been adopted by administrators at two high schools in the district. The policy will include training for staff, reforms in restroom and locker room access, and avoiding contracting with or providing facilities for organizations that discriminate. Forest Leaves (River Forest, Illinois), July 26.

**MAINE** – On July 6, Governor Paul LePage (Republican) vetoed a bill that would have banned state-licensed therapists from engaging in conversion therapy. The governor said that the bill is was not necessary for professionals who already have a defined scope of practice, and he was concerned that it would harm parental rights and the work of faith-based counselors. Since the bill did not apply to faith-based counselors, only those licensed by the state as health care practitioners, it is hard to understand his second objection. As to his first, the bill was intended to protect children from being forced into abusive conversion therapy by well-meaning parents who don’t comprehend the harm they are doing to their children. At the same time, the governor criticized the legislature for failing to pass a bill he had proposed to ban female genital mutilation, a practice that is apparently epidemic in Maine (?) and is already outlawed under federal law. According to a press release denouncing the veto, Human Rights Campaign asserted that Governor LePage is the only governor in the nation who has vetoed such a bill. Marty Rouse, HRC National Field Director, said, “These crucial protections are supported by a bipartisan majority, and have been signed into law in a growing number of other states by both Democratic and Republican governors, including by the Republican governor in neighboring New Hampshire mere weeks ago.” But, after all, LePage’s veto was actually true to his socially regressive record.

**MICHIGAN** – A house divided against itself? The Michigan Civil Rights Commission, following the reasoning of opinions issued by the EEOC and several federal courts, opined that the Elliott-Larsen Civil Rights Act, which forbids discrimination because of sex, also forbids discrimination because of sexual orientation or gender identity. Interpretive Statement 2018-1 (May 21, 2018). Republican members of the state legislature, Senator Arlan B. Meekhof and Representative Tom Leonard, requested a formal opinion from the state’s attorney general (and Republican candidate for governor), Bill Schuette, who responded with A.G. Opinion No. 7305 (July 20, 2018), rejecting the Commission’s action, insisting that this was an invalid amendment to the statute that was beyond the authority of the Commission to effect. He insisted that “any authority they have
to interpret a statute cannot be used to change the statute or to enforce the statute in a way that conflicts with the law’s plain meaning.” But, speaking on behalf of the Commission on July 23, Co-Chair Laura Reyes-Kopack stated that the Commission would stick to its interpretative statement, and would continue to receive and investigate complaints of discrimination because of sexual orientation or gender identity, setting up a likely confrontation in court. Interestingly, Governor Rick Snyder, also a Republican, disagrees with Attorney General Schuette, according to a statement released by Agustin Arbulu, Snyder’s appointed Director of the Michigan Department of Civil Rights, who stated, “The Michigan Civil Rights Commission is an independent, constitutionally created and established body. The Commission is not bound by the opinion of the Attorney General. The only recourse is for the courts to determine if issuing the interpretive statement was within the scope of the commission’s authority, and that is the appropriate venue for resolving this issue.” An attorney for the two legislators, David Kallman, predicted that companies facing investigations from employees claiming discrimination based on their sexual orientation or gender identity would bring legal challenges, and at present there are two companies facing such investigation. Gladiators, suit up!! (Based on reporting from www.freep.com [July 25] and news.bloomberglaw.com/daily-labor-report [July 24].)

NEVADA – Clark County School Board trustees voted 4-3 to adopt a policy addressing the needs of transgender students, requiring schools to create gender support plans, ensure appropriate privacy and confidentiality, and allow locker room and restroom use consistent with gender identity. Law Vegas Review-Journal, Aug. 10.

NEW JERSEY – On July 3, New Jersey Governor Phil Murphy signed into law a birth certificate bill that will authorize issuance of new birth certificates for transgender people who have transitioned, without requiring proof of surgery, making New Jersey the 17 state to have reformed its birth certificate requirements in this way. In addition, the bill makes New Jersey the fourth state, after California, Oregon, and Washington, to offer a third gender option on birth certificates for those who reject the gender binary. The governor also signed into law measures to establish a Transgender Task Force to create a place for government officials, experts in law, policy and medicine, and community leaders and advocates to come together to study and address issues that impact transgender people, and to allow gender identity to be reflected on death certificates. The package of proposals had been promoted by Garden State Equality, whose news release is the source of much of this information. Legislative leadership on this issue was attributed to Assemblywoman Valerie Vainieri Huttle, Assemblyman Reed Gusciora, Assemblyman Andrew Zwicker, Assemblyman Nicholas Chiarevalloti, Senator Joe Vitale, and Senator Loretta Weinberg.

MISSISSIPPI – The Clarksdale Board of Commissioners approved a non-discrimination ordinance that includes sexual orientation and gender identity and applies to housing, employment and public accommodations. Clarksdale becomes the third Mississippi city to enact such legislation, following Jackson and Magnolia. Human Rights Campaign News Release, Aug. 14.

Pennsylvania – The Pennsylvania Human Relations Commission has released interpretive guidelines expanding the definition of “sex” under the state’s anti-discrimination laws to include sexual orientation, gender identity, gender expression, gender transition, and transgender identity, and will take complaints raising such claims. The Republican-controlled legislature has refused to move on legislative proposals to amend the state’s anti-discrimination laws expressly to include these categories, but more than 50 municipalities in the state, including Harrisburg (the capital) and Philadelphia (the largest city) have legislatively banned such discrimination. The Commission premised its authority to issue the guidance on the failure of the legislature to adopt an express definition of “sex” in the statutes, and the traditional role of administrative agencies to provide definitions for undefined statutory terms. Whether this will fly with state courts in an enforcement action is an open question. * * * Governor Tom Wolf signed Executive Order 2018-06 to establish the Pennsylvania Commission on LGBTQ Affairs, which will advise the governor on “Policies, procedures, legislation and regulations that impact LGBTQ individuals and communities” and serve as a central place within the executive branch of the state government to develop, review and recommend policies to the governor, among several enumerate functions.

Pennsylvania – The Bethlehem City Council voted 6-0, with one member absent, to approve the Appropriate Mental Health Services Ordinance on July 17. The measure bans performance of conversion therapy on minors within the City of Bethlehem. Legislation to the same end has been pending in the Pennsylvania legislature for more than a year, but have been blocked in Committee by Republican members, since belief in the efficacy and harmlessness of conversion therapy is a tenet of their ideological faith. (No, actually we believe they are just pandering to certain groups within their...
electoral base, and they really know that conversion therapy does not even rise to the level of junk science, but they have no compunction about sacrificing the health and safety of vulnerable youth on the altar of electoral gain. This bitter comment is incited mainly by our report above about Governor LePage of Maine’s deplorable veto of a similar measure in his state that had passed the legislature with bipartisan support.)* * * Westmoreland County Commissioners voted unanimously to revise their policy on sexual harassment and retaliation to add gender identity and sexual orientation to the list of forbidden grounds for discrimination. The commissioners said that trainings will be scheduled for commissioners and staff on the new policy. Herald-Standard (Uniontown, PA), July 27.

**LAW & SOCIETY NOTES**

By Arthur S. Leonard (except as noted in individual items)

**CORRECTIONAL POLICY** — Adding to the growing literature on the adverse health effects of lack of transgender correctional policy is a study, Drakeford, “Correccional Policy and Attempted Suicide among Transgender Individuals,” appearing in the April 2018 issue of the Journal of Correctional Health Care. A summary of the study, appearing in CorrectCare, Volume 32, Issue 2 at 23 (2018), surveys the literature on the link between suicide attempts and correctional policy in housing and health care. As to housing, the study found that placing inmates according to their external genitalia, rather than their gender identity, “exposes them to high risk of physical and sexual assaults by inmates and correctional staff,” with “profound effects on mental health.” Five medical issues are specifically addressed: psychological evaluation, consultation with experienced providers, initiation of hormones, continuation of hormones, and “freeze frame” dosing. The study found that suicide attempts were three times higher for transgender inmates with long incarceration and “low levels of care.” William J. Rold

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**WILLIAMS INSTITUTE STUDIES** — A study issued by the Williams Institute at UCLA Law School, a leading “think-tank” on LGBT issues, report that same-sex couples are more likely than different-sex couples to raise adopted and foster children. The study found that there were more than 700,000 cohabiting same-sex couples in the United States in 2016, of which an estimated 114,000 were raising children, many of them becoming parents through fostering or adoption. Although most same-sex couples either used surrogacy or donor insemination to produce children biologically related to one of the parents, more than 20% of the same-sex couples were foster or adoptive parents, compared to about 0.4% of different-sex couples who are raising children. * * * Another study released by the Williams Institute estimated that there are about 137,000 transgender people who will be eligible to vote in this year’s midterm elections, but an estimated 57% of them may not have identification or documentation that accurately reflects their gender. Eight states currently require government-issued photo identification documents in order to vote, leading it to election officials and poll watchers to determine whether the documents sufficiently identify the individuals listed on voter registration rolls. Procedures for updating government-issue ID for those who are transitioning vary among the states, with some precluding issuing new identification prior to complete surgical transition.

**NEW YORK** — Catholic Charities of Buffalo announced that it will end its foster care and adoption program rather than comply with state rules that prohibit state contractors from discriminating based on sexual orientation in providing services to the public. The organization’s contract with Erie County Department of Social Services was set to expire in March; the contract requires state licensure and compliance with applicable rules. Buffalo News, Aug. 24.

**U T A H** — Using a little-known state procedure, a woman legally married her deceased partner in the Matheson County courthouse on August 14. According to a report by good4Utah.com posted August 22, “74 year old Bonnie Foerster of South Salt Lake wanted to be declared legally married to her common law partner Beverly Grossaint who died on May 27 after more than 50 years together.” The couple’s attorney suggested petitioning for retroactive marriage recognition. Judge Patrick Corum entered a recognition decision, commenting that this was the “second post-mortem same-sex marriage in Utah,” the other having been recognized after a long-time partner died in a car crash.

**CONTROVERSIAL STUDY** — A study by Brown University Assistant Professor Lisa Littman which has been cited as raising doubts about gender dysphoria in teenagers and has popularized the phrase “rapid-onset gender dysphoria” has attracted negative comment and some distancing by Brown University and the social science journal that published it, PLOS ONE. Littman surveyed parents of transgender youth who had disclosed their gender identity issues to their parents without any “advance warning” or signs detectible by the parents, leading Littman’s study to theorize about her observed correlation of such individuals having transgender friends. There was much
criticism of the study methodology, which did not involve interviewing the young people involved or any sort of systematic collection of diagnostic data about them.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRIA – Austrian officials have generated protest by imposing stereotyped views to reject asylum claims by gay refugees. In a case involving an Iraqi man seeking asylum because he feared to return home due to persecution of homosexuals, an immigration official rejected the claim, saying the applicant acted “too girlish” in his assessment interview. This came just weeks after controversy over the denial of asylum to a gay Afghan teen, with an official stating that the applicant did not “act or dress gay.” Despite plenty of evidence that gay people are in grave danger in Afghanistan, the official said, “The way you walk, act or dress does not show even in the slightest that you could be homosexual.” So gay male asylum applicants can’t win for trying in Austria – either they are too effeminate or not effeminate enough to meet some asylum officers’ stereotyped image of gay men. It has been reported that the government is requiring these officers to undergo some reality training. The Guardian, Aug. 15; Agence France Presse English Wire, Aug. 23.

BERMUDA – The government has filed an appeal of a June 6 ruling that declared parts of the Domestic Partnership Act invalid and held that it could not supplant a prior marriage equality court decision. The enactment of the DPA made Bermuda the only country in the world where marriage equality was ordered by a court and then taken away through legislation. (In the U.S., this happened in California with Prop 8’s enactment following the state’s first marriage equality supreme court ruling, but California is not a country – although dwarfing Bermuda in population and land mass.) The Chief Justice found that the DPA was inconsistent with provisions in the Constitution which based marriage equality on freedom of conscience and prohibition of discrimination because of creed. Royal Gazette, July 5.

BULGARIA – Agence France Presse Wire (July 27) reported that Bulgaria’s constitutional court agreed with opponents of parliamentary ratification of the Istanbul Convention, a treaty intended to prevent and combat violence against women, that the use of “gender” in the convention was grounds for rejecting it. Wrote the majority of the Court: “The definition of gender as a societal concept calls into question the limits between the two biologically determined sexes – man and woman. If society no longer differentiates between man and woman, the fight against violence against women becomes impossible to accomplish.” * * * However, a court in Sofia on June 29 overturned an administrative denial of residency rights to an Australian woman who had married another woman in France. The Australian woman had been granted a residence permit based on EU Directive 2004/38/EC on the right of free movement and residence within the EU. Having obtained the permit, she should be allowed to live together with her same-sex wife in Bulgaria, wrote the court. Although Bulgaria does not allow same-sex unions, its obligations as a European Union member would be paramount if a company employee was transferred to Bulgaria and could not bring and live with her wife.

CANADA – Trinity Western University’s Board of Governors voted to make the school’s “community covenant” which, among other things, requires sexual abstinence outside of heterosexual marriage, voluntary rather than mandatory, in a bid to win accreditation for its proposed law school from Canadian provinces where the law society’s voted to deny it due to the covenant. The move came after the Supreme Court of Canada rejected a “religious freedom” challenge by the university to these accreditation decisions. InsiderHigherEd.com, Aug. 15.

CHILE – The Senate voted 26-14 to approve a bill that allows people 14 or older to change their name and gender on official documents. * * * Although Chile’s Supreme Court ruled that the unit of two women raising a girl together can be deemed a family, it would not recognize that the child has two mothers, rejecting an appeal on behalf of the couple by the Movement for Integration and Liberation (Movilh). The court rejected, by a 2-1 vote, the contention that the Civil Registry acted unlawfully by refusing to register the child as having two mothers. * * * Despite a statement by the president of Chile’s Supreme Court that the Inter-American Court of Human Rights’ marriage equality opinion issued earlier in the year in response to a request for an opinion from Costa Rica is binding on Chile, the country’s Interior Minister confirmed that President Sebastian Pinera would do everything possible to impede its implementation in Chile. The leading LGBT rights organization in Chile stated that it would seek further action in the Inter-American Court.

COSTA RICA – Costa Rica’s Supreme Court has ruled that the country’s ban on same-sex marriage is unconstitutional, in a vote taken on August 8. The court found the existing ban to be inconsistent with a ruling in January by the Inter-American Court of Human Rights.
The Supreme Court gave the political branches of government up to 18 months to implement laws lifting the ban. Costa Rican gay rights advocates welcomed the ruling but denounced the 18-month transitional period.

CUBA – A three-month “public consultation” on a new draft constitution began August 13. Comments submitted during the consultation will be considered for a second draft, which will have to be approved by the National Assembly before being submitted to a voter referendum, which has been scheduled for February 24, 2019. Among other things, the new constitution could clear the way for marriage equality in Cuba by adopting gender-neutral language regarding marriage.

DENMARK – The country will liberalize its blood donation rules, in recognition of scientific evidence about the efficacy of screening tests, and allow gay men to donate blood if they haven’t had sex with another man within a period of four months of the donation date. The four month requirement is to facilitate the identification of HIV-tainted blood before it can be used in the donation. The new policy replaces an outright ban on donations by men who have sex with men.

ECUADOR – Two trial judges have ruled for marriage equality in litigation that has been appealed to the Provincial Court of Justice of Azuay. The two trial judges both found the refusal of Civil Registry Offices to register same-sex marriages was contrary to January’s ruling in the Costa Rica case by the Inter-American Court. So look for new developments in Ecuador in the months ahead.

GERMANY – Thai News Service (Aug. 16) reported that Germany’s cabinet had approved a “third gender option” for official identification documents to comply with the Supreme Court ruling. The option “will be available by the end of the year,” stated the report, which said the cabinet approved a draft bill on August 15 that allowed intersex people to register their gender as “diver”, which is approximately translated as “miscellaneous” or “other.” Up to now, some individuals have been allowed to leave the gender classification blank on official papers.

HONDURAS – The Parliament passed a ban on adoption of children by same-sex couples. Litigation is pending before the Honduran Supreme Court, seeking enforcement of the Inter-American Court’s ruling last January that same-sex couples are entitled to marry as a matter of human rights protection by treaty, to which Honduras is a signatory. The lawsuit aims to strike out a provision of the constitution that bans performance or recognition of same-sex unions, as well as recognition of foreign marriages. It also brings an equality challenge against provisions of the Family Code that extends certain marriage rights to opposite-sex de facto unions, but not to same-sex unions. They also challenge the refusal of the National Registry of Names to allow transgender name changes.

ISRAEL – In a controversial move that sparked widespread protests and marches and even a one-day general strike sanctioned by many large employers, the Israeli Knesset passed a broadened surrogacy bill but rejected coverage of same-sex couples. The new bill lets Israeli families have up to five children through surrogates, an increase from the prior two children. The bill will drop the ban on surrogacy by single women, but a proposal to amend it to allow same-sex couples to use surrogacy failed, despite some back room promises that it would pass. israeltoday.com (July 15).

ITALY – Reuters (Aug. 10), reported that Deputy Prime Minister Matteo Salvini has ordered official forms changed so that same-sex couples cannot both declare themselves as a child’s parent. Salvini told a Catholic on-line newspaper that he ordered forms that used the phrasing “parent 1” and “parent 2” to be altered to read “mother” and “father,” saying, “We will defend the natural family founded on the union between a man and a woman. I will exert all the power possible.” Surrogacy is illegal in Italy, as is joint adoption of children by same-sex couples, but some courts and municipalities have granted parental status to the same-sex partners of birth mothers. Salvini is described as “Italy’s most favored politician” in public opinion surveys, and the political coalition in which his party participates enjoys about 30% in recent polls, a significant figure in a country with a large number of parties.

JAPAN – Chiba City, east of Tokyo, announced August 23 that it will begin issuing partnership certificates for same-sex and transgender couples as well as common-law marriage couples, following the lead of half a dozen other municipalities in Japan that have taken this step, but Chiba is the first not to limit the recognition to LGBT couples. Mayor Toshihito Kumagai told a press conference that he hopes the city’s move would be a “catalyst” for people to rethink the concept of families. Kyodo News, Aug. 23.

LEBANON – Human Rights Watch has reported that a district court of appeal in Lebanon issued a ruling July 12 holding that consensual sex between people of the same sex is not illegal. Several lower courts had refused to convict on charge
of consensual sex between adults, but this is the first appellate court to do so. The statute in question is characterized as a “colonial relic” that was imposed by French colonial authorities in the early 1900s. Prosecutors had appeal these rulings. The appeals court ruled for a “common sense” application of the law, consistent with principles of social justice. The court found that consensual sex between adults of the same sex cannot be considered “unnatural” – as it is described in the statute – as long as it does not violate morality and ethics, for instance, “when it is seen or heard by others, or performed in a public place, or involving a minor who must be protected.”

**LUXEMBOURG** – Equal-eyes.org, an advocacy group, reported on July 25 that the Luxembourg Chamber of Deputies had approved by a vote of 57-3 a statute that will facilitate and simplify access to the procedure for a legal change of gender and first names in civil registries, based on self-declaration rather than medical certification or surgical interventions. Next up the reformists’ agenda: A bill passed by the House, also on July 25, that would require informed consent of intersexual people before they can be subjected to “normalizing” genital surgery.

**MALAYSIA** – Widespread condemnation from human rights groups greeted the news that Malaysian authorities would subject two women to caning. The women were arrested in April by “Islamic Enforcement Officers” “after they were found in a car in a public square in northern Terengganu State,” characterized as “one of the most conservative areas of the country” in a news report by Agence France Presse English Wire, Aug. 14. They were sentenced to fines and sex strokes of the cane each. They were set free on bail with the punishment scheduled to be imposed on Aug. 28. They were reportedly the first women in Malaysia to be sentenced to caning for this kind of offence.

**MEXICO** – Independent journalist Rex Wockner reported that Oaxaca state is now permitting same-sex couples to marry with obtaining a court order, despite the lack of change by the legislature. The state’s legal unit opined that it had the power to do this because of the accumulated pro-marriage equality rulings by the Supreme Court, which amount to “Jurisprudence” (i.e., binding precedent – not every Mexican state agrees with that yet). ***The City of Guadalajara decided its police force could spend its time more profitably than by harassing and arresting people for making out in public, so the authorities have ordered that police will not have authority to sanction public sex acts, as long as no third party complains. If fully implemented, this policy would end the traditional police actions of entrapping gay men in parks and public restrooms by enticing them into soliciting or initiating sexual conduct with undercover officers. NBC Southern California, Aug. 20/21.

**PORTUGAL** – On August 9 the Parliament approved a bill that would allow citizens to change their gender and name from the age of 16 without a medical report showing surgical alteration. According to a sponsor of the bill from the Left Bloc, this makes Portugal the sixth country in Europe – after Denmark, Malta, Sweden, Ireland and Norway – to “grant the right of self-determination of transgender identity without the guardianship of a third party and without a diagnosis of identity disruption.” The measure awaits approval of the conservative President, Marcelo Rebelo de Sousa, who vetoed an earlier version of the measure.

**ROMANIA** – The Constitutional Court ruled on July 18 that a gay Romanian-American couple, married outside the country, is entitled to the same residency rights as other married couples in the European Union. The ruling came following a decision by the European Court of Justice in this case, involved Romanian Adrian Coman and American Claibourn Robert Hamilton. The men live in New York but want their marriage recognized in Coman’s home country. The European Court said that the freedom of residence under European Law would support requiring a country to recognize a marriage for residency purposes. However, the court did not say that Romania is required to allow same-sex marriages or approve them among its own citizens. Associated Press, July 18.

**RUSSIA** – A teenager who was found guilty of promoting homosexualty to minors by posting photographs on a social media network has been fined 50,000 rubles (about $760), officially on the charge of “promoting non-traditional sexual relationship among minors.” Maxim Neverov, 16, is appealing the ruling, according to his lawyer Artyomn Lapov, denying that the pictures posted on a social network amounted to gay propaganda. Reuters, Aug. 20.

**TAIWAN (REPUBLIC OF CHINA)** – Voters unhappy about the supreme court marriage equality decision, under which same-sex marriages will become available automatically sometime next year if the legislature does not act, have obtained sufficient signatures to force a referendum vote on a package of anti-LGBT proposals, including blocking same-sex marriage while substituting a less legally expansive civil union status, and restricting public school education concerning homosexuality for younger students. Taipei Times.
In Africa had amounted to “religious persecution,” and decried the use of “US taxpayer dollars” to “discourage Christina values in other democratic countries.”) But Berry is a widely-respected foreign-service professional, and Trump has been having great difficulty persuading enough of his right-wing billionaire friends to accept ambassadorships to countries without adequate spa and golf course facilities, so presumably Berry is being sent to this remote geographic corner of the world to fill a lingering gap. (Trump has notoriously failed to nominate ambassadors to many countries that loom large in U.S. public policy concerns, after his first Secretary of State, Rex Tillerson, demanded and accepted the resignations of most incumbent ambassadors at the start of the administration, and many key ambassadorial posts remained vacant more than a year and a half into the new administration, with “acting” staff keeping the embassies open.) Washington Blade, Sept. 7.

IMMIGRATION EQUALITY has announced a job search for a full-time Legal Director, and for a part-time attorney position as Hotline Attorney who will deal with incoming calls for advice and assistance on LGBT immigration questions. Full details are available at immigrationequality.org.

RANDY BERRY, an out gay diplomat who served as the first special U.S. Envoy to promote LGBT rights abroad under Secretary of State John Kerry in 2015, has been appointed by President Trump and confirmed by the Senate to be the U.S. Ambassador to Nepal. Since the State Department has abandoned the mission of promoting LGBT rights abroad in the Trump Administration, Berry’s former position was no longer needed. (Confirming this point, in a talk to a “religious freedom” conference in Washington on July 24, reported the Kenyan Daily Nation, Office of Management and Budget Director Mick Mulvaney said that the Obama Administration’s promotion of gay rights in Africa had amounted to “religious persecution,” and decried the use of “US taxpayer dollars” to “discourage Christina values in other democratic countries.”) But Berry is a widely-respected foreign-service professional, and Trump has been having great difficulty persuading enough of his right-wing billionaire friends to accept ambassadorships to countries without adequate spa and golf course facilities, so presumably Berry is being sent to this remote geographic corner of the world to fill a lingering gap. (Trump has notoriously failed to nominate ambassadors to many countries that loom large in U.S. public policy concerns, after his first Secretary of State, Rex Tillerson, demanded and accepted the resignations of most incumbent ambassadors at the start of the administration, and many key ambassadorial posts remained vacant more than a year and a half into the new administration, with “acting” staff keeping the embassies open.) Washington Blade, Sept. 7.

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* * * Lambda Legal has posted job openings for attorneys at all levels in the organization: Senior Counsel, Counsel, Senior Staff Attorneys, and Staff Attorneys, with openings in headquarters (NYC) and many of its regional offices. A detailed announcement is available at lambdalegal.org/about-us/jobs. Lambda is in a period of transition, as a national search is under way for a new executive director. Attorneys at Lambda Legal work on impact litigation, public policy, education, engagement and outreach, and collaborate with other departments in the organization, supervising junior attorneys, paralegals and cooperating pro bono attorneys. There are openings for junior and senior attorneys at different levels of experience.

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We are pleased to note that “On the Basis of Sex (ual Orientation or Gender Identity): Bringing Queer Equity to School with Title IX” (forthcoming in Volume 104 of the Cornell Law Review) by LGBT Law Notes contributing writer Chan Tov McNamarah, a student at Cornell Law School, has received the Dukeminier Award for the best student article on LGBT issues from the Williams Institute at UCLA Law School.
PUBLICATIONS NOTED


4. Atrey, Shreya, Illuminating the CJEU’s Blind Spot of Intersectional Discrimination in Parris v. Trinity College Dublin, 47 Indus. L.J. 278 (July 2018) (case study in which EU Court of Justice rejected intersectionality approach in a case involving discrimination because of age and sexual orientation).


10. Curtis, Kelsey, The Partiality of Neutrality, 41 Harv. J.L. & Pub. Pol’y 935 (Summer 2018) (Mistake of age is frequently raised as a defense where men are prosecuted for sex with younger men who turn out to be younger than the legal age of consent in the jurisdiction).


19. Hoffer, Douglas J., Regulating the Limits of Speech, 91-AUG Wis. L. 36 (July/August, 2018) (noting the potential for a ruling on government limitations of speech in Masterpiece Cakeshop, but asserting that the Court’s disposition of the case avoided such a ruling).

20. Houck, Kathleen, “Mistake of Age” as a Defense?: Looking to Legislative Evidence for the Answer, 55 Am. Crim. L. Rev. 813 (Summer 2018) (Mistake of age is frequently raised as a defense where men are prosecuted for sex with younger men who turn out to be younger than the legal age of consent in the jurisdiction).


22. Levine, Deborah, Sticks and Stones May Break My Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws, 41 Fordham Int’l L.J. 1293 (July 2018).


24. Minehan, Maureen, Sixth Circuit Transgender Decision – Harbinger of Things to Come?, 34 No. 3 Corp Couns Quarterly 28 (July 2018).


35. Sorkin, Anton, Make Law, Not War: Solving the Faith/Equality Crisis, 12 Liberty U. L. Rev. 663 (Summer 2018) (argues that religious objectors should have a good faith exemption from complying with anti-discrimination laws; consider that this is Liberty University’s Law Review).


EDITOR’S NOTES

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