Colonial Era Sodomy Goes Down

India Supreme Court Rules Constitution Protects Sexual Orientation
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Supreme Court of India Strikes Down Colonial Era Sodomy Law by Holding that the Constitution Protects an Individual’s Sexual Orientation

By Vito John Marzano

On September 6, 2018, the Supreme Court of India ruled that Section 377 of the Indian Penal Law (IPC), a Victorian Era statute banning, among other things, carnal intercourse “against the order of nature,” as applied to consensual sexual intercourse between same-sex partners, violated Articles 14, 19, and 21 of Indian Constitution. Navtej Singh Johar & Others v. Union of India et al., [2018] Writ Petition No. 76 of 2016. In so doing, the Court overturned recent precedent that upheld the constitutionality of the same, see Suresh Kumar Koushal & Another v. Naz Foundation and Others, [2014] 1 SCC 1. Prior to the September 6 ruling, India was the most populous nation in the world that criminalized consensual gay sex, being the second largest nation in population. Only China is larger. China repealed criminal laws against private sex between consenting adults years ago, although Chinese society remains generally disapproving of homosexuality and the government censors LGBT expression in many venues.

To briefly explain one aspect of the complex Indian Judiciary, it is important to note that the Supreme Court consists of a Chief Justice and up to 30 other judges. Matters may be heard by two or three-judge panels, or referred to larger panels of five or more, as was the case here. Further, as an aside for U.S. readers, India follows the custom of other high courts of the British Commonwealth in that a single opinion rarely encompasses the whole of the Court’s decision. Rather, each judge may include their own full-length analysis and reasoning that may, at times, duplicate what another has written. As a five-judge panel heard this case, three judges and the Chief Justice included their own analysis and reasoning, for a unanimous holding that Section 377, as applied to consensual homosexual conduct, contravenes Articles 14, 19, and 21 of the Indian Constitution, and therefore must be void, in the 495-page pdf file released by the Court encompassing all of the opinions. Notably, and understandably, the Court did not invalidate the law as it relates to other forms of sexual conduct, noting that nonconsensual sex and bestiality remain subject to the criminal penalties imposed by the statute. In any event, the explanation in this article does not provide an in-depth analysis of each individual opinion, but identifies the legal standards and reasoning employed by all the decisions.

As explained by the Court, Section 377 originated during British rule in the Victorian era (1860s), when LGBTQI individuals were shamed and stigmatized on account of Britain’s heavy Judeo-Christian influence on Indian colonial society. This statute had been imported into the current Indian Penal Code after adoption of its modern constitution when the Union of India achieved independence in 1947. Many have attempted to overturn the statute, which included a High Court decision that was reversed, and the statute was reaffirmed in Suresh Kumar Koushal in 2013. Since that time, however, the Court has had occasion to consider matters confronting the LGBTQI community. In National Legal Services Authority v. Union of India, (2014) 5 SCC 438, the Court construed Articles 15 and 21 of the Indian Constitution to include the right to gender identity and sexual orientation, thus entitling those individuals to the same rights enjoyed by whole of the Indian citizenry. More recently, in Justice K.S. Puttaswamy and another v. Union of India and Others, (2017) 10 SCC 1, the Court recognized that the right to privacy envisioned by Article 21 contemplates a person’s right to make choices that do not interfere with a compelling State interest and/or cause harm to another, and, accordingly, Article 21 includes sexual orientation and gender identity. These decisions, among others, supplied the ground on which the Court reversed Suresh Kumar Koushal. Indeed, some of the justices specifically mentioned Koushal with disapproval in their opinions in Puttaswamy.

In its opinions, the Court explained that the Indian Constitution follows the Living Tree Doctrine, an approach similar to that practiced in Canada. Said doctrine understands that constitutional provisions do not confine themselves to the interpretations of yesterday. To properly scrutinize the meaning of a provision, the Court must consider modern understandings of the matter. This approach markedly rebukes the constitutional interpretation known as “originalism” that has perverted U.S. jurisprudence since the Reagan era.
such, transformative constitutionalism, as explained by the Court, requires “that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead they ought to be given a meaningful construction [that] is reflective of their intent and purpose in the consonance with the changing times. [It] not only includes within its periphery the recognition of rights and dignity of individuals, but also propagates the fostering and development of an atmosphere wherein every individual is bestowed with adequate opportunities to develop socially, economically, and politically.”

While the opinions reference numerous authors on the subject, and Judge R. F. Nariman encourages people to read Oscar Wilde, two opinions reference Dr. Martin Luther King, Jr. in their analyses. Chief Justice Dipak Misra relied on Dr. King’s famous quote, “Injustice anywhere is a threat to justice everywhere.” Judge Dhananjaya Y. Chandrachud relied on Dr. King’s inspiring line that the “the arc of the moral universe is long, but it bends towards justice.”

Turning to the applicable constitutional articles, the Court questioned whether the right to privacy protected by Article 21 necessarily contemplates sexual orientation alone or both orientation and the right to choose one’s partner. In following its lengthy analysis on the origins of Section 377 and historical and modern understandings of sexual orientation, the opinions essentially conclude that homosexuality and heterosexuality offer no difference in human development, both being innate characteristics analogous to a person born left-handed as opposed to a person being right-handed. The science of sexuality understands that sexual orientation is a phenomena significantly controlled by neurological and biological factors. Thus, the right to life and liberty enumerated in Article 21 finds repugnant discrimination against one’s sexual orientation and, logically, protects the right to choose one’s partner to engage in consensual sexual intercourse in private notwithstanding the gender of the individuals.

Article 14 mandates that the law operate equally to all, requiring the State to have “intelligible differentia” when treating classes of people differently, and that such a classification must bear a nexus to the object which the provision seeks to achieve. As such, it seeks to protect the rule of law, rendering a provision that does not meet the aforementioned test as manifestly arbitrary.

The Court contrasted Section 377 of the IPC to Section 375, the latter of which was amended as recently as 2017 and concerned the issue of rape. Section 375 exemplifies a compelling state interest to interfere with an individual’s fundamental rights because the intercourse is nonconsensual. Conversely, Section 377 makes all acts considered against the order of nature, regardless of whether the individuals consent, illegal. This applies to, among other things, homosexuality. Nevertheless, no intelligible differentia, the Court held, exists to render homosexual intercourse between consenting adults illegal. Thus, Section 377, as applied to consensual homosexual intercourse, cannot withstand constitutional scrutiny under Article 14. Judge Chandrachud explained that “[s]ection 377 provides rule by the law instead of the rule of law. The rule of law requires a just law [that] facilitates equality, liberty[,] and dignity in all [of] its facets. Rule by law provides legitimacy to arbitrary state behavior.”

Moreover, as the scientific understanding of homosexuality has changed since the Victorian Era, the basis for the law as it existed then does not provide a foundation for its existence today. As explained by Judge R.F. Nariman, “when the reason for a law ceases, the law itself ceases.”

Article 19 protects one’s freedom of expression, and any limitation on the same requires a reasonable justification. Proponents of the law argued that that LGBTQI individuals represent only a small size of the population, which the Court found unpersuasive on the basis that social stigma cannot form the basis of constitutional morality. A transformative constitution contemplates new scientific understandings and the changes they inhere, not continued societal stigma or disapproval. Hence, the mere size of a minority cannot underscore whether a provision reasonably inhibits the freedom of expression. Sexual orientation, an inalienable characteristic of the individual, finds protection in Article 19.

Although not addressed by all opinions, Judge Chandrachud also tested Section 377 under Article 15, which prohibits discrimination on the basis of sex. He noted that discrimination because of sex, indirect or direct, is not evaluated by the State’s objective but by the impact on the affected individual and their rights. Section 377 may be facially neutral, but its impact has resulted in rape and torture, social boycott, degradation, inhumane treatment, and incarceration of homosexuals. He dispels the notion of gender binary, noting that “one cannot simply separate discrimination based on sexual orientation and discrimination based on sex because discrimination based on sexual orientation inherently promulgates ideas about stereotypical notions of sex and gender roles.” Hence, Section 377 affronts Article 15.

Notably, Chief Justice Misra discussed at length the Doctrine of Progressive Rights. In summary, this doctrine recognizes that once a right is realized, the State cannot rescind that right at a later date. This doctrine necessarily gives rise to the Doctrine of Non-Retrogression. The State must not act to retreat or regress, but must protect, the fundamental rights of the individual. These doctrines would seem to protect against a future court, or the State, from attempting to undo the progress that has been made.

Stunningly, the effects of this case have already trickled down to the lower courts. A court in the southern state of Kerala found that the State infringed on the rights of a lesbian when it committed her to a mental institution against her will because she wanted to live with her female partner. While one can presume that the Supreme Court’s decision will allow LGBTQI individuals to vindicate their rights through the judiciary, it remains to be seen what impact it will have on Indian society as a whole.

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Federal Court Orders Wisconsin to Cover Transition Medical Costs for Transgender State Employees

By Arthur S. Leonard

U.S. District Judge William M. Conley ruled on September 18 in *Boyden v. Conlin*, 2018 WL 4473347, 2018 U.S. Dist. LEXIS 158491 (W.D. Wis.), that Wisconsin’s refusal to cover “procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment” for its transgender state employees violates the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 and in the Affordable Care Act, as well as the Equal Protection Clause of the 14th Amendment. Conley had previously awarded a preliminary injunction to transgender Medicaid participants in Wisconsin who were seeking similar coverage under that program, having concluded that they were likely to prevail on the merits of their claims. *See Flack v. Wisconsin Department of Health Services*, 2018 WL 3574875 (W.D. Wis., July 25, 2018). In this new decision, Judge Conley was ruling on motions for summary judgment by the plaintiffs and the defendants, so this is a final ruling on liability, although there may be a trial on damages if the state doesn’t settle the case.

A Wisconsin statute mandates the state to provide insurance coverage to “aid public employees in protecting themselves against the financial hardships of illness, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale and by establishing equitable benefit standards through public employment.” A Government Insurance Board (referred to as GIB) adopts “Uniform Benefits” for the state’s Group Health Insurance Plan, which then contracts with private insurance companies to provide the mandated benefits to state employees. Employees and their government employers pay money into an Employee Trust Fund (ETF) to finance the benefits.

The exclusion of coverage for hormones and surgery for gender transition has been part of the “Uniform Benefits” standard in Wisconsin in some form since 1994, when GIB adopted the exclusionary language, explaining that such benefits and services were generally deemed by insurance companies to be “experimental and not medically necessary.” The defendants claim that the exclusion of coverage is not total -- that hormone treatment for gender dysphoria is covered “unless specifically made a course of treatment leading to or involving gender conforming surgery,” but there is some dispute about how this is interpreted and applied in practice.

“Still,” wrote Conley, “there is no dispute that mental health counseling as a stand-alone treatment for gender dysphoria is covered, whereas hormone therapy involving gender reassignment surgery is not covered; and there is no dispute that the surgery itself is not covered.” Furthermore, the “Uniform Benefits” also excludes from coverage “treatment, services, and supplies for cosmetic purposes,” with the explanation that “psychological reasons do not represent a medical/surgical necessity.”

A memo arguing that the federal HHS rules interpreting the ACA to cover gender identity discrimination were “unlawful,” a position that a group of states including Wisconsin had taken in a lawsuit filed in the federal district court for the Northern District of Texas. Subsequently, the federal district judge there issued a nationwide injunction, blocking HHS from enforcing its gender identity discrimination policy.

Also, of course, after Donald Trump was elected in November 2016, bringing in Republican majorities in both houses of Congress, Republican leaders announced their goal of repealing the ACA, so it appeared likely that the exclusion might not need to be lifted to comply with that law.

At a GIB meeting on December 13, 2016, an attorney from the Wisconsin Department of Justice recommended...
that “the Board follow the law as it currently stands,” noting that Wisconsin was a plaintiff in the Texas lawsuit. Ultimately, one of the contingencies that GIB embraced for rescinding their prior decision on December 30 would be the federal court in Texas issuing its injunction, the other contingencies being compliance with Wisconsin statutes, renegotiation of contracts with insurance companies that maintained or reduced premium costs, and receiving an opinion from the state’s lawyers that “the action taken does not constitute a breach of board members’ fiduciary duties.” In January 2017, the administrators concluded that the contingencies justifying rescinding the prior vote had been met.

For Judge Conley, however, this political by-play was essentially irrelevant to his ruling on the claims by the plaintiffs, transgender state employees whose federal statutory and constitutional rights were being violated. He focused on the reasons articulated by GIB members for their votes, which varied from person to person. Some were concerned about the Texas court’s preliminary conclusion that the Obama Administration’s interpretation of ACA was unlawful. There was some discussion of costs, but nobody would testify that specific numbers were discussed by GIB, and several members testified that there was no discussion about the medical necessity or safety of the transition procedures, although in this litigation the state presented “expert testimony” (which Judge Conley found deficient) questioning both of those issues.

One GIB member testified that he voted to remove the exclusion because he “viewed the exclusion as discriminatory and supports the right of transgender individual to get the healthcare they need” and that “it’s not costly to add it to the group plan.” This proved to be an apt prediction of what Judge Conley ultimately found, based on the testimony of experts on behalf of the plaintiffs.

Wisconsin is within the 7th Circuit Court of Appeals’ jurisdiction. The 7th Circuit’s rulings are binding on Judge Conley’s District Court in Madison, the state capital. And, he

found, the 7th Circuit has emerged as a champion of LGBT rights with its 2017 decisions in Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017), and Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017). In Hively, the appeals court held that discrimination because of sexual orientation is prohibited by Title VII’s ban on sex discrimination in employment. In Whitaker, the court ruled that discrimination because of gender identity is prohibited by Title IX’s ban on sex discrimination in public schools. Putting them together, Conley found it easy to conclude that gender identity discrimination violates Title VII as well, despite an old 7th Circuit decision, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), ruling out such claims, which has never been explicitly overruled by the circuit court.

He wrote that “all individuals, whether transgender or cisgender, have their own understanding of what it means to be a woman or a man, and the degree to which one’s physical, sexual characteristics need to align with their identity. For example, a cisgender woman who has a mastectomy for treatment of breast cancer may opt not to have reconstructive surgery. That choice, however, may be untenable to another cisgender woman placed in the same position. Similarly, a transgender woman may require breast augmentation to address her gender dysphoria, whereas another transgender woman may not. Nothing about offering coverage without regard to one’s natal sex forces individuals to have surgery to conform their physical traits to their identified gender. Instead,” he wrote, “the Exclusion implicates sex stereotyping by limiting the availability of medical transitioning, if not rendering it economically infeasible, thus requiring transgender individuals to maintain the physical characteristics of their natal sex. In other words, the Exclusion entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary. In this way, defendants’ assertion that the Exclusion does not restrict transgender individuals from living their gender identity is entirely disingenuous, at least for some portion of that population who will suffer from profound and debilitating gender dysphoria without the necessary medical transition.”

In other words, this judge really “gets it.” The opinion exhibits a profound understanding of why this challenged Exclusion is really a form of sex discrimination, which is outlawed by the relevant statutes. Furthermore, since it is sex discrimination in a government policy, it is subject to “heightened scrutiny” under the Equal Protection Clause, throwing the burden on the government to show that the policy substantially advances important state interests. And, as to that, Judge Conley found that the evidence presented by the state as to its purported reasons for rejecting ETF’s recommendation falls short.

“Not only is the record devoid of any evidence to show that GIB members voted as they did for cost or efficacy reasons,” he wrote, “the evidence is overwhelming that the actual or genuine reason for the reinstatement [of the Exclusion] had to do with the DOJ’s guidance — specifically, the belief that the Texas court’s entry of an injunction absolved defendants of any legal obligation to provide coverage.” But, confusingly, the defendants did not put this forward as their reason in support of their motion for summary judgment, instead pointing to costs and efficacy, as to which their expert’s supporting testimony was woefully deficient. Indeed, Judge Conley questioned whether he actually qualified as an “expert” at all. Accordingly, he wrote, “the court concludes that the Exclusion does not survive heightened scrutiny,” and thus is unconstitutional.

While Judge Conley concluded that the individual named government defendants who were sued in their official capacity were entitled to qualified immunity against personal liability, since thus far there is no 7th Circuit or Supreme Court precedent holding that the exclusion is unconstitutional, this is no bar to equitable and monetary relief for the
This doesn’t conclude the case before Judge Conley. In the final part of his opinion, titled “Trial Plan,” he laid out the various claims for relief that plaintiffs can pursue at trial, having won a summary judgment that the Exclusion violates their statutory and constitutional rights. “While the court will determine any equitable relief at trial, as well as award of attorneys’ fees and costs,” he wrote, “defendants have demanded a jury trial as to plaintiffs’ claims for compensatory and/or punitive damages, which is their right. And so a jury there shall be.” The court scheduled a pretrial conference for the last week in September.

The role of the jury in such a case is to determine that amount of money to which the plaintiffs are entitled for the violation of their rights. The state is undoubtedly counting on a jury of taxpayers to be revolted by the thought of awarding substantial sums to transgender plaintiffs, but they should not be so confident, as public opinion has been swinging behind the transgender rights movement. The judge will determine appropriate attorneys’ fees and costs to award to plaintiffs as the prevailing parties on the merits of their claims.

On September 24, Judge Conley issued an Opinion and Order setting a trial date on damages of October 9, 2018, and ruling on motions in limine and related motions. Most notably, he found moot a motion to exclude testimony by the defendants’ experts, inasmuch as their testimony went to the issues of cost and efficacy, which were no longer in issue. The court then concluded with minimal analysis that “Black had provided enough evidence to award to plaintiffs as the prevailing parties on the merits of their claims.” See 2018 U.S. Dist. LEXIS 162757.

Plaintiffs Alina Boyden and Shannon Andrews are represented by John Anthony Knight of the ACLU Foundation, Chicago, Laurence J. Dupuis, of the ACLU of Wisconsin Foundation, Inc., Milwaukee, WI, and local counsel Michael Godbe and Nicholas E. Fairweather, of Hawks Quindel, S.C., Madison, WI.

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### Bisexual High School Student’s Equal Protection Claim Proceeds, But Title IX Claim Does Not

**By Ryan H. Nelson**

In *Black v. Metropolitan School District of New Durham Township*, 2018 WL 4352629 (N.D. Ind., September 12, 2018), U.S. District Judge Jon E. DeGuilio considered Equal Protection and Title IX claims brought against a school district and one of its employees by a bisexual high school student who served on the cheerleading team and as the school’s mascot. Lynnea Black, represented by Christopher C. Myers & Assocs., alleged that her former high school cheerleading coach, Melissa Fleming, represented by Newby Lewis Kaminski Jones LLP, targeted Black for being bisexual.

Specifically, Black claimed that Fleming criticized Black “for not being ‘girly’ or ‘pretty’ enough” to “make the boys on the basketball team ‘happy,”’ even suggesting that Black grow out her hair “so as not to appear so ‘butchy’”; held Black out of cheers at games and threatened to ban her from the team; excluded her from team events like a sleepover because “Fleming did not want ‘a gay girl sleeping by other girls’”; confronted Black and poked her in the chest for violating rules about walking in a prohibited area; and grabbed Black by her hair, dragged her down several bleachers for joining in an unsportsmanlike chant. Black also alleged that these incidents caused her to suffer “bruising, anxiety, and asthma attacks.” Finally, Black alleged that she reported these incidents, as well as the use of anti-gay slurs by unnamed individuals, to the school’s Assistant Principal at least ten times to no avail. Accordingly, Black claimed that Fleming violated the Equal Protection Clause of the Fourteenth Amendment and that the school district (also represented by Fleming’s counsel) violated Title IX of the Education Amendments of 1972. Fleming and the school district moved to dismiss.

The court began its analysis by reviewing Equal Protection Clause jurisprudence, noting that the Fourteenth Amendment protects against discrimination on the basis of gender and sexual orientation and prohibits state actors, such as school districts and their employees, from excluding qualified individuals based on “fixed notions concerning the roles and abilities of males and females.” The court then concluded with minimal analysis that “Black had provided enough evidence to create a genuine issue of material fact as to whether Fleming singled her out for not conforming to sex-based stereotypes,” thereby defeating the motion to dismiss.

While the court’s conclusion is sound, its reasoning could have been buttressed. Indeed, the court fails to state how much protection the Fourteenth Amendment provides to individuals discriminated against based on their sexual orientation. To that end, in the Seventh Circuit, state actions discriminating on the basis of sexual orientation are subject to “heightened intermediate scrutiny,” meaning that they survive constitutional scrutiny only if they “serve important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives.” *Baskin v. Bogan*, 766 F.3d 648, 656-671 (7th Cir. 2014) (overturning Indiana’s unconstitutional ban on same-sex marriage).

The court then considered Black’s Title IX claim, noting that school districts may be liable under Title IX if they are “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” Foremost, the court rejected Black’s allegations concerning the use of anti-gay slurs for lack of specificity (e.g., who said them, when, where). However,
the court did not dismiss this claim with prejudice, thereby leaving open the possibility that these claims could succeed if Black were to supplement the record with more-specific facts. Yet, the court also dismissed Black’s allegations of harassment and discrimination, holding that Fleming’s alleged conduct did not deprive Black of “access to the educational opportunities or benefits provided by the school,” like forcing Black to seek counseling, leaving her homebound or hospitalized, causing her to suffer from recurring nightmares, hurting her grades, causing her to be extensively absent from school, or forcing her to transfer to another school. The court concluded that, absent such “a concrete, negative effect on the victim’s education,” it must reject Black’s Title IX claim. See Davis v. Monroe Cty. Bd. of Ed., 526 U.S. 629, 654 (1999).

Although the court rightly followed precedent here, Black’s case is a perfect example of why Davis is both a flawed and harmful interpretation of Title IX. Under Title IX, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (emphasis added). Thus, while it would be sufficient evidence under Title IX that a plaintiff was excluded from participation in or denied the benefits provided by a school on the basis of sex, the text of the statute itself belies the necessity of such evidence. Rather, plaintiffs like Black should be able to state a plausible Title IX claim by merely proving that the sex-based conduct was “so severe, pervasive, and objectively offensive” that it subjected the plaintiff to discrimination, even if the conduct did not exclude the plaintiff from participation in or a denial of benefits. Discrimination itself is one of the adverse actions that the text of Title IX forbids regardless of whether any additional adverse actions result (e.g., forcing the student to transfer to another school).

**Illinois Federal Court Allows Discharged Gay Organist to Pursue ADA Hostile Environment Claim against Archdiocese of Chicago**

*By Arthur S. Leonard*

U.S. District Judge Edmond E. Chang ruled on September 30 that Sandor Demokovich, a church organist and choir director who was fired from his position at St. Andrew the Apostle Parish, Calumet City, in the Archdiocese of Chicago, after marrying his same-sex partner, may pursue a hostile environment disability harassment claim against his former employers under the Americans with Disabilities Act (ADA). *Demokovich v. St. Andrew the Apostle Parish*, 2018 U.S. Dist. LEXIS 168584 (N.D. Ill.). In previous motion practice, Judge Chang found that Title VII and state and local antidiscrimination claims against the defendants for discriminatory discharge because of his sexual orientation and marital status are barred by the “ministerial exception” recognized by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012). In this ruling, he found that claims of hostile environment harassment because of the plaintiff’s sex, sexual orientation and marital status are also barred, due to Free Exercise and Establishment Clause concerns.

Demokovich began working as Music Director, Choir Director and Organist at St. Andrew in September 2012, and was fired in September 2014. His immediate supervisor, Reverend Jacek Dada, St. Andrew’s pastor, knew that Demokovich was gay and that he was engaged to another man, and, according to Demokovich’s allegations, subjected him to abusive and harassing behavior, which built to a crescendo as the date of Demokovich’s impending wedding approached. Witnesses averred that Dada told them he would fire Demokovich if Demokovich married, and he was true to his word. In addition, Demokovich, who had an obvious weight problem traceable to his struggles with diabetes, also suffered under Dada’s unwelcome comments about his weight and medical condition. “Reverend Dada made harassing remarks about Demokovich’s weight, often urging him to walk Dada’s dog to lose weight, and telling Demokovich that he needed to lose weight because Dada did not want to preach at his funeral,” wrote Chang, summarizing the allegations in the complaint. “Dada also repeatedly complained about the cost of keeping Demokovich on the parish’s health and dental insurance plans because of his weight and diabetes. In 2012, when Demokovich declined a dinner invitation from Dada because he did not have his insulin with him, Dada asked if Demokovich was diabetic and told him that he needed to “get his weight under control’ to help eliminate his need for insulin.”

Being an organist and choir director seems to be a profession that attracts gay men, to judge by the number of cases we have seen over the years, including some of the earliest sexual orientation discrimination cases. Lawsuits challenging dismissals of gay church organists and choir directors almost invariably founder on the courts’ solicitude for defenses based on the First Amendment protection of the decisions by churches about whom to employ in positions directly implicated in carrying out their religious mission, and there is little disagreement among those judges who have faced the question that a church organist and choir director plays a ministerial role in the life of a church. As to that, Judge Chang found that Demokovich’s concession that his is a “minister” for this purpose precludes his pursuit of wrongful discharge discrimination claims, whether premised on Title VII and the ADA or similar state or local laws, based on the Supreme Court’s
determination that the government should never be involved in telling a church whom to employ as a minister.

However, Chang found, the Supreme Court’s *Hosanna-Tabor* case was a discharge case, and can be read to be limited to discrimination claims with respect to tangible employment issues, such as hiring, promotion, assignments, compensation. The Court spoke in that case about the right of a church to decide whom to employ as its minister, but not necessarily how that individual would be treated based on characteristics other than their religion, as to which Title VII provides for an express exception allowing religious institution employers to establish religious criteria for employment. On the other hand, he found, one must resort to circuit court precedent to determine whether the ministerial exemption should also bar hostile environment harassment claims by a ministerial employee against a religious employer. Since these claims involve “intangible” harms, he concluded that it was possible that the ministerial exception does not apply to them. Instead, on a case-by-case basis, the court would have to determine whether allowing a hostile environment claim to go forward would raise significant 1st Amendment free exercise or establishment concerns.

As to this, he concluded, given the Catholic Church’s well-known public opposition to same-sex marriage, alleging a hostile environment based mainly on adverse comments by a supervisor about an employee’s proposed same-sex marriage would intrude unduly into the 1st Amendment rights of the church, thus ruling out that claim as well. “Although the ministerial exception does not bar Demkovich’s hostile-environment claims (to repeat, he does not challenge a tangible employment action), the Court concludes that litigation over Reverend Dada’s alleged harassment based on Demkovich’s sex, sexual orientation, and marital status would excessively entangle the government in religion.” He noted that defendants offered a “religious justification for the alleged derogatory remarks and other harassment: they ‘reflect the pastor’s opposition, in accord with Catholic doctrine, to same sex marriage.’” he wrote.

“Whether Catholicism in fact dictates opposition to same-sex marriage is not subject to court scrutiny,” wrote the judge, quoting 7th Circuit authority to the effect that “once the court has satisfied itself that the authorized religious body has resolved the issue, the court may not question the resolution.” Furthermore, he observed, the Church’s “official opposition to gay marriage is commonly known (nor does Demkovich question it), and there is no reason to question the sincerity of the Archdiocese’s belief that the opposition is dictated by Church doctrine.” Also, Demkovich’s ministerial role “weighs in favor of more protection of the Church under the First Amendment,” he continued, noting that “the church has absolute say in who will be its ministers.” Chang pointed out several different ways in which allowing this hostile environment claim to proceed would raise Establishment Clause as well as Free Exercise Clause problems.

On the other hand, found Chang, there seemed no salient 1st Amendment concern in allowing Demkovich to pursue a hostile environment disability claim under the ADA, assuming that hostile environment claims are actionable under that statute – an issue not yet addressed by the Supreme Court. Although the Church’s ministerial exemption bars suing it about a minister, wrote Chang, it was hard to discern a First Amendment right of the Church that would be abridged by questioning the disability-related hostile treatment of a minister whom the Church was willing to employ.

He wrote, “The Court first notes that the Seventh Circuit has not yet expressly decided that the ADA ever permits a hostile work environment claim. Instead, the Seventh Circuit has assumed – in both published and unpublished decisions - that there is such a claim under the ADA. In light of the similarity between Title VII and the ADA in protection against discriminatory workplace conditions, this Court too assumes that the ADA does provide for hostile work environment claims. When analyzing hostile work environment claims under the ADA, the Seventh Circuit has ‘assumed that the standards for proving such a claim would mirror those established for claims of hostile work environment under Title VII.’”

Significantly, he noted, the Archdiocese “offers no religious explanation for the alleged disability discrimination. The Archdiocese justifies [Rev. Dada]’s comments as ‘reflecting the pastor’s subjective views and/or evaluation of Plaintiff’s fitness for his position as a minister.’ But this is not a religious justification based on any Church doctrine or belief, at least as proffered so far by the defense. So the disability claim does not pose the same dangers to religious entanglement as the sex, sexual orientation, and marital-status claims. Nothing in discovery should impose on religious doctrine on this claim. Rather, the inquiry will make secular judgments on the nature and severity of the harassment (and whether it even happened), as well as what, if anything, the Archdiocese did to prevent or correct it. The Religious Clauses do not bar Demkovich from pursuing the hostile-environment claims based on disability.”

The Archdiocese had also argued that “the alleged conduct was not severe or pervasive, was not physically threatening, and is not alleged to have altered the terms and conditions of Plaintiff’s employment,” but Chang noted that “this case is at the pleading stage, so Demkovich need not plead more facts than necessary to give the Archdiocese ‘fair notice of his claims and the grounds upon which those claims rest, and the details in his Amended Complaint present a story that holds together.’” Judge Chang found that the allegations thus far were sufficient to place a hostile environment claim in issue for purposes of defeating a motion to dismiss.

Thus, the bottom line is that defendants’ motion to dismiss was granted as to the hostile environment claims based on sex, sexual orientation, and marital status, but denied as to the claims based on disability.”

Demkovich is represented by Kristina Buchthal Regal of Lavelle Law, Ltd., Palatine, IL.

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Minnesota Federal District Court finds that ACA May Require Employer’s Self-Funded Health Plan to Cover Gender Transition Costs

By Arthur S. Leonard

U.S. District Judge Donovan W. Frank largely denied defendants’ motion to dismiss the complaint in Tovar v. Essentia Health, 2018 U.S. Dist. LEXIS 16065 (D. Minn., Sept. 20, 2018), in which beneficiaries under the health insurance provided by an employer to its employees and their dependents challenged the plan’s complete exclusion of coverage for “services and/or surgery for gender reassignment.” The suit was brought under Sec. 1557 of the Affordable Care Act, rather than ERISA, because the employer, a health care provider, self-insures and is thus subject to ERISA. However, ERISA is relevant to the co-defendant, HealthPartners, which administers Essentia’s health insurance plan.

Brittany Tovar and her son, Reid Olson, were covered by health insurance provided to its employees by Essentia Health and Innova Health, LLC, from September 24, 2010, until July 29, 2016, the starting and ending dates of Tovar’s employment as a nurse practitioner with Essentia. The court does not go into the details of how her son Reid became covered by the plan on October 1, 2014, but from the date one expects that it was because the ACA provision extending the age at which insurance plans have to cover the children of participants went into effect then. In November 2014, one month after become a beneficiary under the plan, Reid was diagnosed with gender dysphoria, and Reid’s doctor decided that various treatments culminating with gender reassignment surgery were indicated for Reid.

Tovar and Reid then applied for pre-authorization as required under the terms of the health plan, and were turned down because of the exclusionary language in the plan. They appealed, arguing that the exclusion was discriminatory, and in the meantime Reid started on the hormone treatments with Tovar paying out of pocket. At some point, Essentia decided to make an exception to its policy on a “one-time” basis and reimbursed Tovar for her out-of-pocket expenses, but, plaintiffs alleged, “As a result of the denied coverage, Olson and Tovar suffered emotional and financial harm, and Olson suffered delayed access to medically necessary treatment.”

Essentia ultimately asked co-defendant HealthPartners, their plan administrator, to remove the exclusion, which they did effective January 1, 2016. Tovar’s employment ended July 29, 2016, but she and Reid remained covered by the plan until October 31, 2016. Essentia and HealthPartners moved to dismiss the case against them, and the 8th Circuit has already taken a crack at the standing issues they raised.

In this opinion, however, Judge Frank refused to dismiss on the merits, rejecting defendants’ argument that Section 1557 of the ACA, which incorporates the ban on sex discrimination from Title IX of the Education Amendments of 1972, does not forbid gender identity discrimination and does not require health plans to cover gender transition costs. Judge Frank described how federal courts construing sex discrimination provisions, taking their cue from the Supreme Court’s Price Waterhouse and Oncale rulings, have most concluded that gender identity discrimination claims are covered by such laws, with specific reference to gender stereotype theory. “The Court finds the reasoning of the foregoing cases persuasive,” he wrote. “Because Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination, the Court concludes that Section 1557 also prohibits discrimination on the basis of gender identity.”

The court then swept aside various procedural objections, but the judge did find that since Tovar had been reimbursed for her out-of-pocket expenses, she lacked personal standing to pursue the case further. Reid, however, as the beneficiary who needed the coverage, retains standing, so the action was not dismissed with respect to him. (The pronoun usage is explained in a footnote, where Judge Frank says that he will use the pronouns that the plaintiffs used in their complaint to refer to Reid.) Frank rejected HealthPartners’ argument that they should be dismissed from the case as a third-party administrator that was not responsible for determining the terms of the plan, merely for faithfully administering what the self-insured employer decided to cover. Frank was not persuaded, writing, “Contrary to HealthPartners’ argument, ERISA specifically carves out room for TPAs to comply with other federal laws,” citing 29 U.S.C. sec. 1144(d). “The Court will not construe ERISA to impair Section 1557.”

Defendants asked the court to stay its ruling pending a final decision in Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016), in which a notorious district judge issued a nationwide injunction against the federal government enforcing Section 1557 in gender identity discrimination cases, at the behest of some religious employers who believe that Jesus would not look kindly on providing insurance coverage for gender transition. That injunction was aimed at a particular Obama Administration rule, which DHHS has since indicated, under the Trump Administration’s policies of revoking as many Obama Administration rules as they can get their hands on, is being “reevaluated” in anticipation of issuing a new rule, which, consistent with Trump Administration policy, will undoubtedly interpret 1557 to not cover gender identity or sexual orientation claims. Frank decided that a stay was not warranted, because he was ruling based on judicial interpretations of the statutory language, not relying on the DHHS regulation at issue. “The ultimate resolution of Franciscan Alliance and any potential, new proposed DHHS regulation will not affect the resolution of this matter,” he wrote.

Plaintiffs are represented by Christy L. Hall of Gender Justice.
Pennsylvania Supreme Court Refuses to Recognize Standing for Non-Biological Mother in Same-Sex Relationship

By Cody Yorke

In the Supreme Court of Pennsylvania’s decision in C.G. v. J.H., 2018 WL 4537278, 2018 Pa. LEXIS 4952 (Sept. 21, 2018), the court upheld the decisions of the County Court and Superior Court, denying C.G. standing to seek custody and visitation of the child that was conceived by intrauterine insemination using anonymous sperm donor by C.G.’s ex-partner, J.H., during their relationship, and with whom C.G. continued to live as a family for the first five years of the child’s life.

While the decision turned on specific findings of fact by the County Court, it also presented an opportunity for Pennsylvania’s highest court to consider the legal definition of “parent” in that state and so doing to shape the way in which LGBT people will be treated in future when seeking standing for custody and visitation for children to whom they are not related through biology or adoption. Justices Kevin Dougherty and David Wecht each wrote concurring opinions that addressed this issue.

Justice Wecht in particular urged a more expansive definition of “parent,” but the majority failed to adopt it in this decision.

J.H. became pregnant during her relationship with C.G., using intrauterine insemination by an anonymous sperm donor. The two remained together for the first five years of this child’s life, and J.H. and the child moved from Florida to Pennsylvania soon thereafter. At the time C.G. initially filed for standing, she had been living apart from the child, and had had only minor contact for several years.

Beyond that, the facts were greatly contested. C.G. contended that she and J.H. had mutually consented to J.H. becoming pregnant, with the intent that they would co-parent and both act as mothers to the child, and that she had acted as the child’s mother from the time of conception up until the couple’s breakup, after which J.H. had withheld the child from her. J.H. told a very different story: C.G. had made clear to her that she did not wish to have another child (C.G. already had two other, college-age, children), and that she acquiesced to J.H. becoming pregnant on the understanding that the child would be J.H.’s and J.H. would bear the costs associated with raising him. The County Court mostly resolved the factual inconsistencies in J.H.’s favor.

Under Pennsylvania’s Domestic Relations Code, seeking custody and visitation of a child is a two-step process: first, the person must establish that they have standing to do so. Only once standing is established can the person actually seek custody or visitation. Standing can be achieved in three ways: when they are a biological or adoptive parent of that child, when they stand in loco parentis to the child, and when they are a grandparent, in certain circumstances.

The reason for this two-step process, Justice Sallie Mundy explained, is to prevent unnecessary intrusion into the family and in recognition of the liberty interest of parents in the care, custody and control of their child (Troxel v. Granville, 530 U.S. 57, 65 (2000)). C.G. sought standing as a parent and as a person standing in loco parentis.

In loco parentis literally means “in the place of a parent.” C.G. argued for a focus on the bond that had formed between her and the child. The court rejected this request in favor of the established test for establishing in loco parentis: that the person had assumed parental status and discharged parental duties. The Court relied on the County Court’s findings of fact, agreeing with it that C.G. had not met the required burden.

The Domestic Relations Code does not define “parent.” C.G. argued for an intent-based approach to determining legal parentage where a child is born through the use of assistive reproductive technology. She pointed to a number of cases that involved parentage determinations for children who were conceived using reproductive technologies (many of which involved different-sex couples). The court rejected C.G.’s intent-based approach, finding that the case law established “a much narrower framework for establishing parentage in the absence of adoption, biology, or a presumption attendant to marriage;” where legal parental rights and responsibilities have been relinquished or assumed via contract. Since there was no contract granting

All the justices agreed that under any test, C.G. did not meet the definition of parent or in loco parentis.

C.G. parental rights, the court found these cases to be inapplicable.

All the justices, including Justice Dougherty and Justice Wecht, agreed that under any test, C.G. did not meet the definition of parent or in loco parentis as a result of the factual findings made by the County Court. However, both Justice Dougherty and Justice Wecht argued for a broader interpretation of “parent.” Justice Dougherty reasoned that “the inevitable result [of the majority’s interpretation of “parent” in Pennsylvania’s Domestic Relations Law] will be the continued infliction of disproportionate hardship on the growing number of nontraditional families – particularly those of same-sex couples – across the Commonwealth.”

Dougherty further highlighted the “very real and grave risk to this approach, to children and putative parents alike,” referring to the New York Court of Appeals’ decision in Brooe S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, in which the court pointed out that “a growing body of social science reveals
the trauma children suffer as a result of separation from a primary attachment figure — such as a de facto parent — regardless of that figure's biological or adoptive ties to the children.” While Justice Dougherty concluded that it was not necessary at this time to endorse any particular new test to define a parent, it was unnecessary to close off such a possibility.

Justice Wecht disagreed, criticizing the majority for failing “to imagine and embrace the intent-based paradigm that [assisted reproductive technology]-related child custody disputes require.” Moreover, Justice Wecht pointed out the insult of requiring non-biological parents in same-sex couples to even seek standing as in loco parentis: “The point is that the second partner in these scenarios should be considered a parent for purposes of standing in custody. In loco parentis generally is considered a species of standing sought by third parties [. . .] As a matter of law, a same-sex partner who participated in the decision to bring a child into the world, to raise, to educate, to support and to nurture that child, is no longer a third party. He or she is a parent.”

Justice Wecht also pointed out the differential outcome for a different-sex couple: a man whose female partner to whom he was not married had contracted for assistive reproductive technology with a sperm donor, who does not adopt the child, but acts as the child’s father, would be able to establish standing by relying on the doctrine of paternity by estoppel: “the male partner would need only to show that he held the child out as his own.”

Justice Wecht concluded, “I think that today’s case is a missed opportunity for this Court to address the role of intent in analyzing parental standing in ART cases.” This writer agrees. While the decision may be a case of bad facts (or bad findings of fact) making bad law, the majority failed to use the case as an opportunity to provide guidance to the lower courts when addressing those in a similar position to C.G. It remains to be seen whether the decision will be interpreted as closing off that possibility.

*Cody Yorke is a volunteer with the LGBT Bar Association of Greater New York.*

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**Federal Court Orders State Department to Issue Gender-Neutral Passport to Intersex Applicant**

*By Arthur S. Leonard*

U.S. District Judge R. Brooke Jackson has ordered the U.S. State Department to issue a gender-neutral passport to Dana Alix ZZyym, who was identified as female at birth but who rejects the gender binary, identifying themselves as male nor female. Lambda Legal represents ZZyym in this long-running lawsuit in the federal trial court in Denver. **ZZyym v. Pompeo**, 2018 U.S. Dist. LEXIS 160018, 2018 WL 4491434 (D. Colo., September 19, 2018).

ZZyym is described by Judge Jackson as “an intersex individual” who submitted a passport application in September 2014. In common with many intersex people, ZZyym uses the pronouns they, them, and theirs, but Judge Jackson skirts the pronoun issue by using ZZyym’s gender-neutral first name throughout the opinion in place of pronouns.

“Instead of checking the box labeled ‘M’ for male or ‘F’ for female on the application form, Dana instead wrote ‘intersex’ below the ‘sex’ category,” wrote Jackson. “By separate letter Dana informed the passport authorities that Dana was neither male nor female. The letter requested ‘X’ as an acceptable marker in the sex field to conform to International Civil Aviation Organization (‘ICAO’) standards for machine-readable travel documents. It is undisputed that in every other respect Dana is qualified to receive a passport.”

But the State Department denied the application. At the bureaucratic level at which passports are processed, there is no flexibility. One must selection M or F or be denied. In the denial letter, the Department said it would issue Dana a passport listing their gender as “female” because that was the sex listed on the driver’s license that they submitted to prove Dana’s identity. Or, said the Department, Dana could have M listed if they provided “a signed original statement on office letterhead from your attending medical physician” attesting to their “new gender.” Obviously, the low-level bureaucrats at State had trouble getting their heads around the concept of intersex, confusing it with transgender.

Dana submitted a letter appealing this denial, including “two sworn statements by physicians from the United States Department of Veterans Affairs Medical Center in Cheyenne, Wyoming, that verified Dana’s sex as ‘intersex.’” Dana also personally presented their case at the Colorado Passport Agency, explaining why they did not want their passport to indicate M or F.

But the Department persisted, explaining that it could not issue a passport unless the gender box was checked off as M or F. Why? Because. The form requires it. Dana requested reconsideration, which was turned down in April 2015.

This led to the lawsuit, originally against Obama Administration Secretary of State John Kerry (in his official capacity), now against Michael Pompeo, as well as Director Sherman Portell of the Colorado Passport Agency. The lawsuit made multiple claims for relief, foremost arguing that the Department’s conduct was “arbitrary and capricious” in violation of the Administrative Procedure Act, which requires that agency action be undertaken for a reason. The lawsuit also argued that by imposing this gender choice requirement the Department exceeded the authority delegated to it by Congress in the statutes governing issuance of passports, and that it violated 5th Amendment Due Process and Equal Protection rights. As relief, ZZyym ask the court to issue a “writ of mandamus” to compel the Department to issue a passport “accurately reflecting the plaintiff as intersex.”

On November 16, 2016, Judge Jackson ruled that “the agency’s decision-making process was not rational based upon the evidence in the record,” but rather than issue the requested writ of mandamus, he decided to send the case back to the Department for “reevaluation of its gender policy.” Too late, unfortunately,
as this ruling was issued the week after Donald Trump’s election as president. So it eventually fell into the lap of the new Trump-appointed leadership of the State Department, and one can only speculate about the puzzlement and consternation it may have caused in the new fact-free world of the Trump Administration.

“In March 2017, while the Department was reevaluating the policy, Dana requested that the Department issue a full-validity or temporary passport bearing an ‘X’ or other third-gender marking in the sex field in order for Dana to attend an international conference,” wrote Judge Jackson. But the Department refused. Why? Need you ask? No reason, just no. The refusal letter did state, however, that the Department “would soon complete its review of the policy,” but you know where this leading. On May 1, the Department again denied Dana’s application, issuing a memorandum purporting to “explain” its decision, but the explanation really just boiled down to a version of “that’s the way it is.”

Dana moved to reopen the case and their counsel filed a supplemental complaint to reflect the Department’s May action, seeking “injunctive relief and a judicial declaration that the State Department has exceeded its authority under the Administrative Procedure Act and has violated the Fifth Amendment to the U.S. Constitution.” In his ruling of September 19, Judge Jackson explains that there is no need to address the constitutional claim because the matter can be resolved in ZZym’s favor under the APA.

Judge Jackson noted that U.S. passports did not record gender prior to 1976, when the Department “changed course and added a male and female checkbox. The applicant is required to choose one or the other. In my order dated November 22, 2016, I found that the administrative record did not show that the Department’s decision-making process that resulted in the gender policy was rational. The reasons provided by the Department for the policy failed to show a reasoned decision-making process and instead seemed to be ad hoc rationalizations for the binary nature of the gender field.”

The new memorandum issued by the Department fared no better. In the memo, the Department showed awareness that some other countries have accommodated non-binary individuals by using an “X” on travel documents, and they can be scanned by the standard passport reading equipment in use at border crossings and airports. Now the Department advances five “reasons” for its “gender policy.”

First, the Department argued that requiring a gender selection of M or F helps to ensure the accuracy and verifiability of a passport holder’s identity, for which the Department relies on state-issued documents, such as birth certificates and driver’s licenses. Secondly, the sex of a passport applicant is a “vital data point in determining whether someone is entitled to a passport” since “the Department must data-match with other law enforcement systems” all of which “recognize only two sexes.” Thus, State argues, “continued use of a binary option for the sex data point is the most reliable means to determine eligibility.” The Department also argued that “consistency of sex data point ensures easy verification of passport holder’s identity in domestic contexts.” In essence, they argue that introducing a third sex marker on passports could “introduce verification difficulties in name checks and complicate automated data sharing among these other agencies,” which would “cause operational complications.” The Department also contended that “there is no generally accepted medical consensus on how to define a third sex.” While acknowledging that people such as Dana exist, “the Department lacks a sound basis in which to make a reliable determination that such an individual has changed their sex to match that gender identity.” This explanation suggests they don’t understand the difference between transgender and intersex. Finally, they argued, they had to stick with the current policy because “changing it would be inconvenient.” In other words, a totally bureaucratic response focused on technical convenience and unresponsive to the need to deal with individuals as they are.

“Looking at the proffered reasons and cited evidence provided by the Department,” wrote the judge, “I find that the Department’s decision is arbitrary and capricious,” and he went through the reasons step by step, explaining why they failed to show “rational decision making,” which is the minimal requirement under the APA to sustain an administrative decision. He showed how the earlier responses to Dana’s application undermined the explanations provided in the memorandum. Even though M and F do not accurately identify Dana, the Department insists on using them, thus contradicting its explanation that it clings to the binary system for purposes of “accurate” identification of people. And the judge found that the administrative record included data at every turn that contradicted the Department’s conclusions.

Most tellingly, there was never any real explanation as to why somebody’s sex needs to be indicated on their passport that would justify refusing to accommodate intersex people. “Apparently,” wrote Jackson, “the data field of ‘SEX (M-F)’ was recommended because experts thought ‘that with the rise in the early 1970s of unisex fashion and hairstyles, photographs had become a less reliable means for ascertaining a traveler’s sex.’ Additionally, as naming conventions changed, relying on first names to identify sex became problematic. An ICAO report from 1974 recommended adding the sex markers as an aid to identification, and at that time the recommendation was to add M-F as the indicators. But since then the ICAO has modified its standards to use “X” for “unspecified,” so relying on the ICAO recommendation of 1974 no longer justifies refusing to use the “X.”

The court found that the Department contradicts itself by relying on the same sort of authorities to deal with transgender people’s passport applications as would be relied upon in transgender cases. Jackson pointed out that “the information relied upon in the administrative record also reflects a lack of consensus as to how individuals born intersex could be classified as either ‘male’ or ‘female,’” but “this has not prevented the Department from requiring intersex people to elect, perhaps at random, as it doesn’t seem to matter to the Department which one of those two categories Dana chooses.” The lack of a medical consensus is thus irrelevant to the Department’s current practices.

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Finally, turning to the inconvenience and expense argument, Jackson notes that it is merely asserted without any data to back it up. “True,” he wrote, “common sense would tell anyone that altering a system will necessarily involve some effort and money. However, the Department’s rationale here is the product of guesswork rather than actual analysis, and it does not rise to the level of reliable evidence that is needed to show that the Department’s policymaking was rational.”

Actually, Jackson concluded, the new memorandum “added very little” to what was presented to the court in 2016. Jackson also ruled against the Department on Zzyym’s argument that denying them a passport exceeded the Department’s delegated powers. Congress has delegated to the Department the decision to deny passports for a variety of reasons, but, wrote Jackson, “The authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. section 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause . . .”

“Because neither the Passport Act nor any other law authorizes the denial of a passport application without good reason,” concluded Jackson, “and adherence to a series of internal policies that do not contemplate the existence of intersex people is not good reason, the Department has acted in excess of its statutory authority.”

The court determined to grant Zzyym the injunctive relief they sought. “Dana has been pursuing a passport for close to four years now,” he wrote. “I grant Dana’s request for injunctive relief and enjoin the Department from relying upon its binary-only gender marker policy to withhold the requested passport from Dana.” The judge concluded that a writ of mandamus was not necessary, as injunctive relief would suffice. Will the Trump Administration comply or pursue a pointless appeal?

Advocacy for Dana drew in several pro bono cooperating attorneys, local counsel from Denver, and Lambda Legal attorneys Camilla Bronwen Taylor, M. Dru Levasseur, and Paul David Castillo. ■

Colorado District Court Refuses to Dismiss EEOC’s Title VII Claim on Behalf of Transgender Man under Sex-Stereotyping Theory

By Timothy Ramos

Last year, the Equal Employment Opportunity Commission (EEOC) announced its Strategic Enforcement Plan (SEP) for the 2017 – 2021 fiscal years. The EEOC, which then still had a majority of Commissioners appointed by President Barack Obama, prioritized protecting LGBT individuals from discrimination based on sex, a goal unlikely to be articulated by the new Republican majority enabled by President Trump’s appointments when confirmed. As part of the EEOC’s efforts last year to implement its SEP, the Commission filed a Title VII lawsuit in the U.S. District Court of the District of Colorado on September 29, 2017, alleging that A&E Tire, Inc. discriminated against Egan J. Woodward, a transgender male applicant, when the company refused to hire him “because of his sex, male, and/or transgender status.” A&E filed a motion to dismiss, arguing that the EEOC failed to state a viable Title VII discrimination claim as a matter of law, and failed to allege sufficient facts to state a claim for relief plausible on its face. Specifically, A&E pointed to 10th Circuit precedent holding that Title VII’s prohibition on discrimination “based on . . . sex” does not include transgender individuals as a protected class. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In other words, the 10th Circuit did not allow transgender individuals to claim protection under Title VII from discrimination based on their transgender status. One might read Etsitty to hold that Title VII protection extends to transgender individuals only if they are discriminated against because they are male or because they are female, but not because they are transgender. On September 5, 2018, U.S. District Judge R. Brooke Jackson denied A&E’s motion to dismiss, in EEOC v. A&E Tire, Inc., 2018 U.S. Dist. LEXIS 150451, 2018 WL 4219383 (D. Colo.). Judge Jackson held that the EEOC alleged sufficient facts to establish a prima facie claim of sex-stereotyping discrimination under Title VII, including facts showing that Woodward belonged to a protected class. Judge Jackson came to this conclusion without challenging the 10th Circuit’s precedent.

Woodward applied for a managerial position with A&E on May 16, 2014. On that same day, an A&E manager invited Woodward to come to the office for a 45-minute interview. During this interview, Woodward wore traditional male attire and sported a goatee, projecting a totally masculine presentation; thus, the manager apparently never realized that Woodward was transgender. The two men got along so well during the interview that the manager stated at least twice that Woodward had the job, subject to passing a background check. They discussed Woodward’s salary expectations, and the manager introduced Woodward to other employees.

Before the interview concluded, Woodward completed a consent form to authorize the background check. On this form, Woodward provided the traditionally female name he was assigned at birth, and also checked a box indicating that his sex was female. After Woodward left the office, he received a phone call from the manager, who asked about the checked box. Once Woodward confirmed that his answer was correct, the manager stated, “Oh, that’s all I need,” and abruptly hung up. The two men did not speak to each other again until Woodward telephoned the manager on June 10, 2014, to find out the status of his application. It was only then that Woodward learned that the position was given to another applicant, who had applied on May 21st and interviewed.
on June 6th. Subsequently, Woodward filed a Title VII charge with the EEOC, and the EEOC filed its lawsuit after the Commission was unable to reach an acceptable agreement with A&E. Woodward intervened as a co-plaintiff.

To establish a prima facie case in the failure to hire context under Title VII under 10th Circuit precedent, a plaintiff must show that: (1) a plaintiff belongs to a protected class; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, the plaintiff was rejected; and (4) after the plaintiff’s rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications. The only disputed issue before the court was whether Woodward belonged to a protected class. The EEOC proffered two theories to support this assertion: first, a sex-stereotyping theory – that Woodward was not hired because his stereotypically male appearance did not conform to social expectations of a person identified as a female at birth; and, second – that Title VII’s prohibitions of discrimination “because of . . . sex” protect transgender individuals categorically.

In his analysis of the EEOC’s first theory, Judge Jackson recognized that the U.S. Supreme Court laid out the basis for a sex-stereotyping discrimination claim under Title VII in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). There, the Court held that an employer cannot evaluate employees by assuming or insisting that they conform to the stereotype associated with their gender. To allege that sex-stereotyping played a role in an adverse employment decision, a plaintiff must show that an employer relied upon sex-based considerations in coming to its decision. This would support a finding of discriminatory motivation because of sex.

Since Price Waterhouse was decided, many other courts have recognized discrimination claims of transgender individuals as sex-stereotyping discrimination protected against discrimination because of sex under Titles VII (Civil Rights Act of 1964) and IX (Education Amendments of 1972). See, e.g., Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Education, 858 F.3d 1034, 1048 (7th Cir. 2017) (Title IX). Judge Jackson reasoned that recognizing such claims by transgender individuals as sex-stereotyping discrimination remained consistent with the 10th Circuit precedent. In Etsitty, the 10th Circuit held that, although transgender individuals do not qualify as their own protected class, they may seek Title VII’s protections if they are subject to adverse employment decisions where their identity as male or female is improperly taken into account. Thus, Judge Jackson clarified that Title VII protects all people — including transgender individuals — from discrimination based on gender nonconformity.

In the case at hand, Judge Jackson found that the EEOC alleged sufficient facts that plausibly suggest sex-based considerations played a role in A&E’s decision not to hire Woodward. Specifically, the EEOC alleged that Woodward’s appearance and behavior during the interview was stereotypically male, and that he indicated on his background check form that his birth sex was female. Furthermore, the A&E manager asked Woodward only one follow-up question between the informal employment offer made during the interview and the decision not to hire Woodward; that question concerned Woodward’s sex. Altogether, these facts permitted a reasonable inference that A&E’s decision not to hire Woodward was affected by Woodward’s appearance and behavior, and how those traits did not conform to the stereotypical expectations of the sex he indicated on his background check form. Thus, Jackson concluded that the EEOC had met its burden of alleging sufficient facts to show that Woodward belonged to a protected class, therefore establishing all the requirements to make a prima facie claim under Title VII for sex-stereotyping discrimination.

Although the court found that the EEOC’s first theory provided grounds to deny A&E’s motion to dismiss, the judge briefly addressed the Commission’s second theory. The EEOC argued that, given society’s current understanding of “sex,” Title VII’s prohibition on discrimination “based on . . . sex” should be interpreted to protect transgender individuals as a class. In support of its argument, the EEOC suggested that Etsitty left space for argument regarding the evolving understanding of the definition of “sex,” and that portion of Etsitty should also be reconsidered. However, Judge Jackson denied the invitation to weigh in on the issue because it was not necessary to decide on A&E’s motion to dismiss, and, of course, a district court may not openly depart from a binding precedent from the relevant court of appeals.

Though not quoted in Judge Jackson’s opinion, the 10th Circuit stated in Etsitty that “scientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female.” 502 F.3d 1222. Clearly, that time has come. Research and reports have found that a person’s sex is determined by a number of factors outside of his or her genital sex observed at birth, which is the basis on which most birth certificate designations are made. Contrary to Judge Jackson’s assertion of the court’s role, it is the first step in challenging the 10th Circuit’s holding in Etsitty. While Jackson’s decision remains a step forward for transgender rights in the District of Colorado, it shows that the EEOC has way to go in its objective to protect LGBT individuals from discrimination “based on . . . sex.” (Editor: It is worth noting that the 6th Circuit has accepted the EEOC’s second theory in EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018), petition for certiorari pending.)


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Chief U.S. District Judge J. Randal Hall (S.D. Ga.) ruled on September 25 that 11th Circuit precedent has clearly established the general principle that “discriminating against someone on the basis of his or her gender nonconformity constitutes sex-based discrimination,” thus making a qualified immunity defense unavailable to public employees accused of such discrimination. The ruling was part of a decision rendered on a motion to dismiss filed by the Georgia Department of Behavioral Health and Developmental Disabilities (GDBHDD) and individual named defendants in Evans v. GDBHDD (Georgia Regional Hospital), 2018 U.S. Dist. LEXIS 164402, 2018 WL 4610630, in which Lambda Legal represents a lesbian former employee of the defendant in claims of discrimination and hostile work environment under Title VII of the Civil Rights Act of 1964 and the 14th Amendment (via 42 U.S.C. 1983).

This is the case in which an 11th Circuit panel had previously voted 2-1 that Evans could not assert a sexual orientation discrimination claim under Title VII, but remanded to allow her to file an amended complaint asserting a gender nonconformity discrimination claim under that statute.

Evans was hired by GDBHDD to work as a security officer at Georgia Regional Hospital beginning in August 2012, and encountered no difficulties until her supervisor was replaced by Charles Moss, one of the individual named defendants. Evans is a masculine-appearing lesbian, and things got off on the wrong foot when Moss, even before becoming her supervisor, apparently mistook her for a man and asked if she was dating a female nurse on the hospital staff. After become the Facility Safety Chief, Moss created a new position, “Star Corporal,” and promoted another employee with less experience than Evans to hold that position. He also reassigned Evans to work a long overnight shift (7 pm to 7 am), making her “the only employee reassigned from the eight-hour day shift to the twelve-hour night shift.”

Evans claims she suffered a hostile environment, attributed mainly to Moss, who in one incident when Evans had been standing in the doorway of an office while performing her duties, told her that she “can’t hang out here” and “proceeded to repeatedly slam the office’s door into Plaintiff.” Evans tried to report her concerns about Moss to Lisa Clark, the Hospital’s Director of Risk Management, but she told Evans to “continue working the night shift and never responded to Plaintiff’s concerns about the door incident or being passed over for the Star Corporal position.”

Evans file a written complaint with the Human Resources Department, but claims she was told that any complaint not “corroborated” by a co-worker would be deemed unsubstantiated, even though she had non-co-worker witnesses who could corroborate some of her complaints. While discussing the investigation into her complaints, Evans was asked by Powell, an HR staffer, if she was “a homosexual.” “Plaintiff confirmed that it was apparent from her masculine appearance and presentation that she was a lesbian, but that she typically refrain from broadcasting such information.” The investigators refused to take any action against Moss, and Evans quit on October 11, 2013, concluding that she could no longer endure his harassment.

After exhausting administrative remedies, she filed her Title VII case pro se on April 23, 2015, alleging sex discrimination based on her sexual orientation and gender nonconformity, naming as defendants the hospital, Moss, Clark, and Powell, the HR staffer who had inquired about her sexual orientation. A magistrate judge, while granting Evans’ motion to proceed in forma pauperis, recommended dismissal of her Title VII claim, finding that discrimination because of sexual orientation or gender identity was not actionable under Title VII, and that only the employer entity could be sued under Title VII, not individual supervisors and managers. Evans had also asserted a retaliation claim, but the magistrate recommended dismissal of that as well, on the ground that her complaints were not “protected conduct” under Title VII.

Evans did not file any objection to the dismissal of her retaliation claim, but did object to the dismissal of her discrimination and hostile environment claims. The district court, overruling the objections, adopted the magistrate’s recommendation without substantive comment, dismissing the claims with prejudice, but appointing Lambda Legal attorney Greg Nevins to represent Evans in an appeal to the 11th Circuit. As noted above, an 11th Circuit panel subsequently affirmed as to the sexual orientation claim, but reversed and remanded as to the gender nonconformity claim, after an unusual oral argument during which Nevins advocated for Evans and nobody appeared for the defendant hospital! The court gave leave to Evans to file an amended complaint focused on the gender nonconformity claim. The Supreme Court denied a petition for certiorari in December 2017, seeking review of dismissal of the sexual orientation claim. See Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017), cert. denied, 138 S. Ct. 557 (Dec. 11, 2017).

Ultimately, Lambda Legal filed two amended complaints, the second of

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**District Court Holds That Right to Be Free of Discrimination Because of Gender Nonconformity under Title VII and Equal Protection is Well Established in the 11th Circuit**

By Arthur S. Leonard

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The doctrinal model for the Section 1983 claim is under 42 U.S.C. 1983. The unconstitutional discrimination complaint added a claim against them defendants in the case, the amended dismissed. In order to keep the individual which is the subject of this motion to the 11th Circuit, and public employees a lesbian was not clearly established in claims to support a cause of action by unconstitutional actions where the constitutional right at issue is not “clearly established.” (Individual defendant Powell was out of the case at this point, as her inquiry into Evans’ sexual orientation was not deemed to be hostile or discriminatory.)

“Clearly established law is defined as law that is well enough recognized to provide officials with ‘fair notice’ that the alleged conduct is unlawful,” wrote Judge Hall, citing Hope v. Pelzer, 536 U.S. 730 (2002). “In Glenn v. Brumby... the Eleventh Circuit explicitly held that ‘discriminating against someone on the basis of his or her gender nonconformity constitutes sex-based discrimination.’ The court applied gender nonconformity sex discrimination to the transgender plaintiff’s Section 1983 claim, but noted that ‘all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.’”

Turning to the merits, Judge Hall found that Evans’ factual allegations, even if deemed to be true, did not meet the high pleading bar (“sufficiently severe or pervasive to alter the terms and conditions of plaintiff’s employment) for a hostile environment case. However, he found, they were sufficient to ground a straightforward sex discrimination case on grounds of gender nonconformity, as to the failure to promote, the shift reassignment, and other allegations of differential treatment by the employer. Furthermore, he found most significantly, that the individual defendants could not rely on qualified immunity to escape liability. They were claiming, of course, that coverage of gender nonconformity claims to support a cause of action by a lesbian was not clearly established in the 11th Circuit, and public employees are qualifiedly immune from liability for allegedly unconstitutional actions where the constitutional right at issue is not “clearly established.” (Individual defendant Powell was out of the case at this point, as her inquiry into Evans’ sexual orientation was not deemed to be hostile or discriminatory.)

In conclusion, Hall wrote, “While Plaintiff fails to state a claim for hostile work environment, she does allege facts that support a plausible claim of discrimination under Section 1983 and Title VII. Finally, neither Lisa Clark nor Charles Moss can be granted qualified immunity. Thus, although the hostile environment claims are dismissed, Evans’ claim of “unlawful sex discrimination under Section 1983 and title VII shall proceed.” The parties were directed to submit a proposed scheduling order within fourteen days.

At this stage, Evans is represented by Natalie A. Nardeccia, a Lambda staff attorney in the Los Angeles Regional Office, and Greg Nevin, in Lambda’s Atlanta Regional Office.
Michigan Federal Court Allows Same-Sex Couples’ Suit Challenging Michigan’s Discriminatory Adoption Practices to Move Forward

By Matthew Goodwin


Plaintiffs, the Dumonts and Busk-Suttons — two married lesbian couples — alleged that they were rejected as prospective foster and adoptive parents by state-contracted faith-based child placement agencies, because of the religious objections of those agencies to placing children with gay and lesbian couples. Specifically the Plaintiffs sued Nick Lyon, Director of the Michigan Department of Health and Human Services (DHHS) and Herman McCall, Executive Director of the Michigan Children’s Services Agency (CSA), and sought declaratory judgment against them that DHHS’s and CSA’s contracts with these faith-based organizations violated the First and Fourteenth Amendments of the U.S. Constitution. Another plaintiff, Jennifer Ludolph, joined the suit solely on the cause of action objecting to taxpayer funds being provided to the objectionable faith-based agencies; she had not been turned away as a prospective parent by any state-contracted adoption agency.

The court allowed St. Vincent Catholic Charities to intervene as Defendants, as they claimed that success by Plaintiffs could force them to close their adoption and foster services. Also allowed as Defendant-intervenors were certain families who adopted children through St. Vincent’s, who argued that the loss of services that their families continued to receive from the defendant agencies if the plaintiffs were successful, would be to the detriment of their children.

The current controversy flowed from the passage of a 2015 Michigan religious protection statute — Public Act 53, or PA 53 — signed into law by Governor Rick Snyder, which provided in pertinent part “[t]o the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs.” At the core of the lawsuit is the plaintiffs’ allegation “that some child placing agencies have interpreted these statutes as permitting taxpayer-funded state-contracted child placing agencies to turn away prospective families for children in foster care based on religious criteria and the State has allowed this practice to occur.”

The plaintiffs alleged that contracts between DHHS and all child placing agencies require “the contracting agencies to comply with DHHS’s non-discrimination statement, which mandates that agencies ‘will not discriminate against any individual or group because of[ . . . ]sexual orientation[ . . . ].’” The complaint goes on to allege that, “although DHHS is aware that certain child placing agencies have refused to accept same-sex couples for processing necessary to foster or adopt children in the child welfare system, DHHS has not taken any remedial action under its contracts . . . .”

The defendants filed a motion to dismiss all of the claims under FRCP 12(b)(1) and 12(b)(6), arguing that plaintiffs lacked both standing and had failed to state claims upon which relief could be granted.

Judge Borman first found that the parent-plaintiffs had standing to bring their Establishment Clause and Equal Protection Claims. Plaintiffs claimed “‘stigmatic and practical injuries’ allegedly stemming from the [Michigan state-imposed] ‘barrier to adopt a child out of the state-run foster care system[,]’”

The court looked to Allen v. Wright, 468 U.S. 728 (1984) and a 4th circuit case, Moss v. Spartanburg County School District Seven, 683 F.3d 599 (2012), to find stigmatic injury standing under the Equal Protection and Establishment Clauses. The court concluded that there was standing because plaintiff-parents “allege stigmatic injury because they were personally turned away by certain faith-based child placing agencies — they allege that they personally encountered the stigmatic harm about which they complain through that act of being turned away as prospective adoptive parents.”

Likewise plaintiff-parents established “practical injuries” which the court ruled conferred on them standing under the Equal Protection Clause. Quoting from the Supreme Court’s City of Jacksonville decision (508 U.S. 656 [1993]), Judge Borman wrote, “‘[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.’” The court went on, “Plaintiffs allege in their Complaint that faith-based agencies handle ‘20% of the active foster care and adoption cases in Michigan’ . . . the ability of faith-based agencies to employ religious criteria as a basis to turn away same sex couples erects at least a 20% barrier to the Prospective Parent Plaintiffs’ ability to adopt or foster a child in the State of Michigan.’”

Finally, the parent-plaintiffs met their burden of demonstrating that the injuries they complained of are “fairly traceable” to defendants and that those injuries are “redressable by a favorable decision.”

Turning to defendant’s 12(b)(6) motion to dismiss the non-tax-related
Establishment Clause claim, the court undertook the analysis prescribed by Lemon v. Kurtzman, 403 U.S. 602 (1971). The court took pains to point out that Plaintiff’s “do not challenge the eligibility of religious organizations to receive government contracts to provide social services;” rather Plaintiff’s ask the court to invalidate the State’s practice of allowing state-contracted taxpayer-funded child placing agencies to disqualify prospective families headed by same-sex couples based on agencies’ religious beliefs.

To satisfy the Lemon test, the state action under scrutiny must satisfy three prongs: (1) the activity must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.

As to the first prong, the court concluded that assuming the facts as alleged in the complaint to be true, “an objective observer would conclude that [the State’s implementation of PA 53 through its contracts with child placing agencies] communicates a message of government endorsement of religion generally and of [opposition to same-sex marriage] in particular.” The defendants had argued that the secular purpose of PA 53 was to seek to “alleviate interference with faith-based agencies’ abilities to carry out their religious mission to create the greatest environment for the benefit of the most children.”

The court stated that defendants might be able to prove this at a later stage of the proceedings but, because defendants’ position directly contradicted plaintiffs’, and plaintiffs’ allegations must be credited as true for purposes of deciding the motion to dismiss, defendants’ contention must be rejected.

As to prong two, the defendants claimed they were “not seeking to advance religion, but to create a provider environment that allows faith-based and non-faith based CPAs to flourish for the benefit of children.” Again, the court accepted as true plaintiffs’ allegation that the purpose of PA 53 was to “authorize discrimination” and thereby advance religion in derogation of prong two.

The court devoted most of the Establishment Clause analysis to prong three, finding excessive entanglement between defendants and religious service providers. In doing so, the court adopted plaintiffs’ argument that “defendants’ delegation of public child welfare services to faith-based child placing agencies ‘with permission to use religious eligibility criteria violates the Establishment Clause.’” In essence, plaintiffs challenged the use of “religious eligibility in the public child welfare system.” In coming to this conclusion the Court focused extensively on two Supreme Court cases: Larkin v. Grendel’s Den, Inc., 459 U.S. 116, and Kiryas Joel v. Grumet, 512 U.S. 687.

Larkin involved a Massachusetts statute which, in violation of the Establishment Clause “vest[ed] in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a five-hundred foot radius of the church or school.” Similarly, Kiryas Joel dealt with a New York law that “carved out a distinct school district for a village (‘Kiryas Joel’) of ‘vigorously religious people’ that isolated its members from the larger community . . . and ‘empowered a locally elected board of education to take such action as opening schools and closing them, etc.’”

Apparently defendants attempted to argue, as Kiryas Joel respondents had, that “the Constitution allows the State to accommodate religious needs by alleviating special burdens . . . and . . . may (and sometimes must) accommodate religious practices.” The court embraced the admonition of Kiryas Joel, however, that “accommodation is not a principle without limits . . . .” As to Defendants’ contention that PA 53 does not preference one religion to another, and that it was simply trying to remain neutral as between the religious and irreligious, the court noted that the Establishment Clause prohibits the State from preferring religion to irreligion.

The court did agree with defendants that plaintiffs had, in opposing PA 53, “not identified an express legislative appropriation directing that funds be used to further or carry out a religious purpose.” As such, the court dismissed the Establishment Clause taxpayer claims of all the plaintiffs, knocking Ms. Ludolph out of the suit completely.

Turning to the Equal Protection arguments, the Court noted that “the Sixth Circuit has not recognized sexual orientation as a suspect classification and thus Plaintiffs’ Equal Protection claim is governed by rational basis review.”

Defendants argued “the State’s interest is to find as many families as possible for children,” and ‘to achieve the policy of casting the net as wide as it can, the State has chosen to continue its long-time and historical practice of contracting with faith-based as well as secular child placement agencies . . . which benefits all children in the State’s care.”

By contrast and, once again adopted as true for purposes of the motion, plaintiffs alleged that, by allowing faith-based organizations to turn away gay and lesbian putative parents, the State was exacerbating an already extant shortage of qualified families available to adopt and foster children in the State’s care. In this portion of the opinion, the court seemed to leave open the possibility that the defendants might ultimately prevail on a rational basis review of PA 53 at a later stage of the litigation, although the judge pointedly cautioned that rational basis review is not a license to discriminate.

The court then addressed an overarching argument of defendants: that plaintiffs’ suit failed to allege any state action whatsoever and must therefore fail. Here the court stated “. . . Plaintiffs challenge the actions of Defendant state officials in entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those [services], conduct the Defendants concede the State could not take itself.”

The court went on to say: “Defendants stubbornly, and inappropriately, insist

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Fourth Federal Judge Refuses to Dissolve Preliminary Injunction against Trump’s Military Transgender Ban

By Chan Tov McNamarah

A September 18, 2018 holding from the U.S. District Court for the Central District of California (Riverside) rejected the Trump administration’s latest attempt to dissolve the preliminary injunction against the ‘transgender military ban.’ The case, Stockman v. Trump, 2018 WL 4474768, 2018 U.S. Dist. LEXIS 161231, dismissed the government’s arguments that a new policy—which still severely limited transpersons’ ability to serve openly in the military—was substantially different than the one against which the preliminary injunction was originally directed.

On July 26, 2017, in a series of tweets, President Donald J. Trump announced that the United States military would no longer “accept or allow” service by transgender persons. On August 25, 2017, the President’s twitter declaration was formalized in a memorandum (“2017 Presidential Memorandum”) that prohibited transgender individuals from entering the military and authorized the discharge of transgender service members.

A series of judicial orders across the country, including the precursor to the present ruling, Stockman v. Trump, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017), enjoined the government from enacting the discriminatory policy. In response, on March 23, 2018, President Trump revoked the previous policy, while simultaneously authorizing the Defense and Homeland Security Departments to implement a “new” policy—which still severely limited transpersons’ ability to serve openly in the military—was substantially different than the one against which the preliminary injunction was originally directed.

In their motion, Defendants contended that Plaintiff’s challenge was now moot because any dispute over the new policy “presents a substantially different controversy” than the Plaintiffs’ challenge to the 2017 Presidential Memorandum. The motion further stated that the appropriate inquiry for mootness was whether the “challenged conduct continues” or whether the policy “has been sufficiently altered as to present a substantially different controversy from the one [previously] decided.”

District Judge Jesus Bernal agreed with Defendants’ framing of the question before the court, but was entirely unconvinced by their argument. He wrote, “The enactment of a new policy does not moot a challenge to a previous one where, as here, the new one differs little from the first.” In his view, the new policy’s exclusion of anyone who desired to serve in their gender identity, or anyone who had undergone gender transition, was tantamount to a prohibition on service by all transgender persons. In sum, wrote the Judge, the new policy increased the disadvantages transgender service members in the same fundamental way as the first. Thus, the Plaintiffs’ challenge could not be mooted since the “challenged conduct continues underlying the initial preliminary injunction continued.

In their motion, Defendants argued that the new policy was only subject to rational basis review because “it draws lines based on medical condition (gender dysphoria),” as opposed to transgender status per se. They bolstered this argument with case law establishing that military decisions are entitled to enhanced deference.

Judge Bernal made quick work of these contentions. He first established that military deference is “most

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appropriate when the military acts with measure, and not ‘unthinkingly or reflexively,’” quoting Rostker v. Goldberg, 453 U.S. 57, 72 (1981). The Judge’s opinion then walked through the record to demonstrate that the new policy was “invented post hoc” in an attempt to justify the initial military ban on transgender service members. Finding military deference inapplicable, the policy would be evaluated under intermediate scrutiny.

Arguing that the policy survived intermediate scrutiny, the government offered three justifications: (1) promoting military readiness based on deployability; (2) promoting unit cohesion based on concerns about maintaining sex-based standards; (3) lower costs. However, writing that the court had previously examined and rejected the Defendants’ second justification, Judge Bernal only evaluated the first two.

For their first justification Defendants argued that because most transgender service members requested gender transition surgery, their participation in the military could negatively affect deployability. But as Judge Bernal noted, the policy was not a prohibition on only individual who have or might undergo gender transition surgery. Instead, the policy effectively excluded all persons who present as transgender. Therefore, the Judge reasoned, the Defendants’ rationalization was not compelling.

In this author’s view, the highlight of the opinion was Judge Bernal’s response to the second purported justification—that accommodating transgender service members would “erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline.” Echoing the all-too-familiar privacy arguments that have featured prominently in transgender bathroom litigation, the government argued that “allowing service members who have . . . developed the anatomy of their identified gender to use the facilities of either their identified gender or biological sex would invade the expectations of privacy of the non-transgender service members who share those quarters.”

Judge Bernal began his response by recalling that the United States military previously used concerns regarding ‘unit cohesion’ to contest permitting service by persons who were openly homosexual. Invoking Log Cabin Republicans v. U.S., 716 F. Supp. 2d 884 (C.D. Cal 2010) (finding Don’t Ask Don’t Tell violated the First Amendment), the judge pointed out that the government had used identical arguments, when they stated that DADT was “necessary to protect unit cohesion and heterosexual service member’s privacy.”

But Judge Bernal went further. As his opinion pointed out, the genesis of the military’s ‘unit cohesion’ concerns predated DADT: Looking to the military’s arguments against unit desegregation in the 1940s, and later against the inclusion of women in the Armed forces, the Judge remarked that these apprehensions have been consistently revived, and yet, repeatedly found baseless. He asserted: “In the history of military service in this country, ‘the loss of unit cohesion’ has been consistently weaponized against open service by a new minority group . . . . As with blacks, women, and gays, so now with transgender persons.” Because the military’s warnings had proven without merit in the past, the Judge held that the government can no longer use this concern to exclude minority groups in the future. With this, the Defendants’ second justification also failed to survive intermediate scrutiny.

Accordingly, finding neither of the Defendants’ justifications exceedingly persuasive, and their mootness arguments unsubstantiated, Judge Bernal denied Defendants’ motion to dissolve the preliminary injunction.

Plaintiffs in this challenge to the policy are represented by the National Center for Lesbian Rights, GLBTQ Legal Advocates and Defenders, Equality California, and pro bono lawyers from Latham and Watkins LLP.

Chan Tov McNamarah is a law student at Cornell Law School (class of 2019).

New York City Will Stand Trial for Rape Culture at Riker’s Island Jail

By William J. Rold


The rape and assaults occurred in relatively isolated areas of the jail’s medical clinic. In 2016, M.T. voluntarily dismissed with prejudice all claims (including conspiracy and state law claims) against Corizon (the Rikers contractual health care provider) and its employees, who were also sued. No remuneration is cited in PACER.

The City “investigated” the allegations, but M.T. was never interviewed and no rape kit was performed. Video of the clinic area was not preserved; Judge Stein later granted sanctions for spoliation of evidence, but the nature of the sanctions is not specified in the PACER minute entry.

In New York, there is no consent defense to sexual relations between guards and prisoners. Under N.Y. Penal Law, §§ 130.0-5, et seq., prisoners are deemed legally incapable of consent, so sexual intercourse with a guard is statutory rape. On paper, New York City has a detailed “zero tolerance policy” about sexual activity and harassment by correction officers, as well as a stated means for inmates to report abuse. Neither appears to work in practice, at least not sufficiently to remove a jury question on whether the policies and practices are adequate, as applied.

In 2014, New York City hired an outside consulting firm to review its practices on sexual misconduct; and the resulting product, the Moss Report, was scathing in its criticism.

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Four different reporting mechanisms supposedly available to inmates “did not actually function.” The Report found that the grievance system was actually “discouraging complaints” (emphasis in the opinion), and staff were not able to articulate what they should do to report and/or investigate complaints or preserve confidentiality. The Report found in a review of actual investigations that obvious or necessary witnesses – such as the accused, other inmates, clergy, defense attorneys, and medical staff – were not interviewed before issuance of a finding of “unfounded.”

All witnesses that were interviewed were given Garrity warnings, even if they were not remotely a criminal target. [Garrity warnings come from the case of Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding that the Fourteenth Amendment “prohibits use in subsequent criminal proceedings of statements [by public employees] obtained under threat of removal from office”). Its wholesale use in interviewing non-targets has the effect of stifling candor.]

The City moved for summary judgment on the policy and training claims against it under Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 690 (1978), but it did not move for summary judgment for the accused assailant, Officer Galan – although Galan and the City appear to be jointly represented by the same attorney from the New York City Corporation Counsel’s office. [This may be like the situation that cost a plaintiff his judgment after trial, where a Monell defendant attempted to avoid liability by letting the blame fall on the officer, whom it was also representing. The Circuit vacated the judgment as resulting from an “unfair” trial with conflicts of interest that the district court should have raised sua sponte. Moreover, “plaintiff’s attorney should also have been aware of the problem and should have called it to the attention of the court.” Dunton v. County of Suffolk, 728 F.2d 903, 909 (2d Cir. 1984).]

The City tried to blunt the force of the Moss Report by arguing that is was after the fact, but Judge Stein inferred that the protections against sexual assault were likely worse in 2012 when M.T. was raped than they were in 2015 when the Report was written. The City then tried to argue that it could not be charged with knowledge of the Moss Report, but Judge Stein cited testimony from the DOC Commissioner to the New York City Council about the background of the need for the Report. Finally, the City tried to preclude the Report as inadmissible evidence of subsequent remedial measures under F.R. Evid. 407, but Judge Stein ruled that the evidence of deficiencies would be admissible, even if specific corrections would be barred, citing 2 Weinstein’s Federal Evidence § 407.06[1] (2018) and Westmoreland v. CBS Inc., 601 F.Supp. 66, 67-68 (S.D.N.Y. 1984).

M.T.’s charge that the City had a “policy or custom of tolerating and authorizing the type of abuse” that M.T. allegedly suffered will go to the jury. A policy of inaction can support a Monell claim where the inaction is the result of deliberate indifference, Judge Stein commented, citing Cash v. City of Erie, 654 F.3d 324, 334-6 (2d Cir. 2011) [string cites omitted]. The plaintiff need not identity what specific policy improvements are needed to prevail under Cash. Id. at 338.

As to failure to train, however, Judge Stein writes that M.T. has failed to identify specific failures in training, so that she “cannot prevail on that theory” under Jenkins v. City of New York, 478 F.3d 76, 94 (2d Cir. 2007). This seems wrong, since the court’s opinion itself documents lack of training. Nevertheless, perhaps this can be presented as the absence of a policy of determining whether the City’s training is being absorbed or working. Judge Stein also allows M.T.’s state common law claim of intentional tort to proceed against Officer Galan. Other state law claims are dismissed for various reasons. The case will be tried on federal claims against the City and Galan and a single state law claim against Galan.

M.T. is ably represented by Frank Brian Poe and Philip Michael Hines of Held & Hines, LLP, of Brooklyn.

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.

Transgender Inmate States Claim for Lack of Protection against Wardens at Two Prisons Following Multiple Rapes

By William J. Rold

Proceeding by initials, transgender inmate A.K. brought suit against correctional officers and supervisory defendants (including the Acting Commissioner of the New York Department of Corrections and Community Supervision) for violation of her civil rights during incarceration at Greene and Woodbourne Correctional Facilities in A.K. v. Annucci, 2018 U.S. Dist. LEXIS 156455, 2018 WL 4372673 (S.D.N.Y., September 13, 2018). U.S. District Judge Vincent L. Briccetti granted in part and denied in part the motion of the supervisory defendants to dismiss the complaint for failure to state a claim against them. This opinion does not deal with the line officers or sergeants who allegedly participated in the sexual assaults and other violations of A.K.’s civil rights, including rapes, forced oral sex, masturbation, and other acts.

All but one defendant, correction officer Clifford A. Rowe, are represented by the New York Attorney General, Rowe, who was criminally convicted in relation to official misconduct in the A.K. matter, has separate counsel; and he has cross-claimed against the other defendants for contribution and indemnification.

At all times relevant, A.K. has presented as a woman in male prisons; and she arrived in state custody with records showing she had been raped at Rikers Island by a prison chaplain. She was at Greene for about nine months and at Woodbourne from 2014 until “sometime in 2016.” She alleges she was repeatedly raped and sexually assaulted by correction officers during her incarceration at Greene and Woodbourne, both medium security prisons.
At Greene, A.K. was raped by Rowe in a restricted officers’ area; A.K. saved some of Rowe’s semen in a pill bottle. On another occasion, the rape was observed by another inmate, and a rape kit was performed on A.K. in the medical unit. This proof led to Rowe’s conviction. A.K. also alleges that another officer, Matthew Latham, also violated her civil rights at Greene by calling her a “faggot,” withholding her estrogen medication, kicking and striking her, and fondling her breasts, buttocks, and groin. She said her complaints to John Doe sergeants were ignored. Latham also took A.K.’s legal mail and read it aloud to other inmates, for which she alleges a First Amendment violation. A.K. pleaded that the Greene superintendent and deputy superintendent (supervisory defendants) were aware of the risk to her and failed to remEDIATE it. They knew the housing areas were understaffed, conducted rounds on a predictable schedule, and failed to secure inmate safety.

Upon her arrival at Woodbourne, Sergeant Jeffrey Bowers confronted her “because of her interaction with C.O. Rowe at Greene.” Bowers repeatedly groped and raped A.K., as well as other inmates. He required her to masturbate in his presence. When A.K. complained to other sergeants, they said they “know all about” “the nasty stuff going on with Bowers.” Nevertheless, they did not report it to supervision. A.K. said the Woodbourne superintendent and deputy superintendent were aware of the risk and did nothing, “even routine supervision,” allowing A.K. to be alone with Bowers “for extended periods of time without detection or consequences.” Sergeants faced no action against them for failing to report sexual misconduct.

A.K. pleaded that the supervisors at both prisons and the Acting Commissioner maintained a policy of inadequate and ineffective supervision and investigation, including not disciplining Latham and Bowers when their conduct was reported. They also failed to conduct background checks on hiring staff or proper training. A.K. specifically cites the failure to provide protective custody despite her records from Rikers Island jail and her incidents at Greene, including one that resulted in the criminal conviction of an officer. Here, the risk to A.K., because of her presentation and history, was obvious under the second arm of Farmer v. Brennan, 511 U.S. 825, 834 (1994).

More generally, Judge Briccetti accepted the allegations of heightened risk for transgender inmates in prison, based on a variety of cited factors – including Congressional findings in the Prison Rape Elimination Act, 34 U.S.C. § 30301, et seq., (“PREA”); statistics from the National Institute of Corrections and the Bureau of Justice Statistics; and reports and cited testimony from the Sylvia Rivera Project, Solitary Watch, and the Correctional Association of New York. A.K. also alleged that her file had numerous letters of concern from family, clergy and attorneys. [Note: Discovery under PREA is likely to reveal a wealth of documentation kept (or that defendants failed to keep) under PREA, including plans for inmate safety and self-evaluation.]

Judge Briccetti had little trouble finding that A.K. presented a serious risk of harm under the first prong of the Eighth Amendment Farmer tests. Her risk was “plausible” under Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). On the second prong (deliberate indifference to the risk), Judge Briccetti found that A.K. had alleged more than mere negligence against the supervisors. The allegations, given all favorable inferences, show that the supervisors had subjective knowledge of the risks to A.K. and chose to ignore them – at least for purposes of stating a claim under Iqbal, since they failed “to take reasonable measures to abate the harm.” Hayes v. NYC. Dep’t of Corr., 84 F.3d 614, 620 (2d Cir. 1996). Here, the risk was “obvious” – Farmer, 511 U.S. at 842. [Note: In the writer’s experience, it would be almost impossible for them not to have knowledge of incidents at Greene and Woodbourne that led to an officer’s conviction.] Judge Briccetti accepted the allegations in the complaint that these supervisors were directly responsible “for knowing about the history of sexual abuse and harassment of each prisoner, the history of sexual abuse and harassment by each officer, and the location(s) where allegations of sexually abusive behavior occurs.” This satisfied the fifth factor for supervisory liability in Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (“failure to act on information indicating that unconstitutional acts were occurring”).

Judge Briccetti observed that, since Iqbal, there has been a division in the Second Circuit district courts as to the viability of the five threads of supervisory liability under Colon that the Court of Appeals has yet to resolve. He then wrote: “However, that court’s decision in Turkmen v. Hasty, 789 F.3d 218, 250 (2d Cir. 2015), rev’d in part on other grounds sub nom. Ziglar v. Abassi, 137 S. Ct. 1843 (2017), supports a reading of Iqbal that permits supervisory liability when the supervisor’s actions violate the terms of the constitutional provision at issue. Here, plaintiff alleges the Supervisory defendants’ conduct amounted to deliberate indifference.” [Note: The “deliberate indifference” standard and Farmer apply to inmate-on-inmate violence or to supervisors’ failure to take steps to stop violence of any kind. The rape of an inmate by an officer – is subject to a more exacting standard – that governing reasonable use of necessary force under Hudson v. McMillan, 503 U.S. 1, 6-7 (1992). There is no two-prong Farmer analysis or reasonable force defense available to an officer rapist, since there is no legitimate correctional interest in raping a prisoner.]

Judge Briccetti found the pleadings inadequate to keep the Acting Commissioner in the case and granted his motion to dismiss on personal involvement grounds. He found these allegations too “generalized” and “conclusory” to be “plausible.” He also reserved all questions of qualified immunity until discovery had proceeded to show a better record on A.K.’s need for protective custody.

Finally, Judge Briccetti denied A.K.’s First Amendment claim for reading her legal mail out loud. The act was too isolated to violate the First Amendment access to court protection and too de minimis to constitute retaliation, citing Tafari v. McCarthy, 714 F. Supp. 2d 317, 347 (N.D.N.Y. 2010) (“Courts in this circuit have held that claims of mail tampering do not constitute adverse action”; collecting cases). A.K. is represented by Philip Michael Hines of Held & Hines, LLP, Brooklyn.
California Magistrate’s Novella on LGBT Rights at California Women’s Prison Clarifies Nothing

By William J. Rold

Four LGBT prisoners who had been confined at the Central California Women’s Facility [CCFW] sued for multiple violations of their civil rights in Rojas v. Brown, 2018 WL 4183269, 2018 WL 4183269 (E.D. Calif., August 30, 2018), naming 13 defendants, including Governor Jerry Brown. All plaintiffs identify as “gender non-conforming and/or queer.” Plaintiffs Stacy Rojas, Ivett Ayestas, and Sara Lara shared a cell at CCFW, and the events as to them occurred in 2015. Plaintiff Isaac Medina is a transgender man, and the events as to him occurred in 2017.

The plaintiffs allege their experiences are part of a pattern of mistreatment of LGBT inmates at CCFW, but they do not plead a class action. The nearly 18,000-word Report and Recommendation [“R & R”] by U.S. Magistrate Judge Jennifer L. Thurston is so prolix that this writer has been able neither to read nor follow it in one sitting. This report will address only the high points.

Defendants moved to sever the 2017 incidents from the 2015 claims of the inmates who shared a cell. Judge Thurston grants this motion and directs the opening of a new file for Medina. (The details of her reasoning under F.R.C.P. 21 are omitted here). Having ordered severance, Judge Thurston then proceeds to discuss all four plaintiffs’ claims under F.R.C.P. 12(b)(6), as to whether they have stated a claim. In so doing, she correctly states but then persistently confuses the standards for review of the pleadings (assuming all facts fairly pleaded to be true, along with all favorable inferences) with the standards for summary judgment (whether there is or is not enough evidence after discovery to take the case to trial).

The 2015 incidents include verbal abuse; excessive force on all three inmates – including stomping on their backs and breasts while handcuffed, causing severe boot burns and lacerations, and yanking and wrenching their shoulders – slamming them to the floor; locking them in cages where they were forced to stand and denied water or toilets; forcing them to wear muumuus that exposed their private parts and then walking them through cell blocks and outside in inclement weather; withholding sanitary products while they were menstruating; and denying them medical care for their injuries. All three said the guards involved, who are named, were never disciplined.

The 2017 incidents as to Medina involved verbal harassment; handcuffing him behind his back, although he has a permit for front cuffing because he uses a walker; denial of medication; slamming him against a wall, using a headlock and a chokehold; “tossing” him (prison slang for one officer stepping on the chain between the inmate’s feet while another pushes him forward while he is cuffed behind his back, so that he falls on his face); raising Medina up from the ground by pulling upward on his rear handcuffs to cause excruciating shoulder pain and risk of dislocation; stripping him to expose his genitals and wheeling him about in a wheelchair; and denying him medical care for his injuries.

The 2017 incidents as to Medina are dismissed for failure to state a claim. In so doing, Judge Thurston relies upon a footnote in Blankenhorn v. City of Orange, 485 F.3d 463, 481 n.12 (9th Cir. 2007), a summary judgment case, which stated the standards for bystander liability and reversed a district court dismissal of officers who were on the scene of excessive force, handcuffed the victim (even if not abusively), and stood ready to assist, thus lending their authority to the excessive force administered. Relying on discovery disclosure, only two officers were dismissed: one who did not arrive until after the incident was over; and one who was doing crowd control at a different part of the crime scene.

Although Judge Thurston says in the body of the opinion that only three should be dismissed, her R & R inexplicably recommends that all excessive force claims in both cases be dismissed in their entirety. This happens again later in the opinion.

Judge Thurston declines to draw favorable inferences from the medical allegations in dismissing the failure to treat claim, indicating that the plaintiffs failed to plead that the officers subjectively knew that the inmates would be at risk if denied treatment, even assuming the injuries were serious. This is inconsistent with the pleadings, which alleged that the officers used force for the very purpose of causing unnecessary injury. [Note: In this writer’s experience, it is standard procedure in every prison to require a medical examination after any use of force – documenting what happened – something that was not done here.] The R & R says all medical claims should be dismissed.

Judge Thurston also recommends that all claims of sexual abuse and harassment be dismissed. In so doing, she balkanizes each incident and officer and refuses to examine the components
as constituting a part of a pattern. As with excessive force, she finds certain officers blameless and then recommends the dismissal of the claim as to all officers, even those shouting epithets as they beat the plaintiffs.

Judge Thurston also rejects all claims of retaliation. She finds complaining to Investigative Services not to be protected activity under the First Amendment.

As to supervisory liability, Judge Thurston dismisses claims against Governor Brown, apparently because he was dropped in the amended complaint. She recommends dismissal of the claims against the California DOC Secretary on training and discipline, finding it “dubious” that he has any such obligation. As to the same claims against various wardens, Judge Thurston found the pleadings inadequately identify the policy, procedures, etc., that are at issue and recommends dismissal of this count as well.

As stated, some of the R & R findings are inconsistent with the Recommendations at the end. Judge Thurston granted leave to amend as to the both the main and severed cases, except as to Governor Brown. According to PACER, plaintiffs’ counsel intend to do that. They are also appealing the R & R on three points: the joinder issue; the finding that complaining to the Investigative Services Unit was not activity protected against retaliation under the First Amendment; and the finding that the pleadings were insufficient to state a claim of sexual harassment.

The pilpul that Judge Thurston’s opinion represents has not helped the District Court, the plaintiffs, or the vindication of civil rights, for which there are many valid claims here. It has not even helped the defendants, except to buy them time, if they truly want to operate a constitutional system. Judge Thurston has advanced nothing; and this writer sympathizes with plaintiffs’ counsel who now must pour over this opus in detail and be prepared to start over with two cases in a hostile forum.

The plaintiffs are represented by Anne Butterfield Weills, Emily Rose Johns, and Daniel Mark Siegel, of Siegel & Yee, Oakland.

North Carolina Federal Court Dismisses Bullied Student’s Negligent Supervision and Training Claim against School Board

By Bryan Xenitelis

The U.S. District Court for the Middle District of North Carolina has granted summary judgment to various individuals school official and the school board, who were sued by an LGBT student (and his parents), claiming that he was severely bullied and that various individual defendants and the school board should liable for his three subsequent suicide attempts, which he attributed to their negligence in the supervision and training of school board employees. Nance v. Rowan-Salisbury Board of Education, 2018 U.S. District LEXIS 156713, 2018 WL 4398260 (M.D.N.C., September 14, 2018).

Hunter Nance, who identifies as openly gay, described severe and persistent bullying in school including physical assaults, name-calling, and threats of violence, which eventually caused him to attempt suicide three times. Nance claimed that in some instances of bullying the school punished the students perpetrating the bullying, and in some, the perpetrators faced no consequences. He and his parents the school board and many school board employees, asserting claims discrimination claims under Title IX (sex discrimination) and the Equal Protection Clause, as well as tort claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent supervisions and training. Many of the claims were dismissed on immunity grounds.

One claim remained to be disposed of on summary judgment: that under North Carolina law, the defendants including the school board were negligent in screening, hiring, training, retaining, supervising and disciplining their teachers and other school employees. The defendants moved for judgment, arguing that plaintiffs failed to allege incompetence, actual or constructive notice of incompetence, and any injury resulting from incompetence.

Ruling against plaintiffs, Circuit Judge Thomas D. Schroeder found that plaintiffs’ negligent training claim failed to provide the specific factual allegations necessary to ground the claim. He found that plaintiffs had failed to allege constructive knowledge of any incompetence of the individual defendants to support the negligent supervision claim. Specifically, Judge Schroeder found that the fact that the young man’s mother was informed by a defendant that the superintendent had been informed of the third suicide attempt could not itself carry the claim, because that communication alleged no misfeasance or malfeasance as it was merely a report of the “suicide attempt and hospitalization, not of incompetence.”

Judge Schroeder found that plaintiffs had failed to allege any facts indicating that, prior to dealing with the bullying of the young man, the school board had any reason to know of “any [school board employee] acting negligently in handling harassment, discrimination, or bullying complaints.”

Finding that absent “specific factual allegations that the Board had reason to know of the alleged incompetency of school employees, plaintiffs have failed to plead facts sufficient to permit an inference of constructive notice to the Board.” Even “assuming that school employees were negligent in responding to allegations of harassment,” Judge Schroeder found plaintiffs had failed to sufficiently allege a cause of action and dismissed the claim. He concluded: “Because this deficiency might be subject to cure, the court will dismiss the claim without prejudice,” which would allow plaintiffs to bring the suit again if they can allege facts sufficient to ground their claims.

Plaintiffs are represented by Karen L. Vaughn of K Legal Services, Mooresville.

Bryan Xenitelis is a New York attorney addition and adjunct professor at New York Law School, where he teaches “Crime & Immigration.”

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Paroled Transgender Inmate Suffers Loss of 8th Amendment Claim Despite Court Finding “Deliberate Indifference to a T”

By William J. Rold

Transgender inmate Andrea Richardson was brutally raped and assaulted in the D.C. Jail on August 25, 2014. Four years later, federal claims against the Warden and ten John Does were dismissed on summary judgment by U. S. District Judge Christopher R. Cooper (Obama) in Richardson v. District of Columbia, 2018 U.S. Dist. LEXIS 144354, 2018 WL 4053375 (D.D.C., August 24, 2018). The court also remanded the state law claims to the Superior Court of the District of Columbia, where the case was filed prior to its removal to federal court.

Richardson is a pre-operative transgender person who presents as female, with breasts, female attire, and haircut. Upon arrival at the D.C. Jail in June of 2014, she signed a waiver of protective custody, believing that she would face severe restrictions on privileges in protection and that in general population she would be housed alone or with another transgender inmate. She was housed alone for about a month, when, pursuant to a new policy that all inmates in general population would have cellmates (in order to reduce suicide), she was moved into a cell with an aggressive male inmate, who immediately threatened to rape her. She reported the threats to her caseworker and to officers on her unit, to no avail. No reassessment of her risk or the propensities of her future assailant was conducted. Her complaint alleges written complaints, but none were produced in discovery. She also alleges a sexually charged atmosphere, in which transgender inmates were regularly ridiculed and slurred, increasing their risk.

Richardson filed a notice of claim with the District of Columbia in November of 2014, and criminal charges were brought in District Criminal Court for the rape. According to PACER, the criminal charges were still pending as of 2017; and Judge Cooper denied a stay of the civil case. According to the Complaint, Richardson has been released from custody since October of 2015. It is impossible to tell from PACER what materials were produced in discovery or who was deposed, although leave was granted to conduct four depositions out of time, on a single day at one-hour intervals. These included two officers, the warden, and another witness.

Richardson’s opposition to summary judgment includes 1½ pages of deposition excerpts purporting to be her testimony and identifying her caseworker; but it has no cover sheet showing when this testimony was given. There is no opposition affidavit from Richardson herself. Although Judge Cooper does not mention it, the complaint is quite detailed about the day of the rape: it occurred between 8:30 and 8:45 p.m. on August 25, 2014, in Cell 44 on Unit E3. It should not have been difficult to obtain a photo array of officers and civilians (including the caseworker), narrowed by physical description, of those John Does working in the area at or around the time – provided Richardson was available to review them – a questionable issue based on the pleadings in opposition to summary judgment and Richardson’s counsel’s consent to dismissal of the John Does without prejudice based on an inability to identify them in discovery, after an extension for this purpose.

The case against the warden is dismissed in his individual capacity because Richardson did not defeat his invocation of qualified immunity. Judge Cooper found no clearly established law on what procedures were needed to protect Richardson from harm, so that the warden was protected, even if ultimately incorrect in his assessment. He evaluated the warden’s liability under three tests: “First, that he failed to properly assess that [the assailant] would pose a high risk of sexual assault and then failed to remove him from Richardson’s cell after she complained repeatedly about his sexually aggressive comments and behavior; . . . second, that he failed to initiate a policy requiring transgender female inmates to be housed alone or with transgender or gay male inmates; . . . . and, third, that he allowed a hostile environment to thrive in the unit.” [Internal quotes omitted]. The judge found only the second theory applicable. He found that the warden was not subjectively aware of the facts supporting the first or third theories – even though the Prison Rape Elimination Reform Act, 34 U.S.C. §§ 30301-30309 – and its implementing regulations, 28 C.F.R. §§ 115.11-115.93 (in effect since 2012) – require him to do just that: re-evaluate unfolding risk and take his head out of the sand as to conditions on the blocks. As to the second theory (housing female transgender inmates in general population with male inmates), this was no ordinary male inmate but one with a violent history sufficient to take him to criminal trial for this incident.

That the policy of double-celling to prevent suicide came from above the warden (from the Executive of the DOC) does not, in this writer’s view, relieve the warden of individual responsibility to protect Richardson, even if the warden only arrived at the jail a few months before Richardson, as Judge Cooper notes repeatedly. Wardens are not neophytes to corrections or to the danger transgender inmates face. This is a case where PREA was used as a sword to protect executive staff who have policies that look good on their face but break down in practice: here, there was plainly
misunderstanding on Richardson’s part as to the consequences to conditions of confinement of her choice for protection.

The plaintiff in Farmer v. Brennan, 511 U.S. 825, 830 (1994), also chose to be in general population. Judge Cooper’s reliance on Farmer involves the reasoning that prisoners in his situation face such a reason - personal to him or because all prisoners in his situation face such a risk.” Id. at 843. Judge Cooper’s reliance on Farmer involves the reasoning that prisoners in his situation face such a risk. Judge Cooper’s reliance on Farmer involves the reasoning that prisoners in his situation face such a risk. Judge Cooper’s reliance on Farmer involves the reasoning that prisoners in his situation face such a risk.

Faces an excessive risk of attack for more than it matters whether a prisoner is the single source or multiple sources, any admonition of Farmer that “it does not matter whether a prisoner is maintained based on an isolated policy case against a municipality cannot sustain the existence of an Eighth Amendment cause of action, lightens the way for any correctional official who seeks guidance on preventing rape.

The failure to bother to learn about it as the law requires constitutes deliberate indifference. As to the warden’s official capacity, Judge Cooper treats it like a claim against the District as a municipality, requiring a showing of failures in policy, practice, training, supervision, and the like. Judge Cooper finds that all of Richardson’s evidence (as opposed to her allegations) goes to her particular case; and a practice and policy case against a municipality cannot be maintained based on an isolated incident, citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985).

Judge Cooper’s opinion and remand to Superior Court is all the more bizarre based on his concluding footnote, which reads: “[H]ere, the record undoubtedly supports the existence of an Eighth Amendment claim against at least one official. Richardson testified that [the assailant] made sexually aggressive comments toward her, that she told several guards and her case manager that she feared he would assault her, that her pleas were ignored, and that she was ultimately assaulted. That is deliberate indifference to a T.”

### Indiana Federal District Court Finds No 1st Amendment Protection for College Teacher’s Sexist, Racist, Homophobic and Islamophobic Classroom Comments

**by Arthur S. Leonard**

Ruling on cross-motions for summary judgment in a lawsuit against a state university by a tenured professor who was suspended after an investigation of classroom conduct and statements brought to light by student complaints, Senior U.S. District Judge James T. Moody ruled that the 1st Amendment did not protect, inter alia, certain statements the professor made about homosexuality. Poulard v. Trustees of Indiana University, 2018 U.S. Dist. LEXIS 167617 (N.D. Ind., Sept. 28, 2018).

Jean Poulard has taught political science at Indiana University Northwest Campus (IUN) for more than 30 years, earning tenure in 1990. On June 1, 2015, Gianluca Di Muzio, then chair of the political science department, in which capacity he looked at student course evaluations of department faculty, communicated to Ida Gillis, then Director of Affirmative Action for IUN, student evaluation comments raising concerns about Professor Poulard’s behavior and statements in the classroom. The student comment that first raised a red flag was that Poulard would “frequently voice his racist and sexist views” and that he was “obscenely flirtatious with his female students, often saying perverted things.”

Prof. Di Muzio also commented that he had personally observed Poulard kissing students on the hand and cheek. Gillis and Di Muzio extended their investigation over several years of student evaluations, uncovering a variety of incendiary classroom comments attributed to Poulard, among them a student writing, “I took great offense when he stated how wrong and disgusting it is to be gay and how terrible and messed up a child with same sex parents is going to be in the head.” There was also a statement that “black people were destroying Chicago and his solution to crime would be a weekly hanging.”

When confronted with these statements in the ensuing disciplinary proceeding, Poulard denied making some statements, softened others (such as claiming he spoke in favor of capital punishment, not weekly hangings), but did not deny hugging and kissing students or his comments about gay people and gay parents.

Gillis wrote a report, supplemented by Di Muzio’s complaint, which was presented to the Vice Chancellor for Academic Affairs, who concluded that Poulard had violated the University’s Sexual Misconduct Code and Code of Academic Ethics, suspending him for a month without pay, placing a letter of reprimand in his personnel file, and requiring him to complete the University’s sexual misconduct training.

Poulard brought a lawsuit in state court that the University removed to federal court, claiming breach of his tenured employment contract as well as violations of his constitutional rights to due process and freedom of speech. Judge Moody found that material fact disputes about when the University began to include a disclaimer of contractual effect in its Academic Handbook precluded summary judgment on the breach of contract claim, but rejected the due process claim, finding that the procedures leading up to the Vice Chancellor’s ruling comport with standards of procedural fairness.

As to the First Amendment claim, and particularly the comments about gays and gay parents, Moody found no 1st Amendment protection for Poulard’s remarks. Although some of his statements, for example, “regarding gays, Muslims, and African Americans and crime, could potentially be matters of public concern,” wrote Moody, that was only one factor in applying the
Supreme Court’s *Piggee* standard governing public employee speech, especially as applied in the 7th Circuit under *Piggee v. Carl Sandburg College*, 464 F. 3d 667 (2006). “Applying a balancing test,” he wrote, “the Seventh Circuit found that the instructor’s interest in making comments regarding religion and homosexuality were not protected when balanced against the school’s interest in the instructor’s adherence to the subject matter of the course she was hired to teach (which in that case was cosmetology).”

Moody continued, “In the case at hand, [Vice Chancellor] McPhail specifically restricted plaintiff’s speech out of concern for ‘developing among students respect for others and their opinions.’ The court agrees with McPhail that IUN had strong interests in restricting plaintiff’s statements in order to preserve respect for the student body, harmony among the IUN population, and to prevent the exclusion and isolation of the minorities targeted by plaintiff’s speech. McPhail also concluded that the statements were not germane to the topic of the class. However, plaintiff argues that his case can be distinguished from *Piggee* on this issue, because, since he teaches a political science course, his statements and comments were within the scope of the course. The court disagrees.”

“It is true that the teacher in *Piggee* taught cosmetology which was even further off topic from the instructor’s speech,” Moody explained. “However, here, plaintiff’s course was a course involving Latin American politics, an issue that was not addressed in any of the statements at issue. Second, the court recognizes that faculty members have some right to engage in academic debates, pursuits, and inquiries. And being a political science course should give professors some leeway to delve into topical or hot-button social and political issues. However, statements about gays being ‘disgusting,’ criticizing religious (Muslim) clothing, and asserting that African Americans should be ‘hung,’ are not topical statements and do not invoke hot-button issues.

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**Federal Judge’s Severance of Transgender Inmate’s Claims into Multiple Cases Results in Disparate Dispositions, including First Amendment Protection for Wearing Make-Up**

*By William J. Rold*

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 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 remove 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 by corrections officers 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 other 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 an outside consultation and MRI (ordered by the dentist) confirmed that her jaw was fractured in multiple places. She says that follow-up care ordered by the specialist was not given, that the prison physician (Dr. Alfonso David) refused to see her, that the sutures and bone pins came out, and that she was left with attempting herself to remove a bone fragment painfully protruding out of an open portion of her lower jaw. She says she has permanent visual impairment from her eye injury.

Judge Rosenstengel found insufficient allegations for a conspiracy count to go forward, and she dismissed the count of inadequate provision of transgender care to Spoden for failure to specify a liable defendant. 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 protect from harm prior to the assault by another named inmate against defendants who allegedly had specific knowledge in
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 reduce her 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 policy points.

On September 21, 2018, Judge Rosenstengel dismissed the retained case claim with prejudice because Spoden failed to file an amended complaint regarding policy claims against the warden after two warnings, in Spoden v. Dennison, 2018 U.S.Dist. LEXIS 161979 (S.D. Ill.). Judge Rosenstengel also assessed “strike” under the PLRA. Spoden had been released on parole on August 6, 2018. Perhaps she had survival issues upon release that kept her from keeping track of the proliferation Judge Rosenstengel had made of her cases. What follows addresses only her claims for damages in Cases 1 through 4, as numbered above, one of which Judge Rosenstengel severed into yet another new case.

Case #1, concerning retaliatory discipline, assault by officer Phelps, bystander officer liability, and state law claims arising from the same events, is before U.S. District Judge Staci M. Yandle. In Spoden v. Phelps, 2018 U.S. Dist. LEXIS 140870 (S.D. Ill., August 20, 2018), the judge allowed most of the claims to proceed. Officer Phelps’ writing Spoden a frivolous and bogus disciplinary ticket for complaining when he asked her to remove her homemade make-up was sufficiently retaliatory for screening purposes under the First Amendment. Spoden’s allegations of denial of procedural due process in the disciplinary hearing, however, are rejected under Wolff v. McDonnell, 418 U.S. 539, 563-9 (1974), particularly in light of her relatively light punishment. Judge Yandle leaves the door open a little, however, as she allows Spoden to replead the Due Process claim as a substantive one if she can show an “extreme frame-up” where consequences were sufficiently severe to invoke substantive due process, citing Lagerstrom v. Kingston, 463 F.3d 621, 625 (7th Cir. 2006); Black v. Lane, 22 F.3d 1395, 1402-03 (7th Cir. 1994). This writer suspects that Phelps’ conduct, described below, influenced this dicta and permission to replead.

Judge Yandle found that wearing make-up for a transgender prisoner “expresses her gender identity” and was “inherently expressive” for First Amendment purposes, citing Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 64 (2006). “An intent to convey a particularized message was present[,] and, in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam).

After Spoden’s jaw surgery, Phelps slammed her cell door in her face, causing further injury to her pinned and fractured jaw and tearing the stitches in her mouth. These allegations are sufficient to survive screening under the Eighth Amendment and Illinois state battery law, citing Hendrickson v. Cooper, 589 F.3d 887, 890 (7th Cir. 2009); and Smith v. City of Chicago, 242 F.3d 737, 744 (7th Cir. 2001). The bystander officers who did not intervene are also liable for screening purposes under Lewis v. Downey, 581 F.3d 467, 472 (7th Cir. 2009).

Phelps also wrote a new disciplinary report against Spoden after the cell door slamming incident, which was witnessed by the bystander officers. Judge Yandle allows a First Amendment retaliation claim to proceed against all three. A further claim that a nurse was complicit in the conspiracy to cover up the incident was rejected without prejudice at screening because of insufficiently detailed pleading.

Judge Yandle denied appointment of counsel. The request for counsel may be refiled if Spoden “has significant difficulty” after discovery has commenced.

In Spoden v. Lynn, 2018 U.S. Dist. LEXIS 135380 (S.D. Ill., August 10, 2018), a severed case regarding retaliation, called Case #2 above, was also assigned to Judge Rosenstengel. This case concerns four counts: two disciplinary tickets and the alleged lack of due process following each one as it was adjudicated. Judge Rosenstengel found no lack of due process because Spoden received the protections required by Wolff. Moreover, her punishment was too minor to meet the threshold for deprivation of liberty. As to the allegations that the punishment was initiated because of Spoden’s complaints that peer counselors were engaging in anti-LGBT rhetoric, the two tickets as retaliation under the First Amendment survives scrutiny. Because the disciplinary charges involve separate incidents and different ticketing officers, however, Judge Rosenstengel severs them, keeping one and directing that the other proceed as yet another separate case but allowing it to be deemed screened with a carry-over of the in forma pauperis status already granted.

Case #3, Spoden v. Smith, 2018 U.S. Dist. LEXIS 146338 (S.D. Ill., August 28, 2018), is also before Judge Yandle. This is the claim that another inmate (Burton) assaulted Spoden, causing her injuries to her eye and jaw and that officials had ample opportunity to prevent it. The pleadings show that Spoden was “brutally assaulted” by a known sexual predator (inmate Burton), about whom Spoden complained to a caseworker, who was a “mandatory” reporter. Spoden said that Burton had grabbed her in the shower and that hostility between the two was “ongoing.” The caseworker took no action. On the day of the assault, three

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Virginia Federal Magistrate Judge Questions Whether Old 4th Circuit Dicta Rejecting Sexual Orientation Claims under Title VII are Still Good Law

By Arthur S. Leonard

U.S. Magistrate Judge Robert S. Ballou, quoting the 2nd Circuit’s statement in Zarda v. Altitude Express, 883 F.3d 100, 107 (2018), that “legal doctrine evolves,” decided that a gay discrimination plaintiff under Title VII should have an opportunity to amend his complaint to, if possible, avoid the factual pleading deficiencies that the judge identified as falling short of making out a Title VII employment discrimination claim and provide an argument that Title VII allows such claims. Jones v. Virginia Polytechnic Institute and State University, 2018

“I question Defendants’ assertion that the Fourth Circuit’s statements in Wrightson and Hopkins, which are dicta, are binding in this case.”


Title VII, adopted as part of the Civil Rights Act of 1964, prohibits employment discrimination because of the sex of the plaintiff. In recent years, some courts have given traction to the argument that sexual orientation discrimination is prohibited by this provision, while others have disagreed. To date, the 2nd and 7th Circuits have ruled, en banc, that sexual orientation discrimination claims should be treated as a subset of sex discrimination claims under Title VII, following the lead of a 2015 ruling by the Equal Employment Opportunity Commission (EEOC), the agency tasked with interpretive and enforcement authority under Title VII. Thus, in this case, where the defendant filed what its counsel undoubtedly considered a routine motion to dismiss based on the “conventional wisdom” that Title VII does not prohibit sexual orientation discrimination, it was likely surprised that Judge Ballou was open to the contrary argument.

“Defendants claim that Jones cannot state a Title VII claim for discrimination based on sexual orientation,” he wrote. “Defendants rely upon Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4th Cir. 1996), where the Fourth Circuit Court of Appeals stated in dicta that ‘Title VII does not afford a cause of action for discrimination based upon sexual orientation.’ See also Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751-52 (4th Cir. 1996) (ruling that same-sex sexual harassment may be a basis for a Title VII claim, but noting that ‘Title VII does not prohibit conduct based on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee’s sexual orientation and not at the fact that the employee is a man or a woman’). Several district courts within this circuit have relied on that dictum to dismiss Title VII claims for sexual orientation discrimination...”

Defendants also noted that circuit courts have previously unanimously held that sexual orientation discrimination...
claims are not cognizable under Title VII," citing mainly older rulings from a variety of circuits, but culminating with a citation to Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017), which relied on an old 5th Circuit precedent to reject a sexual orientation claim, with the Supreme Court denying review last December.

“However,” wrote Ballou, quoting from Zarda, “‘legal doctrine evolves’, and there has been a recent trend in United States Supreme Court decisions to expansively define sex discrimination under Title VII.” Judge Ballou traced this “trend” from Meritor Savings Bank (1986), the Supreme Court’s first hostile environment sexual harassment case, through Price Waterhouse v. Hopkins (1989), in which the Court found that “sex discrimination includes discrimination based on an employee’s failure to conform to gender norms,” and thence to Oncale v. Sundowner Offshore Services (1998), in which “the Supreme Court ruled that sex discrimination encompasses same-sex sexual harassment claims.” Quoting Justice Scalia’s much-cited passage in Oncale that courts are not limited in interpreting Title VII to the kinds of “evils” that Congress would have been contemplating in 1964, Ballou wrote: “The rationale in Oncale supports an expansive reading of ‘because of . . . sex’ in Title VII.” Then he noted the EEOC’s 2015 decision in Baldwin v. Foxx, and of course the 7th and 2nd Circuit en banc rulings in Hively and Zarda, respectively, noting that there are certiorari petitions pending before the Supreme Court seeking resolution of the circuit split on this issue. “There further exists a strong possibility of binding Supreme Court precedent on this issue in the near future,” he concluded his historical recitation.

“Analyzing the case before me,” he continued, “I question Defendants’ assertion that the Fourth Circuit’s statements in Wrightson and Hopkins, which are dicta, are binding in this case. I further question whether the Fourth Circuit’s statements in those cases are consistent with the current state of the law, given that they were made prior to the most recent Supreme Court, EEOC and circuit court decisions on this issue. However, even if I assume for the purposes of this opinion that discrimination based upon sexual orientation is prohibited by Title VII, I find that Jones has not provided sufficient facts to state a claim in this case, as explained more fully below. Accordingly, I will grant Defendants’ motion to dismiss without prejudice, allow Jones leave to amend his Complaint, and defer ruling on the issue of whether I am bound by the Wrightson dicta, and whether there has been, or should be, a shift in the previous case law holding that sexual orientation is not protected by Title VII.”

Omitting a detailed recitation here of Jones’s factual allegations, it suffices to say that Judge Ballou found that they were too generalized to meet the specificity requirements to survive a motion to dismiss, but that it was possible that upon amendment Jones’s counsel could assert the necessary facts to avoid an outright dismissal of his claim on factual pleading grounds, in which case the court would have to make a decision on whether to accept a well-pleaded sexual orientation discrimination claim under Title VII. Jones had also asserted a retaliation claim, which relied on the fact that he had filed an internal grievance contending that he was a victim of sexual orientation discrimination and had subsequently suffered adverse action. The problem here was that the adverse action was not close enough in time to the grievance for the court to draw a necessary inference that the one was retaliation for the other without more detailed factual allegations to link them.

Judge Ballou stated that he would “allow Jones leave to amend his Complaint, and address the issue of whether sexual orientation discrimination claims are protected by Title VII if Jones provides sufficient facts to state a claim.”

Brian Dwayne Jones is represented by Linda Leigh Strelka and Norvell Winston West, IV, of Strelka Law Office, Roanoke.
property, church or other religious facility or institution, government building, institution of higher education, or cemetery.

According to the court, the next part is “murky.” To the best of the court’s understanding, Doctor John’s explained to the Village that the ordinance does not apply to them because “(1) Doctor John’s is a ‘clothing and accessory store selling items relating to the enhancement of romance’ rather than an “Adult Entertainment Business”; and (2) that, if necessary, Doctor John’s was willing to tinker with its inventory in order to come into compliance with the ordinance’s restrictions—just like they have done with their other stores.” The Village was not persuaded, and this lawsuit followed.

Dr. John’s sued the Village and the Mayor, alleging violations of the First, Fifth, and Fourteenth Amendments. The defendants moved to dismiss.

At the outset of the court’s analysis, Judge Gillbert was less than pleased with the pleadings, including an amended complaint that the court found to be “still lacking.” The court, nevertheless, went on to address the “cavalcade of theories,” dismissing many and allowing others to proceed.

St. John’s First Amendment theory was allowed to proceed. The court applied City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), which held that “even if a zoning ordinance appears to blatantly discriminate against certain types of speech, the ordinance can survive a First Amendment challenge if the defendant can show that the goal of the ordinance is to suppress the ‘secondary effects’ of that speech rather than the speech itself.” If the defendant can prove that, then the regulations must advance a substantial government interest and be narrowly tailored.

The court found that the Village’s intent with respect to the regulation was indeed addressing the “secondary effects” as it was, in part passed to “regulate uses which, because of their nature, are recognized as having serious objectionable, operational characteristics, particularly when several of them are concentrated in a particular area, thereby having a deleterious effect upon the adjacent areas.” Doctor John’s then argued that the ordinance enacts “further restrictions than are necessary” in order to curb the “secondary effects” of adult-use establishments. The court notes that given the vast scope of the regulation, it might cover the ENTIRE Village, and if that were the case, Doctor John’s might be correct, since “current law still dictates that the Village provide ‘reasonable alternative avenues of communication.’” Thus, the court concludes that the First Amendment theory was plausible. The court did, however, reject the argument that since the ordinance regulated “specified anatomical areas” which it defined to include genitals, buttocks, and breasts, it was overly broad, apparently applying to “common retailers who sell things like underwear and birth control.”

The court was less persuaded by St. John’s Procedural Due Process argument, which the court described as a “mess.” Basically, Doctor John’s argued that the ordinance didn’t apply to it at all since the company was always planning to adjust its merchandize as it had in other jurisdictions and the Village violated its due process rights by denying its business license without issuing a formal ruling. The court rejected this claim with several other messy process claims contained in the briefing. The court notes that “Doctor John’s abjectly ignores the protected interest prong in all of its papers, and the Village skips the issue in its motion to dismiss. That alone is enough to warrant dismissal of the procedural due process claims—the court is under no obligation to craft an argument for Doctor John’s.”

The most compelling claim, at least from the author’s perspective, and given that Law Notes is a publication covering LGBT legal developments, is St. John’s Substantive Due Process argument.

First, Doctor John’s asks the court to find that “its customers have a fundamental right of privacy in the sale, possession, and use of sexual devices.” Doctor John’s argues that the privacy right in Lawrence v. Texas – which invalidated a Texas statute that criminalized sodomy by holding that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring . . . ” and that “liberty [is] protected by the Constitution”– also applies to the use of sex toys that come “in intimate contact with another person.” On the merits of that argument, the court notes at least one circuit (the Fifth Circuit, surprisingly) has held that a statute making it illegal to sell sexual devices violates the principles seen in Lawrence.

Second, Dr. John’s asserts that it has standing to bring that privacy claim for its customers. This is where the court, which acknowledges that the standing issue is tricky, holds that the claim fails apart. Neither party has identified a Seventh Circuit case that “declares that retailers have standing to bring a substantive due process claim on behalf of its customers.” Instead, Doctor John’s argues that the petitioners in Griswold and the defendants in Reliable Consultants were the sellers of contraception rather than consumers.” The court notes that the 11th Circuit, in a case that postdated Lawrence, upheld an Alabama statute that criminalized the sale of sexual devices “—reversing a district court holding that found that rights to sexual privacy are “deeply rooted in the history and traditions of our nation” and “encompass the right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas marketed by vendors involved [in that case].” But after Obergefell and Windsor were handed down, the 11th Circuit was again faced with a municipal ordinance that criminalized the sale of sexual devices in Flanagan’s Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 831 F.3d 1342, 1348 (11th Cir. 2016), the panel noted that “Windsor and Obergefell cast serious doubt on Williams,” its prior case on this issue, but declined to overrule Williams in the absence of an en banc or Supreme Court decision on point.

The court held that Griswold and Williams dealt with criminal prohibitions on the sale of goods. Standing in those cases, the court notes, is obvious. The Village, however, “does not want to throw the owner of Doctor John’s in jail for selling a sex toy. Instead, this is a cookie-cutter case about a zoning regulation.” And thus the court dismissed the claim. The court also rejected an Equal Protection argument with a three sentence analysis that kills
the theory so quickly that it isn’t worth recounting. Other miscellaneous claims involving the ability to sue the Mayor, and the claim for attorney’s fees, are also quickly rejected.

Dr. John’s is represented by Thomas G. Maag, of Maag Law Firm LLC, Wood River, IL, and W. Andrew McCullough, of Midvale, UT.

Eric Lesh is the Executive Director of LeGaL.

“Bisexual” continued from page 513

Interpreting Title IX as requiring some other adverse action would not only pervert the text of the statute, but also “penalize resilient survivors.” Grayson Sang Walker, Note, The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault, 45 Harv. C.R.-C.L. L. Rev. 95, 112 (2010). The U.S. Supreme Court, and, if it is reluctant, Congress, must reconsider the Davis standard in light of cases such as these, to apply combat odious discrimination in public schools, the likes of which Lynnea Black surely plausibly alleged here.

Judge DeGuilio was appointed by President Barack Obama.

Ryan Nelson is corporate counsel for employment law at MetLife in New York City.

“Indiana” continued from page 533

They sound much more like harassing statements that IUN has a strong interest in eliminating in order to foster an inclusive learning environment for all students, including gays, Muslims, and African Americans. Accordingly, when performing the Pickering balancing test, the court concludes that the interests of IUN outweigh Poulard’s interests.”

Thus, the court granted defendants’ motion for summary judgment as to the 1st Amendment free speech claim. Judge Moody also found that a separate free speech claim under the Indiana Constitution could be resolved on the same analysis.

Judge Moody was appointed to the district court by President Ronald Reagan.

CIVIL LITIGATION notes

CIVIL LITIGATION 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. SUPREME COURT – As of the end of September, President Trump’s nomination of D.C. Circuit Judge Brett Kavanaugh to the Supreme Court to fill the seat vacated by the retirement of Justice Anthony M. Kennedy, Jr., was still pending before the Senate Judiciary Committee, with plans for an early vote being delayed to allow time for the Federal Bureau of Investigation to conduct a limited investigation to determine whether there was evidence to corroborate allegations that Kavanaugh had engaged in inappropriate sexual conduct with non-consenting women while a high school and college student. Committee and Floor votes in the Senate were expected to take place early in October. When the Supreme Court made its first announcement of certiorari grants for the October 2018 Term at the end of September, there was no word about the three pending petitions in cases concerning interpretation of Title VII of the Civil Rights Act of 1964 with respect to sexual orientation or gender identity discrimination claims. Alliance Defending Freedom (ADF), the firm representing Harris Funeral Homes in the gender identity discrimination case from the 6th Circuit, wrote to the Court suggesting that all three petitions should be considered together, and that consideration be deferred to the Court’s October 26 conference, by which time the briefing would be completed on the Petition in their case. (It had been delayed by several applications for extension of time.) Over the summer the Clerk of the Court had listed the sexual orientation cases from the 2nd Circuit (Altitude Express) and the 11th Circuit (Bostock) for consideration during the “long conference” beginning September 24, but they were removed from the agenda around the time that ADF wrote to the Court. It is possible that the Court will defer discussing these petitions until a ninth justice is seated, as it appears to be trying to avoid scheduling cases likely to generate 4-4 rulings by the 8-member Court while the current nomination is pending.

U.S. SUPREME COURT – When the 9th Circuit granted the government’s request on September 17 to stay a discovery order by the U.S. District Court in Seattle in the ongoing litigation challenging Trump’s ban on transgender military service, the government withdrew a petition it had filed days earlier asking the Supreme Court to issue an emergency stay. The dispute concerns whether the Defense Department and the White House will be required to disclose information pertinent to the question whether the government had a compelling interest to ban transgender people from military service. The district court had previously ruled that gender identity discrimination involves a suspect classification, and had denied motions to dismiss and for summary judgment by the government, noting that failure of the government thus far to provide evidence of a compelling justification for the ban, which was announced with no warning to the Pentagon (other than a few hours’ notice to the vacationing Secretary of Defense) in a Presidential Tweet on July 26, 2017. The government is maintain that much of the information the plaintiffs are seeking is protected by “deliberative process privilege.” For example, in his Tweet, the president said he was announcing the policy after conferring with “my generals and military experts,” but the administration has never revealed who these people are. Similarly, a Report submitted by the Defense Department in February 2018, accompanied by a memorandum...
attributed to Defense Secretary James Mattis, has no names attached to it and only the most general description of how it was composed. This struck District Judge Marsha Pechman as consistent with her speculation in earlier rulings on motions in the case that there was no factual basis for the announced policy change. A previous ban on transgender service had been ended by the Defense Department in June 2016 after a lengthy period of study and the commission of a Report from the RAND Institute, a defense contractor think-tank.

**U.S. COURT OF APPEALS, 2ND CIRCUIT** – In an early precedential application of its en banc ruling in *Zarda v. Altitude Express*, 883 F. 3d 100 (2nd Cir., 2018), a 2nd Circuit panel has revived a gay man’s Title VII sex discrimination claim in *Cargian v. Breitling USA, Inc.*, 2018 WL 4293325, 2018 U.S. App. LEXIS 25518 (Sept. 10, 2018). Frederick Cargian appealed from District Judge Daniels’ ruling on the employer’s motion for summary judgment, which was issued September 29, 2016, at which time the court granted the motion based on then-valid 2nd Circuit precedents. In a summary order from the panel consisting of Circuit Judges Peter W. Hall and Raymond J. Lohier and Judge Jane A. Restani (Court of International Trade, sitting by designation), the court said: “At the time the order was issued, however, the district court lacked the benefit of the guidance provided by this Court’s recent February 2018 decision in *Zarda* . . . , which addresses this Court’s jurisprudence on sexual orientation discrimination under Title VII.” In *Zarda*, the court overruled circuit precedent and held that sexual orientation claims can be brought as sex discrimination claims under Title VII. (The employer in *Zarda* has filed a certiorari petition, which the Supreme Court will most likely consider at its conference on October 26.) “Because the legal framework for evaluating Title VII claims has evolved substantially in this Circuit,” continued the court, “we conclude the district court should have the opportunity to consider in the first instance whether Cargian’s claims can survive a motion for summary judgment after *Zarda* altered that legal landscape. Given that the district court declined to exercise supplemental jurisdiction over Cagian’s remaining claims in light of the dismissal of his federal law claims, the district court is free to reconsider that aspect of its prior ruling on remand. In so concluding, we express no opinion as to the proper resolution of Cargian’s Title VII and state law claims on remand.” Cargian is represented by New York City solo practitioner Janice Goodman.

**U.S. COURT OF APPEALS, 6TH CIRCUIT** – We frequently see cases in which anti-gay preachers want to set up shop with their sound systems to bellow Biblical verses and condemnations in the vicinity of Gay Pride celebrations. Police intervene, forcing them to move some distance away and, occasionally, arresting them when they resist moving. In subsequent litigation, the courts usually find that public order concerns justified the police action. But not in *McGlone v. Metro. Govt. of Nashville & Davidson County*, 2018 U.S. App. LEXIS 26635, 2018 WL 4502283 (6th Cir., Sept. 19, 2018), where a divided 6th Circuit panel found that the plaintiff-preachers were ordered to leave a public sidewalk or else face arrest for preaching against homosexuality outside of an LGBTQ Pride Festival in downtown Nashville, so the city had violated the plaintiffs’ free speech rights, and its action did not survive strict scrutiny applied to content-based regulation of speech. Writing for the court, Judge Alice M. Batchelder, an appointee of President George H.W. Bush, reversed the district court’s summary judgement against plaintiffs. “The question in this case,” she wrote, “is whether Nashville’s exclusion of the preachers from Public Square Park can be justified under the applicable level of constitutional scrutiny . . . McGlone and Peters say our scrutiny of Nashville’s actions should be strict. Nashville argues that it should be intermediate. McGlone and Peters are right. Strict scrutiny applies because Nashville’s restriction of McGlone and Peters’ speech was content based.” The court found that the location in question is a “traditional public forum,” that the plaintiffs were singled out for adverse treatment because of the anti-homosexual nature of their speech, and that the city lacked a compelling interest for doing so. In oral argument before the district court, counsel for the city made the argument – fatal to their defense in the view of the panel majority – that “but for the anti-homosexuality message that McGlone and Peters were advancing as they stood on the sidewalk, they would not have been excluded.” Asked Batchelder, “How, then, can Nashville argue that its restriction of the preachers’ speech was not content based?” She pointed out that “speech deemed hateful and offensive is not only still protected by the First Amendment, it is the speech most in need of First Amendment protection,” then quoted from Justice Scalia’s opinion in *Texas v. Johnson*, 491 U.S. 397 (1989), striking down a conviction under a state “flag desecration” law used to prosecute people who burned the American flag in an act of political protest. As to the argument that letting the preachers speak would somehow intrude upon the pro-gay message of the Pride Festival, she wrote, “We see no risk that those attending the festival, or even ambling past Public Square Park, would have mistaken McGlone and Peters’ preaching for the speech of the Pride Festival. Nor did the preachers ‘alter the message the [Pride Festival] sent to the media and other observers.”’ The court found that the permit given by the City to the festival organizers did not extend to the sidewalk adjacent to the park.
U.S. COURT OF APPEALS FOR VETERANS CLAIMS – In Atkins v. Wilkie, 2018 WL 4380801, 2018 U.S. App. Vet. Claims LEXIS 1235 (Sept. 14, 2018), Judge Joseph Falvey had to deal with Marvernson Atkins’ appeal of a ruling by the Board of Veterans’ Appeals denying service connection for HIV infection. The question was whether the Board had failed to provide an adequate statement of reasons or bases for (1) concluding that a medical examination or opinion was not required, (2) its assessment of the veteran’s credibility, and (3) its determination that an in-service diagnosis of HIV was needed to establish service connection. Falvey determined that the Board provided inadequate reasons or bases for its overall determination that Atkins was not disabled from HIV while on active military service, and set aside the Board’s decision, remanding for further proceedings. Atkins served on active duty in the Army Reserve from September 5, 1985, until February 1, 1986, with continuing reserve obligations through July 30, 1993, during which time he had several short periods of active duty each year through 1990. He tested positive for HIV-antibodies in July 1989, and had a positive confirmatory diagnosis of HIV infection in November 1989. In August 2011, he filed a claim for service connection for HIV, which was denied by a VA regional office. He filed a Notice of Disagreement with that ruling, stating that he became so ill at Ft. Riley during “summer camp” in 1988 that “they had me, and everyone, tested.” In his appeal to the Board, he wrote that “he believed he contracted HIV when he was date raped, presumably while on [active duty], and he identified his alleged attacker by name.” The Board remanded his claim “for additional development” before issuing the opinion on appeal denying service connection, thus depriving him of medical expense and treatment eligibility by the government. “Here, the Board denied service connection because it found that Mr. Atkins did not develop HIV while on [active duty.]” The Board acknowledged that “the veteran has indicated that he believes he contracted HIV as a result of being date raped in service.’ Yet the Board failed to make any findings about the claimed assault or explain why such an in-service incident could not constitute an in-service injury for purposes of service connection. Instead, the Board noted that the incident was not corroborated and ultimately concluded that, even assuming the assault occurred, the lack of a medical diagnosis for many years after service weighed against the claim.” Falvey found this conclusion “problematic” for three reasons. “First, it is difficult to understand how the Board could find that Mr. Atkins was not diagnosed for many years after service,” since he had periods of active duty in 1986, 1987, 1988, 1989 and 1990, “and tested positive for an HIV antibody in July 1989 and was diagnosed with HIV in November 1989.” The Board did not provide a reason for disregarding these periods of active duty. Second, Falvey found that the Board was making its own impermissible medical determination. “There is no evidence in the record addressing when HIV develops after a sexual assault. The Board concluded that Mr. Atkins did not develop HIV while on active military service, but the Board did not explain the factual or legal basis underlying its conclusion that a person infected with HIV during or following an assault would not be disabled from disease or injury until formally diagnosed.” Finally, he pointed out, these deficits in the Board’s decision left Atkins and the court “to speculate if the Board denied service connection based on its own improper medical determinations on when HIV develops or because the Board found that the assault did not occur. The Board’s reasons or bases for the decision do not allow the veteran to understand why the infection that he allegedly contracted during the assault is not a disability resulting from disease or injury, or for the Court to review the Board’s decision on the issue.” The court found “unpersuasive” the Secretary’s argument that service connection was “warranted only if Mr. Atkins was diagnosed” while on active duty, pointing out that there is no such requirement in applicable regulations. “On remand,” wrote Judge Falvey, “the court reminds the Board that the duty to assist may require the Secretary to obtain relevant records of fellow service members that may aid in corroborating a personal assault. Because the veteran identified his alleged assailant by name, VA may need to take steps to determine if that individual served with the veteran and, if so, if other relevant records exist.” The court also pointed to VA General Counsel Precedent Opinions 04-2002 and 08-2001 “which discuss the legal considerations for when an assault or viral exposure in the course of Reserve duty may lead to service connection.” What Judge Falvey does not mention is that at the time of the alleged assault, Atkins and his sexual partner were not “out” because military regulations in the 1980s mandated the discharge of any service member who was gay, with no exceptions, so reporting a “date rape” would be unimaginable! (Even after “Don’t Ask, Don’t Tell” was legislated in 1993, a gay male service member would risk discharge from reporting a “date rape” by another man.) Indeed, until Congress repealed the DADT statute late in 2010 and the Defense Department then lifted the ban on gay service in the fall of 2011, gays could
CALIFORNIA – California courts have frequently looked for ways to avoid ordering people to arbitrate disputes where they had a plausible claim that they had not voluntarily agreed in advance to arbitrate, only to be batted down more than once by the U.S. Supreme Court. In Souden v. PacifiCare Life & Health Insurance Co., 2018 WL 4443119, 2018 Cal. App. Unpub. LEXIS 6372 (Cal. 2nd Dist. Ct. App., Sept. 18, 2018), the court seized upon an interesting “technicality”: although the insurance contract between the insured and the insurance company had a provision requiring the insured to submit all disputes to arbitration, the plaintiff in this case, the insured’s domestic partner, was not a party to that contract. The plaintiff is suing for wrongful death loss of consortium, based on the contention that the insurance company’s bad faith refusal to pay for life-saving medical treatment was a cause of the insured’s death. Thus, although the insured contracted to submit all of his claims based on the insurance contract to arbitration, this waiver of the right to sue was not effective against the plaintiff. Plaintiff Randall Souden and his domestic partner, Robert Carey-Hogue, each applied for individual preferred provider health care services plans (PPOs) with PacifiCare in 2004. Both were HIV positive, and Carey-Hogue had been diagnosed with AIDS. They disclosed their diagnoses in their applications, and PacifiCare agreed to enroll them in individual PPO plans, presumably because somebody at the insurance company failed to note this information when processing the application. They registered as California domestic partners in 2009, several years after each acquired their insurance coverage. Then somebody apparently “woke up” at PacifiCare, perhaps due to claims that one or both of the men were filing, and looked for a way to justify cancelling their coverage. In 2007, PacifiCare stopped paying medical benefits to both of them, while continuing to accept their premiums! In June 2008, PacifiCare filed a lawsuit in Missouri (where the men were living) seeking to rescind the policies, claiming they were procured by fraud because the men had stated on their applications that they lived in Los Angeles but they actually lived in Kansas City. The men filed counterclaims for breach of contract, then voluntarily dismissed those claims prior to trial. The Missouri trial court found that the couple maintained residences in both cities and thus had not committed fraud, ordering PacifiCare to pay medical benefits to both men, a ruling affirmed on appeal by the Missouri appellate court. Souden and Carey-Hogue then sued PacifiCare for breach of contract and related torts in Los Angeles Superior Court, but the court found their claims precluded since they should have been litigated in the Missouri action. Carey-Hogue died in 2011, and Souden filed this lawsuit, seeking damages for loss of consortium wrongful death as a surviving registered domestic partner. The trial court sustained a demurrer, finding Souden’s claims barred by res judicata, but the 2nd District Court of Appeal reversed, finding that the wrongful death claims asserted a “different primary right” from that alleged in the earlier lawsuits. Back to the trial court, and PacifiCare petitioned to compel arbitration, citing the arbitration provision in the applications both men filled out in 2004. PacifiCare argued that Souden’s wrongful death claim “fell squarely within the scope of the arbitration agreement.” Souden argued that he was not a signatory to Carey-Hogue’s application, and that by engaging in the prior lawsuits, PacifiCare had waived its right to invoke arbitration. The trial court bought the waiver argument, and PacifiCare appealed. The Court of Appeal affirmed the trial court’s rejection of the motion to compel arbitration, but on a different theory. “Arbitration is generally a matter of mutual assent,” wrote Judge Dennis M. Perluss for the unanimous panel. “The legislative exception to the requirement of mutual assent to arbitrate for wrongful death plaintiffs in medical malpractice cases created by MICRA and set forth in section 1295 is entirely absent from Health and Safety Code section 1363.1. That omission is significant. If section 1295 had not expressly included wrongful death claims within its ambit, it is unlikely the Supreme Court in Ruiz [v. Podolsky, 50 Cal.4th 838 (2010)] would have concluded the Legislature intended to create a statutory exception to the mutual assent requirement for arbitration in medical malpractice wrongful death cases.” But this case does not involve medical malpractice! It is alleging wrongful death due to the insurer’s alleged bad faith denial of coverage under a contract of insurance. The court found that the “exception to mutual assent recognized in Ruiz for professional negligence claims against health care providers does not apply in this bad faith breach of contract action against a health care services plan,” and rejected the insurer’s argument that “the same policy justification for binding
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wrongful death plaintiffs to a decedent’s arbitration agreement in medical malpractice cases involving health care providers also exist in nonmedical malpractice cases involving health care service contracts – reducing litigation costs, thereby reducing plan premiums.” While the legislature might want to extend the exception in future on those and other policy grounds, wrote the court, “Until then, we are bound by the well-settled principle that a party who has not consented to arbitration cannot be compelled to arbitrate his or her own, nonderivative case of action.” Souden is represented by Brian S. Kabateck, Anastasia K. Mazzella and Nicholas R. Moreno, of Kabateck Brown Kellner.

COLORADO – Colorado First Judicial District Judge Margie Enquist ruled on July 31 that a non-legal commitment ceremony of two men in 2003, eleven years before same-sex marriage became legal in Colorado, had resulted in the formation of a legal marriage between Dean LeFleur and his former boyfriend. The boyfriend had sued LeFleur for spousal support, alleging the existence of a marriage that had never been legally terminated – which, of course, it couldn’t have been before the Supreme Court in 2014 denied certiorari to the state’s appeal of a ruling finding its ban on same-sex marriage to be unconstitutional, which had been affirmed by the 10th Circuit Court of Appeals. Since the Supreme Court premised its subsequent marriage equality ruling in Obergefell v. Hodges on the 14th Amendment, which became part of the Constitution in 1868, courts in some cases have found that the right to form legal marriages should be viewed retrospectively in particular fact situations presented to them. According to a news report about the lawsuit against LeFleur, he “had to divorce a man to whom he never believed he was married, losing a sizable amount of his assets in the settlement that resulted.”

Asked LeFleur, “I’m not sure what the Supreme Court was intending when they said that not only do you have the right to get married, but you always did. Did they really mean that the court can retroactively call you married? Because there’s no such thing as retroactive divorce.” He said that they had a “typical relationship” fifteen years ago, but his partner wanted “some kind of ceremony to acknowledge our relationship” which LeFleur was “reluctant to do.” He decided to go along because “it wasn’t legally binding. I thought, what could it hurt?” He said the relationship subsequently broke down, and LeFleur moved to California – “and when he wouldn’t leave my house, I called the police and they had to remove him.” He returned to Colorado in 2009 and started dating his former partner, allowing him to move back into the house. LeFleur had a job involving frequent travel and was not home a lot, and “by 2013 we had really become roommates. We lived in different portions of the house and pursued other relationships. At that time, there definitely wasn’t a marriage. The only time we really lived what you and I call a married lifestyle was back in 2003.” However, LeFleur concedes that he financially supported the man during this period by covering all the expenses of the house. When LeFleur asked him to leave in 2017, he sued LeFleur for support. After Judge Enquist’s refusal to dismiss the support action, LeFleur moved for a divorce. A hearing was held on September 5, and a ruling granting the divorce came through on September 13. As part of the divorce, LeFleur’s former partner was awarded a portion of LeFleur’s net worth and four years of spousal support, and LeFleur spent approximately $30,000 on the litigation. He claims to have depleted his retirement savings to the extent that he claimed a lack of resources to pay for an appeal. He was hoping that publicity about his situation might prompt a lawyer to offer him pro bono representation, sounding a cautionary note for others who might be in a similar situation concerning a long-forgotten commitment ceremony coming back to haunt them. Concluded LeFleur: “I’m just asking to be held to the laws that were in place at the time, not the way the laws might be in the future.” Westword.com, Sept. 28.

FLORIDA – In Junco v. Adventist Health Care System, 2018 WL 4599650, 2018 U.S. Dist. LEXIS 162428 (S.D. Fla., Sept. 24, 2018), plaintiff Bryant Junco, pro se, alleged that he had been subjected to an offensive and hostile work environment, in violation of Title VII, and suffered retaliation when he complained about it. According to his allegations, his coworkers and supervisors at the defendant hospital “constantly talked down to him and mocked/harassed him for being ‘the only male secretary,’ telling him that he had ‘an old lady job,’ and ‘must surely be homosexual.’” After he complained about this harassment, the employer retaliated against him, first “by trying to lower his rate of pay numerous times,” and then by “terminating his employment and offering a fabricated reason of ‘disregard for patient safety.’” He also claimed that the hospital continued to retaliate after firing him by misrepresenting his work history in response to information requests from potential new employers. Junco filed a charge with the EEOC, which dismissed the charge and issue a right-to-sue letter. He then filed suit pro se, attaching as an exhibit to a perfunctory complaint 100 pages of the records of the EEOC’s investigation into his charge. Defendant moved to dismiss or for a more definite statement; Junco responded by boiling down his factual allegations to amended complaint of a few pages. Defendant responded with a new motion to dismiss that reflected laziness of counsel, as it failed to reflect the fact that Junco’s amended complaint now complied with the pleading rules of the court. Magistrate Judge Jonathan Goodman
denied the motion for a more definite statement, now mooted by the amended complaint, and the motion to dismiss. There is no discussion in the opinion about any doubts whether allegations of this type are actionable under Title VII, despite the 11th Circuit’s continued insistence on following ancient precedents excluding sexual orientation discrimination claims from coverage under that statute. On the other hand, there is no indication in Goodman’s opinion that Junco was seeking to assert a sexual orientation claim; rather, he was contending that he was a victim of hostile environment sex discrimination and retaliation. From the briefly quoted factual allegations, this looks like a gender stereotype claim rather than a sexual orientation claim.

ILLINOIS – David Igasaki suffered summary judgment of his employment discrimination claims in Igasaki v. Illinois Department of Finance & Professional Regulation, 2018 U.S. Dist. LEXIS 169005 (N.D. Ill., Sept. 30, 3018). Igasaki who worked at IDFPR until his termination in March 2015, alleged discrimination because of his race, sexual orientation, and age in violation of Title VII and ADEA, and also a violation of the Americans with Disabilities Act. He also asserted a retaliation claim. Igasaki v. Illinois Department of Financial and Professional Regulation, 2018 U.S. Dist LEXIS 169005. According to the motion to dismiss, Igasaki had been receiving negative job evaluations and eventually there was a particular incident where the employer deemed the employee to be incompetent – . Judge Andrea Wood devoted the first part of her opinion chastising plaintiff’s counsel for her submissions in opposition to the motion, asserting that she had failed to comply with court pleading rules or to effectively rebut many of the Department’s affirmative argument. Although the court conceded that Igasaki, a gay Asian man, is in one or more protected classes under Title VII. Omissions from the response to the motion ended up conceding various factual points, and ultimately, the court found the complaints unsubstantiated for purpose of ruling on dismissal of a Title VII claim. Plaintiff is represented by Anne I-Pin Shaw, Shaw Legal Services LID.” Igasaki’s discrimination claims were doomed, in Judge Wood’s estimation, because he failed to offer up a comparator employee who was treated better than him. Furthermore, as to the continuing problems between Igasaki and his supervisor, the court wrote: “Neither Title VII nor the ADEA protect an employee from having a difficult boss. The statutes do not impose a ‘general civility code’ designed to purge the workplace of all boorish or even harassing conduct,” wrote the court, in granting the motion to dispose of Igasaki’s complaint.

KENTUCKY – Senior U.S. District Judge Joseph M. Hood found that binding 6th Circuit precedent required dismissal of a sexual orientation discrimination claim brought under Title VII by a discharged employee of a diagnostic medical facility. Sharp v. EMHFL, Inc., 2018 U.S. Dist. LEXIS 167810, 2018 WL 4685443 (E.D. Ky., Sept. 28, 2018). “While the Supreme Court has recognized that [Title VII’s ban on discrimination ‘because of sex’] includes claims based on sex stereotyping and same-sex sexual harassment,” wrote Hood, “the United States Court of Appeals for the Sixth Circuit has held, however, that the mere fact that a plaintiff has a particular sexual orientation cannot be used to claim discrimination on the basis of ‘sex’ entitled to Title VII protection and does not recognize discrimination claims based on perceived sexual orientation of a plaintiff as discrimination based on sex, generally,” citing Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006). “While court in other circuits have held that discrimination on account of sexual orientation is sex discrimination under Title VII,” Judge Hood continued, citing the 7th Circuit in Hively and the 2nd Circuit in Zarda, “this court is bound by the Sixth Circuit’s decision in Vickers.” In a footnote, he commented: “Twelve years have passed since the Vickers decision and with them many assumptions and understandings about sexual orientation. Given the development of jurisprudence by other circuits that encompasses sexual orientation discrimination within the definition of sex discrimination for the purposes of Title VII, the Court of Appeals for the Sixth Circuit may need to consider this issue and its rationale for its previous decision anew. Notably,” he continued, the Vickers court had “extensively relied” on the then-recent 2nd Circuit ruling from 2005, Dawson v. Brumble & Brumble, which was specifically overruled earlier this year in Zarda. The court did not mention that two certiorari petitions are pending before the Supreme Court raising the question whether Title VII covers sexual orientation claims. Judge Hood was appointed to the bench by President George H. W. Bush.

KENTUCKY – U.S. Magistrate Judge Lanny King ruled that a Social Security ALJ’s “decision not to give great or controlling weight to the medical opinion of Plaintiff’s treating psychiatrist . . . was not supported by substantial evidence,” requiring a remand to the Commissioner for a new decision about whether the HIV-positive gay male plaintiff is entitled to Social Security disability benefits. Kin solving v. Berryhill, 2018 U.S. Dist. LEXIS 164135 (W.D. Ky., Paducah Div., Sept. 25, 2018). We no longer routinely report decisions concerning disability benefits appeals by HIV-positive people, most of which are rejected on the ground that the individual’s infection is controlled and
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does not substantially limit them in the ability to engage in gainful employment, but every now and then a case comes along deserving comment. Magistrate King’s recounting of the plaintiff’s factual allegations is startling. “He stated that he has had violent encounters with his father in the past, which he does not completely remember, and that he has made eleven attempts on his life. Plaintiff was date raped in 2004, discovered he was HIV positive in 2005, and last worked in 2008 in San Francisco, after being gang raped. He was unable to continue working due to rape trauma and fear of men. In 2009, he returned home to Kentucky, where he lives with his parents. He no longer drives, and he relies on his mother to take him to appointments. He mostly stays at home due to agoraphobia and fear of the public.” The psychologists retained by the Social Security Administration in connection with his application for disability benefits concluded that he suffered from various psychological disorders, but opined that he had limited capacity to work on relatively menial jobs without much contact with other people. His treating psychiatrist, Dr. Sallee, by contrast, “found that Plaintiff has ‘extreme’ limitations in his abilities to: 1) complete a normal workday and work week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, 2) respond to changes in the work setting, and 3) travel in unfamiliar places or use public transportation,” and also found “marked” limitations as to a variety of situations involving proximity to and interaction with other people. This doctor, while expressing hopes for future improvement, noted in September 2016 that “the prospect for his ability to hold a regular job of any type is nearly nonexistent for the foreseeable future.” The doctor based this opinion on what Judge King described as “the fact” that the Plaintiff (now quoting the doctor) “has been traumatized in the past, and this continues to affect him.” He “struggles on a nearly daily basis with panic attacks and anxiety, as well as mood symptoms” and “sometimes has problems with paranoia.” The ALJ decided to give “little” weight to the psychiatrist’s opinion, finding that “it is not supported by the record.” Reviewing the record, Judge King held that this failure to accord “controlling weight” to Dr. Sallee’s opinion was erroneous, as the record reflected years of treatment and prescriptions of strong psychotropic drugs to help the plaintiff control his symptoms. “In light of Plaintiff’s extensive treatment with Dr. Sallee and Dr. Sallee’s extensive prescription of psychotropic medication,” wrote King, “Dr. Sallee’s opinion (though perhaps not perfectly or completely) was ‘well-supported by medically acceptable clinical and laboratory diagnostic techniques and was not inconsistent with the other substantive evidence in your case record.’” quoting pertinent language from 20 C.F.R. sec. 404. Further, the ALJ failed to give “good reasons” why Dr. Sallee’s opinion was not entitled to “greater weight than any other opinion in the administrative record concerning what Plaintiff can still do despite his impairments.” Judge King reviewed Dr. Sallee’s findings in detail and then asserted that “the ALJ essentially rejected every medical opinion in the administrative record concerning what Plaintiff can still do despite his mental impairments and created and adopted her own medical opinion. The ALJ was unqualified to do this.” However, the judge found that an award of benefits was not indicated here, because “there is no vocational testimony concerning the effect of acceptance of Dr. Sallee’s findings on Plaintiff’s ability to perform jobs in the national economy,” so a remand is necessary to compile an appropriate record, according appropriate weight to Dr. Sallee’s findings. Plaintiff Jesse Kinsolving is represented by Donna s. Thornton-Green of Paducah, Ky.

LOUISIANA – An HIV-positive woman whose doctor prescribed a form of therapy known as “dry needling,” which involves “fine needles” being inserted by a therapist into “myofascial trigger points (painful knots in muscles), tendons, ligaments, or near nerves in order to stimulate a healing response in painful musculoskeletal conditions,” sued under the Americans With Disabilities Act and Section 504 of the Rehabilitation Act because the defendant’s employee therapist refused to perform the dry-needling therapy upon learning that the plaintiff was HIV-positive. Doe v. Ortho LA Holdings, LLC, 2018 U.S. Dist. LEXIS 165199, 2018 WL 4613946 (E.D. La., Sept. 25, 2018). Denying cross-motions for summary judgement, U.S. District Judge Triche Milazzo found that there were contested issue of material fact that required trial, having determined that the plaintiff had succeeded in pleading a prima facie case of disability discrimination under both statutes. “Plaintiff argues that Defendant’s conduct was unlawful because Cortez [the therapist] failed to perform an individualized assessment of Plaintiff’s fitness for dry needling therapy. Defendant argues that Cortez’s decision was not unlawful because he made a medically reasonable determination that dry needling therapy was not appropriate for Plaintiff in light of his training as a physical therapist. Summary judgment on Plaintiff’s Title III claim [under ADA] is inappropriate because questions of material fact abound. The reasonableness of Cortez’s determination that Plaintiff was not a candidate for dry needling is a question of fact best reserved for a jury.” Much of the opinion is devoted to arguments about qualifications of expert witnesses offered by both parties, and the degree to which they could give opinion testimony on various contested points. Plaintiff is represented by Galen M. Hair, Jennifer Jon Greene, John Eric Bicknell, Jr., of Scott, Vicknair, Hair & Checki, LLC, New Orleans, LA;
Joshua L. Holmes, CrescentCare Legal Services, New Orleans, LA; and Sarah Mae Kalis, Varadi, Hair & Checki, LLC, New Orleans, LA.

MARYLAND – If anyone needed persuading that the statutory infrastructure governing the legal status of non-citizens in the United States is very complicated, refer them to the opinion by U.S. District Judge George L. Russell, III, in Obando-Segura v. Sessions, 2018 WL 4384166, 2018 U.S. Dist. LEXIS 156826 (D. Md., Sept. 14, 2018), in which a young gay man whose parents brought him with them from Colombia to the U.S. on a tourist visa in 2001 when he was eleven years old is now struggling, pro se, to stay in the United States, or at least to avoid involuntary removal. In this opinion, Judge Russell (who was nominated by President Obama in 2011 and took the bench in 2012) struggles with the narrow but complicated question of whether the government should be allowed to continue holding the Petitioner in detention (where he has been for twenty months) while his case is pending. Things are complicated by his conviction, as a teenager, for dealing in marijuana, for which he served four years in a California state prison, after which the Department of Homeland Security instituted removal proceedings against him, both on grounds of his conviction and on the ground that he and his parents had overstayed their tourist visa and he never became a U.S. citizen. He was found removable by an Immigration Judge in Arizona in 2012, and was ordered removed to Colombia, but he appealed to the Board of Immigration Appeals (BIA), which denied his appeal in 2013. He appealed to the 9th Circuit, remaining in detention while that appeal was pending, Immigration Control and Enforcement (ICE) having concluded based on his “criminal history” that he had “failed to establish that he is not a danger to the community or a flight risk.” Petitioner moved to reopen the proceedings in his case so that he could pursue asylum on grounds of being a member of a particular social group (gay men) who were subject to persecution in his home country. The BIA denied the motion as untimely, also find that he had “not satisfied his heavy burden of establishing a material change in circumstances in Colombia regarding treatment of homosexuals such that his safety would be in jeopardy, which would have excused the untimeliness of his motion and entitled him to review,” wrote Russell. Also, he had not raised an asylum claim in prior proceedings, although it is not clear from the opinion when Petitioner might have realized he could raise such a claim, either in terms of knowledge of his sexual orientation or knowledge of these grounds for relief. During 2014 the BIA repeatedly rebuffed attempts by the Petitioner to get his case reopened, but on August 25, 2014, the 9th Circuit remanded his case “on the government’s unopposed motion to remand,” and on October 28, 2014, an Immigration Judge ordered his release from immigration detention on a $20,000 bond. He posted bond and was released after being detained more than 24 months. The BIA reviewed his case, pursuant to the 9th Circuit’s remand, and sent the case on to an Immigration Judge “to allow for consideration of Obando-Segura’s potential eligibility for relief from the order of removal,” wrote Russell, with the BIA instructing the IJ to give the parties an opportunity to update the evidentiary record, including allowing Petitioner to present evidence in support of his asylum claim, and for DHS to provide documentation of his criminal record, which seems to have been missing from the files. Since Petitioner was living in Maryland after his release, DHS had the IJ proceedings moved to Maryland. On May 17, 2017, the IJ ordered Petitioner’s removal to Colombia yet again, and denied Petitioner’s motion for a continuance to allow him to file a petition for a U visa, under which he could be allowed to remain in the U.S. if he made a special showing that he had suffered “substantial mental or physical abuse” as a crime victim and was assisting U.S. law enforcement authorities. His basis for seeking such relief is not explicated in the court’s opinion. The IJ also denied his request for “voluntary departure” on the ground that “he does not meet the good moral character requirement” because of his past incarceration on a criminal conviction. He appealed again and filed a petition for the U visa, and the BIA remanded the case to another IJ, noting that although there was sufficient evidence in the record to find him removable based on having entered the U.S. on a visitor visa and overstayed, “the record did not contain documentation regarding Obando-Segura’s criminal convictions” and DHS should be “permitted to substantiate the criminal convictions on remand. He has been in ICE detention since December 7, 2016, thus the petition for habeas corpus filed with the district court in this case, claiming that continued detention of him while his case is pending violates his due process rights. He argues, among other things, that under the system giving ICE authority to decide whether he must be detained indefinitely offends fundamental due process because “there is no neutral arbitrator” to decide whether detention is justified. Petitioner sought an order from the court requiring that the immigration court “hold an immediate bond hearing where the government has the burden of proof by clear and convincing evidence that he is either a danger to the community or a flight risk to justify further detention.” After a detailed analysis of applicable law, and noting the lack of 4th Circuit precedent on questions that have divided other circuits, Judge Russell decided that on the current state of the record he could not rule on the motion, directing the parties to submit supplemental briefs addressing a list of “reasonableness
factors” that he derived from a prior decision, Jarpa v. Mumford, 211 F. Supp. 3d 706 (D. Md., 2016). “The Court will further direct the parties to supplement the record with any decisions, orders, transcripts of proceedings, or other relevant documents concerning review of Obando-Segura’s continued detention, the basis of his removability, and the status of his U visa application. The parties shall also advise the Court if a hearing in this matter is necessary and, if so, the estimated length of the hearing.” The judge pointed out the fluctuating reasons given by the government for Petitioner’s removability and continued detention, and the lack of evidence before the court about how ICE had decided that he must be detained despite his willingness to post a bond.

MASSACHUSETTS – To judge by the facts alleged in Bettencourt v. Town of Mendon, 2018 WL 4621733, 2018 U.S. Dist. LEXIS 164931 (D. Mass., Sept. 26, 2018), the Mendon Police Department was an extraordinarily dysfunctional agency under the direct of former Chief Ernest Horn and his allegedly despicable second-in-command, Lt. Donald Blanchette, who was so nasty to his subordinates that some of the discrimination claims based on his actions were not tenable because he mistreated everybody regardless of sex, sexual orientation, or any other prohibited ground of discrimination. Gay plaintiff Edward Bettencourt, a public school employee who alleged that the boss found out he was not gay, he was hired based on his sexual orientation. Heys evidently believed that Wang Anderson when Y.C.W. confided in him. Heys evidently believed that Wang Anderson might be dangerous to Y.C.W., if Wang Anderson found out about Y.C.W.’s gender identity issues. Wang Anderson denies that, and the Court has no reason to question her denial at this point. But there are undoubtedly many adolescents in the world who don’t have a supportive family as they struggle with complicated questions of identity and sexuality – or, worse yet, for whom family conflict is part of their crisis. Perhaps Heys’ judgment was off about Wang Anderson, or he was misled by what Y.C.W. told him – but even so, nothing alleged suggests the sort of ‘conscience-shocking’ misconduct required to prove a substantive due process claim.”

NEBRASKA – In Anderson v. State of Nebraska, 2018 WL 4599832 (D. Neb., Sept. 25, 2018), U.S. District Judge John M. Gerrard granted a motion by Millard Public Schools and various school personnel to dismiss a suit filed by Catherine Yang Wang Anderson, the mother of two girls who attended the school. Anderson alleged that the teacher’s relationship with her daughter “alienated Wang Anderson from Y.C.W. causing a chasm to begin to form in their relationship which grew so vast that it resulted in Y.C.W.’s reports of abuse or neglect which resulted in the removal of Y.C.W. and X.C.W. [the older daughter] from Wang Anderson’s care, a violation of Wang Anderson and X.C.W.’s right to family integrity.” Judge Gerrard questioned the “supposed chain of causation” between the teacher’s actions and the decision by the state to remove the children from their parents and place them in foster care. Wrote Gerrard, “Nor is there any legal support for Wang Anderson’s assumption that Heys [the teacher] was somehow obliged to tell Wang Anderson when Y.C.W. confided in him. Heys evidently believed that Wang Anderson might be dangerous to Y.C.W., if Wang Anderson found out about Y.C.W.’s gender identity issues. Wang Anderson denies that, and the Court has no reason to question her denial at this point. But there are undoubtedly many adolescents in the world who don’t have a supportive family as they struggle with complicated questions of identity and sexuality – or, worse yet, for whom family conflict is part of their crisis. Perhaps Heys’ judgment was off about Wang Anderson, or he was misled by what Y.C.W. told him – but even so, nothing alleged suggests the sort of ‘conscience-shocking’ misconduct required to prove a substantive due process claim.”

NEW YORK – Here’s an unusual case. A straight man brings a sexual orientation discrimination claim under Title VII and the NYS and NYC Human Rights Laws, alleging that he was hired based on the boss’s mistaken belief that he was gay, and that the boss only wanted to employ women and gay men. When the boss found out he was not gay, he
began being mistreated and humiliated and ultimately discharged. U.S. District Judge Laura Taylor Swain’s opinion in McDonough v. New York City Department of Education & Paul DiDio, 2018 WL 4636834, 2018 U.S. Dist. LEXIS 166967 (S.D.N.Y., Sept. 27, 2018), relates how P.S. 159 Principal Paul DiDio hired six probationary teachers for the 2014-15 school year, of whom McDonough was the only male and, indeed, was one of only two male teachers at the school, which had a full-time faculty of 35. According to the complaint, DiDio wanted to hire the plaintiff because he assumed “plaintiff was homosexual” based on his “effeminate qualities,” but subsequently discovered the contrary, by seeing a “flirtatious email exchange” between the plaintiff and a female colleague “that was flagged during the pre-hire review process,” as a result of which DiDio changed his mind and “commenced a year-long campaign of harassment against plaintiff based on plaintiff’s gender.” There follow in the opinion several pages of Judge Swain’s summary of the factual allegations that make one wince in the reading. How can a professional educator engage in such blatantly stupid comments and actions as are attributed here to Principal DiDio? Is there no training of management officials by the NYC Department of Education about the requirements of anti-discrimination law? McDonough made complaints to the teachers union representative, who “conveyed them to DiDio,” which, of course, brought on retaliation, and ultimately the plaintiff’s termination by the district superintendent. Plaintiff filed an EEOC charge under Title VII and received a right to sue letter; then filed an Article 78 proceeding in state court, claiming his termination violated the Education Law and the equal protection clause, then filed an amended version of that action, removing the discrimination claim (wrong venue) while pursuing the Title VII action, with supplementary state and local law claims in federal court (including tort claims against DiDio). His Article 78 was denied, and the Education Department filed a motion to dismiss the federal lawsuit. After clearing away various problems posed by plaintiff having filed and lost his Article 78 proceeding, Swain turned to the Title VII sex discrimination claim. She found that plaintiff is a member of a “protected class” because of his gender. “Defendant’s challenge rests on Plaintiff’s failure to plead facts from which the Court could plausibly infer that his termination was motivated by discriminatory animus,” writes Swain, rejecting that argument: “Plaintiff has plausibly alleged that he suffered an adverse employment action motivated by gender discrimination,” she wrote. “He supports this claim with evidence demonstrating Defendants’ anti-male bias. For example, Plaintiff alleges that Defendant DiDio made several ‘invidious comments’ about his gender: DiDio allegedly told him that he was ‘hesitant to hire men because he had a bad experience once,’ and that he ‘wanted to put McDonough in the second grade, but he did not think men should teach below the second grade.’ DiDio also allegedly remarked on Plaintiff’s teaching placement in gender-degrading terms, stating, ‘if I were a parent and dropped off my pre-k child, and the teacher was a guy, I would feel weird about it . . . that’s why I’m not sure where to place you next year, Lane.’” Since DiDio’s evaluations of the plaintiff comprised a “significant portion of the materials” that the district superintendent relied on in deciding whom to terminate, plaintiff’s allegations “are sufficient to meet his minimal burden to plausibly plead that DiDio’s discriminatory intent was a motivating factor contributing to his adverse employment action.” In other words, this is a cat’s paw case, with DiDio using the superintendent as his weapon against the plaintiff. The court also found that the faculty demographics at P.S. 159 definitely helped to prove DiDio’s anti-male bias, which the court said showed a “severe underrepresentation of male teachers at P.S. 159, and supports an inference that Defendants were not inclined to hire and retain men to teach there.” Unless, of course, they were effeminate gay men? Plaintiff also presented lots of evidence of ways he was subjected to treatment inferior to that accorded his female colleagues. The court also found that plaintiff had alleged a plausible retaliation case, based on DiDio’s reaction to news that plaintiff was complaining about his treatment. (Doesn’t anybody tell school principals that retaliating against people who file grievances with the teachers’ union can be the basis of a separate statutory claim that is ultimately easier to prove than a discrimination claim?) Ultimately, however, failure to serve a timely notice of claim on the Education Department required dismissal of some of the counts of plaintiff’s complaint pertaining to state and city law claims, but the Title VII claims are left for trial. The court declined to exercise supplemental jurisdiction over state and local law claims against DiDio. McDonough is represented by Maria Lauren Chickedantz and Ria Julien, of Mirer Mazzocchi Schalet & Julien, PLLC, and Jeanne Ellen Mirer, of Law Offices of Jeanne E. Mirer, PLLC. The New York City Law Department represents the defendants. Will the Department investigate DiDio based on the outcome of this motion? Inquiring minds want to know.
short term conditions are generally not
work for ten days, after which he could
“asked that plaintiff be excused from
from whom plaintiff sought treatment
Rights Law, noting that the doctor
a disability under the City’s Human
court concluded that it did not constitute
employee “ never alerted” the employer
to accommodate a disability when the
probationary period of employment.”
absences from work during his initial
termination was plaintiff’s excessive
plaintiff, then a probationary employee,
The hospital-employer asserted that the
plaintiff, and then a probationary employee,
was discharged due to “excessive
absences.” Judge Gonzalez found
that plaintiff “failed to raise an issue
of fact whether the proffered reason was pretextual,” wrote the Appellate
Division in a brief Memorandum. The
court observed that the anonymous
plaintiff had “submitted no evidence
that defendant knew he had HIV.”
Plaintiff asked the court to draw a
conclusion about the employer’s state
of knowledge based on a doctor’s letter
he had submitted on the letterhead of
Housing Works, “that states that he
suffered from unspecified ‘symptoms’
and needed to be excused from work
for three days.” “The mere fact that
the letterhead includes a caption that
refers to housing for homeless people
with AIDS and HIV does not, standing
alone, suffice to create a triable issue
whether defendant knew that plaintiff
had HIV,” wrote the court. “There is
no evidence that Housing Works treats
only individuals with AIDS and HIV,
that defendant believed that that was
the case, or that the two individuals
who made the decision to terminate
plaintiff’s employment saw the doctor’s
letter. Both of those individuals denied
any knowledge that plaintiff had HIV,
and both averred that the sole basis for
his termination was plaintiff’s excessive
absences from work during his initial
probationary period of employment.”
The court also noted that here is no duty
to accommodate a disability when the
employee “ never alerted” the employer
to the disability. As to osteopenia, the
court concluded that it did not constitute
a disability under the City’s Human
Rights Law, noting that the doctor
from whom plaintiff sought treatment
“asked that plaintiff be excused from
work for ten days, after which he could
return with ‘no restrictions.’” Such
short term conditions are generally not
considered disabilities for purposes of
discrimination law. It seems a bit odd to
us that a major health care institution in
New York City could claim ignorance
that Housing Works was established
primarily to provide services to people
living with HIV, but, as noted, the court
apparently found credible the testimony
that those who made the discharge
decision never saw the letter on Housing
Works letterhead and that the plaintiff
had never expressly informed the employer about the nature of his medical
condition. Plaintiff is represented by
Gregory Antollino, Antollino PLLC,
New York.

NEW YORK – In Toulouse v. Village
Diagnostic Treatment Center, 2018
U.S. Dist. LEXIS 168202, 2018 WL
4682782 (S.D.N.Y., Sept. 28, 2018), out
gay plaintiff Bertrand Toulouse suffered
dismissal of his sexual orientation and
gender stereotyping claim under Title
VII because, when completing the
EEOC’s intake form, he omitted to
check the box for “sex.” Toulouse was
fired in January 2014, and filed his
EEOC Charge in November of that year.
The EEOC dismissed his charges in
February 2015 and issued him a right to
sue letter. In July of that year, the EEOC
ruled for the first time that it considered
sexual orientation discrimination claims
to be covered under Title VII, a position
that the 2nd Circuit did not embrace until
earlier this year in Zarda v. Altitude
Express. So, at the time Toulouse filed
his charge, checking the box for “sex”
would have seemed a futile gesture.
Toulouse did have lots to complain about
in connection with his treatment and
discharge by his employer, to judge by
U.S. District Judge Vernon Broderick’s
summary of the factual allegations in
his Third Amended Complaint, and to
any fair-minded reader, his adequately
pled facts plausibly allege a violation of
Title VII as currently construed by the
2nd Circuit. This included an intensely
homophobic supervisor who subjected
him to a variety of anti-gay epithets at
work and set him up for a discharge after
learning that he had filed a complaint
concerning breach of confidentiality
in his medical records with the Office
of Civil Rights of the U.S. Department
of Health and Human Services. The
supervisor’s alleged comments reeked
of homophobic gender stereotyping.
But when Toulouse filed his Title VII
and ADA claims with the EEOC, the
only boxes he checked on the intake
form were “retaliation” and “disability.”
This charge related to violations of his
medical confidentiality that led a
management official of the employer
to believe that Toulouse, an openly gay
employee, was concealing HIV infection
because he had declined an HIV test
when hospitalized after a fainting spell
at work, giving rise to his disability
discrimination claim under the ADA.
He also claimed retaliation for filing
the charge with OCR at HHS, but such
retaliation would not be actionable under
Title VII, whose retaliation provisions
relate only to discrimination because
of race or color, sex, religion or national
origin. “I agree with Defendants,” wrote
Broderick, “and find that Plaintiff’s Title
VII sexual orientation and stereotypical
animus claims must be dismissed since
those claims were not pled in the EEOC
Charge and are not reasonably related to
the allegations contained in that charge.
Plaintiff did not allege claims for
clearly stated in his EEOC Charge relating to sex/sexual orientation or stereotypical animus.
In his EEOC Charge, Plaintiff indicated
that his employment discrimination
claim was being filed under both Title
VII and the Americans with Disabilities
Act and he selected the following two
options as the bases for discrimination:
‘Disability’ and ‘Retaliation.’ Plaintiff
did not check the box identifying ‘sex’
or ‘other’ which were plainly-marked
options on the EEOC Charge. Critically,
with regard to the substance of the
assertions in the EEOC Charge, Plaintiff
did not allege any facts that would have
given the EEOC notice to investigate
any claims based on Plaintiff’s sex or sexual orientation. Indeed, under the most favorable reading of the EEOC Charge, Plaintiff’s claims allege only that he was terminated in retaliation for lodging a HIPAA complaint. Plaintiff’s EEOC Charge does not mention Plaintiff’s sexual orientation or that Dellosso learned that Plaintiff had refused an HIV test. Rather, Plaintiff’s argument solely alleges that ‘Village Care engaged in unlawful employment practices . . . by discriminating against [Plaintiff] . . . because he opposed the unlawful employment practices engaged by his Employer including violating his HIPAA rights.” For this reason, I find that Plaintiff’s Title VII claims based on sex/sexual orientation and stereotypical animus asserted in the Third Amended Complaint are not reasonably related to the allegations contained in Plaintiff’s EEOC Charge . . . Accordingly, Plaintiff’s Title VII claims are dismissed for failure to exhaust administrative remedies.” The court also declined to retain jurisdiction over Toulouse’s state and local law claims. For some context, it is important to reiterate that at the time Toulouse was filing his EEOC Charge on November 12, 2014, the EEOC had not yet issued its first decision recognizing sexual orientation claims under Title VII, and 2nd Circuit precedents would have precluded a district court from accepting a sexual orientation claim under Title VII and largely ruled out the possibility of asserting a sex stereotyping claim based solely on a plaintiff’s sexual orientation. Although the court’s opinion indicates that Toulouse is represented by Julio Enrique Portilla, there is no indication in the opinion whether he was represented or advised by counsel at the time he filed his Charge with the EEOC; at that time, however, competent advice could have suggested avoiding mentioning sexual orientation in his EEOC charge, since the agency had not recognized the viability of sexual orientation claims and some district judges within the 2nd Circuit in those days would have automatically dismissed a sex discrimination claim by a gay plaintiff if there was even a hint in their pleadings that the discrimination they suffered was actually due to their sexual orientation. So Toulouse, whose factual allegations would suggest a slam-dunk victory under Title VII in the 2nd Circuit today, appears to be a casualty of a legal time warp. Broderick mentions having dismissed “all of Plaintiff’s claims over which I had original jurisdiction early in this litigation,” so at this point only the Title VII claims remained to be dealt with. Broderick ends the opinion by directing the Clerk of Court to “enter judgment for Defendants and close the case.” Toulouse might attempt to appeal this dismissal to the 2nd Circuit, arguing that his failure to exhaust administrative remedies should be equitably excused in light of the state of 2nd Circuit and EEOC case law at the time he filed his EEOC charge, but the requirement to exhaust administrative remedies is statutory and it is unclear how the 2nd Circuit would react to such an argument. Perhaps it would be persuaded by the egregious facts related in Toulouse’s complaint.

NEW YORK – Lambda Legal announced a settlement of a lawsuit it filed on behalf of Thomas Hamm against the city of New York and various Corrections officials and officers, Hamm v. City of New York, Case No. 1:15-cv-06238-JPO (S.D.N.Y., Settlement Stipulation filed Sept. 10, 2018), stemming from a severe beating that Hamm, an out gay man, suffered at the hands of Corrections personnel while visiting his partner at Rikers Island. The factual allegations in the complaint suggest disgusting, homophobic statements and actions by Corrections personnel, who were offended by seeing Hamm embrace his same-sex partner in the same manner that other visitors were embracing opposite-sex partners. When Hamm left after the visit, he was viciously attacked by officers, suffering serious injuries, without any provocation on his part, and was falsely charged with third-degree assault and second-degree harassment, charges that were subsequently dismissed. In a press release issued by Lambda on September 12 announcing the settlement, Hamm stated: “I went to visit my partner but ended up being harassed and assaulted in the visitors’ room by correction officers at Rikers because I am gay. They beat me quite severely that day. I will carry the physical scars from the facial fractures forever, but the larger scars of discrimination and anti-gay violence are what I hope to heal – or being to heal – as a result of this settlement. I do not want anyone else to ever suffer this type of abuse at the hands of official New York City personnel, security or staff. As a New Yorker, I stand up for everyone in the hopes that this will not happen again.” Under the settlement, the City Law Department agreed that the City would pay $280,000 to Hamm to settle the case, in return for a release of all defendants from liability, “except for the claims related to plaintiff’s arrest on January 6, 2017, for criminal possession of a controlled substance in the seventh degree, from the beginning of the world to the date of the General Releases, including claims for costs, expenses and attorneys’ fees.” The settlement stipulation contains the usual statement that it not be deemed an admission by defendants that they violated plaintiff’s rights, and “nothing herein shall be deemed to constitute a policy or practice of the City of New York or any agency thereof.” The settlement includes a requirement that the City state on the record that its policy is to treat all visitors to DOC facilities equally regardless of race, gender, sexual orientation or gender identity,” and that instructions to this effect be provided to DOC officers at Rikers Island. There is no indication in Lambda’s press release that the
Corrections officers who administered the beating to Hamm have been disciplined by the Department. Lambda Legal Senior Attorney Omar Gonzalez-Pagan, Staff Attorney Richard Saenz, and cooperating attorney David B. Rankin, a partner at Beldock Levine & Hoffman LLP, served as counsel to Hamm.

**OHIO** – In a very procedurally complicated case, the Ohio 7th Appellate District Court of Appeal found that the Mahoning County Court of Common Pleas did not abuse its discretion in granting custody of minor children to their maternal grandparents. *In the Matter of J.R.P. and J.A.P., Alleged Dependent Children*, 2018-Ohio-3938, 2018 Ohio App. LEXIS 4303, 2018 WL 4677520 (Sept. 27, 2018). Yes, you read that correctly. In this case where an administrative determination was made that the children should be removed from the custody of their biological parents, who proved incapable of caring for them responsibly, the trial court ultimately determined that as between a married heterosexual couple, one of whom is a cousin of the children’s biological father, and another married couple, one of whom is the children’s maternal grandfather and the other is grandfather’s husband, the trial court appropriately exercised discretion to award custody to the gay grandparents. Ultimately, when all the facts are placed on the table, the decision seems profoundly correct, regardless of any general views one might hold about the parental competence of gay people, because these kids have medical and psychological problems that the heterosexual couple – which had temporary custody for an extended period of time – seemed unwilling to recognize and deal with, while the grandparent and his husband, once they obtained custody, addressed promptly and effectively. Extended litigation in the trial court focused on the views of the guardian ad litem and the standard to be applied in this custody dispute between non-parents. Ultimately, the trial judge decided to apply a best interest of the child standard, as a decision had already been made, appropriately, that the biological parents’ parental status should be terminated, and the maternal grandmother, who had custody for some time, became ill and unable to continue in that role. Other factors weighing in favor of the maternal grandfathers included that they had custody of other siblings of the minor children in question, and that if “family reunification” was a consideration, they also had a continuing relationship with their daughter, the children’s biological mother. The full story of the litigation is too complex and extended to be recounted here, but anybody with an interested in complicated family law stories might well seek out the opinion for the unanimous panel by Judge Cheryl L. Waite.

**PENNSYLVANIA** – The Superior Court of Pennsylvania, an intermediate appellate court, affirmed a ruling by the Bucks County Common Pleas Court in an unusual custody dispute between the two biological mothers of twins, *L.M. v. C. McG.*, 2018 Pa. Super. Unpub. LEXIS 3625, 2018 WL 4656473 (Sept. 28, 2018). One mother is a transgender woman who had banked her sperm prior to transition, the sperm then being used to impregnate her cisgender female partner, who bore the twins, such that, as Judge Jack A. Panella wrote for the unanimous panel, “both mothers are thus the biological parents of Children.” The twins were born in April 2010, but the parents separated midyear through 2011, and L.M., the cisgender mother, filed a petition for custody. After a hearing in December 2011, the trial court entered a temporary shared custody order, memorializing the parties’ agreement to undergo a private custody evaluation by a psychologist, who submitted to the court a 75-page custody evaluation report in October 2012, which was based on “extensive interviews of nineteen individuals, including four interviews of the parties, and six psychological tests administered to L.M. and C. McG.,” the two mothers. The court does not favor the reader with a summary of the psychologist’s findings and recommendations. In February 2013, L.M. notified C. McG. of her proposed relocation to another part of the state, which ended up being the cause of much litigation (fourteen court hearings) and even a brief period where L.M. served ten days in the Bucks County jail for contempt of a court order. Ultimately, the trial judge, after considering the psychologist’s report and making extensive findings of fact on the record, concluded that shared custody remained desirable, permitting one relocation by L.M. (who eventually relocated a second time, to Watchung, New Jersey, without court permission while the issue of relocation was pending on the court’s docket). A final order was not entered until July 2017, when the trial court read into the record an order providing for shared legal custody, primary physical custody with C. McG. during the school year, partial physical custody with L.M. two weekends a month during the school year, and primary physical custody and visitation flipped during summer vacation to L.M. L.M. was required to provide all the transportation involved in getting the kids between Watchung, N.J., and New Hope, Pa., which seems fair since she is the one who insisted on relocating. The court refused to reconsider this order on L.M.’s motion and there ensued complicated legal maneuvering, including a request for a writ of mandamus from the Pennsylvania Supreme Court to order the trial court to dispose of L.M.’s “request to relocate” which went nowhere. L.M. also tried to get the trial judge to recuse, but that was denied twice. In appealing the trial judge’s final order, L.M. asked the
CIVIL LITIGATION notes

Superior Court to do what appellate courts almost never do in such cases: to override the credibility determinations and fact-finding of the trial court, where the standard of review is abuse of discretion. Judge Panella’s opinion rips through all the grounds raised by L.M. for attacking the trial court’s order, but the court did not address her issues on the merits; “Here,” wrote Panella, “L.M.’s failure to develop her arguments, cite to pertinent portions of the record to support her claims, or provide legal authority to support her averments, precludes us from review of her issues, and results in the waiver of her claims.” Part of the problem here is that the 14 hearings generated a voluminous testimonial record, but apparently L.M.’s appeal provided no help to the court by citations to particular parts of the record to support her arguments. “While all appellants are required to make appropriate references to the record,” wrote Panella, “this lack is particularly egregious considering the voluminous nature of the notes of testimony.” The court quoted extensively from the trial court’s statement concerning the various factors to consider in a custody determination between legal parents, which showed that the trial judge ultimately concluded that both women were capable parents who loved and provided good parenting to the children, thus supporting the shared parenting decision despite the tensions that had arisen between them (undoubtedly complicated by one of them forming an attachment to a new partner). The early LEXIS print of this opinion that we had to work with at deadline for this issue of Law Notes did not identify counsel for the parties, although an award of attorneys’ fees is mentioned at one point. Reading the opinion is like listening to a veteran trial lawyer telling a war story about a case that dragged on through years of hearings, motions, appeals, and dealing with contentious clients, only to end up approximately where they started.

Pennsylvania – In **Harrison-Harper v. Nike, Inc.**, 2018 U.S. Dist. LEXIS 163904, 2018 WL 4614158 (E.D. Pa., Sept. 24, 2018), a lesbian who was employed as a supervisor in a Converse retail store complained that her discharged stemmed from sexual harassment of her by a female subordinate, whom she believed to be straight. The subordinate came on to her verbally and made a variety of comments expressing envy of the plaintiff, and remarking about her former partner and various other allusions to social activities that irritated and embarrassed the plaintiff, who ultimately protested to management. She claims that the result of her protest was retaliation, naturally. (To judge by the cases we read, employers have a hard time restraining their supervisors and managers from retaliation against employees who complain internally about discrimination, which may explain why so many retaliation cases survive pretrial motions even when the underlying discrimination charges are dismissed.) At any rate, Judge Mitchell S. Goldberg granted the employer’s motion for summary judgment on both claims, finding that the alleged “harassment” was insufficiently severe or pervasive to adversely affect the plaintiff’s terms and conditions of employment, and finding that the factual pleading underlying the retaliation claim was insufficient to show causation. The plaintiff is represented by David M. Koller of Koller Law PC, Philadelphia.

South Carolina – Can a plaintiff within the jurisdiction of the 4th Circuit assert a sexual orientation discrimination claim under Title VII? Most district courts would say “no” based on dicta in **Wrightson v. Pizza Hut of America, Inc.**, 99 F.3d 138 (4th Cir. 1996). On that basis, U.S. District Judge R. Bryan Harwell accepted a magistrate judge’s recommendation to dismiss Bennett’s sexual orientation discrimination claim. **Bennett v. Wilson Senior Care, Inc.**, 2018 U.S. Dist. LEXIS 158633, 2018 WL 4443118 (D.S.C., Florence Div., Sept. 18, 2018). However, Judge Harwell rejected the magistrate judge’s recommendation to dismiss Bennett’s Title VII sex discrimination and retaliation claims, finding that her factual allegations were sufficient to support both claims, applying the notice pleading standard under FRCP 8. As part of her allegations, for example, Bennett, a lesbian, asserted that she was being subjected to camera surveillance by the employer that was not being used to surveille any male employees. She alleged, also, that she was subjected to a hostile environment, but the court found that her factual allegations fell short of the kind of “severe or pervasive” harassment necessary to state such a claim under Title VII. Her wrongful discharge claim asserted that the employer’s explanation that she was “not a good fit” for the company was pretext for discriminatory and retaliatory discharge. The court upheld the magistrate judge’s denial of permission to file an amended complaint, finding that the original complaint was sufficient to survive the motion to dismiss. Bennett is represented by Pheobe A. Clark of Wukela Law Firm, Florence, SC.

South Carolina – In another decision by U.S. District Judge R. Bryan Harwell (see immediately above), a self-identified non-gay man, Henry Allen Banks, Jr., suffered dismissal of his defamation suit against his former employer, Perdue Farms, Inc., seeking to hold Perdue liable for Banks’ constructive discharge due to pervasive rumors, started by a company supervisor, that Banks was gay. **Banks v. Perdue Farms, Inc.**, 2018 U.S. Dist. LEXIS 153738, 2018 WL 4297867 (D.S.C., Florence Div., Sept. 10, 2018). Banks was hired as a truck driver in February 2015 and was promoted to be a driver trainer. He alleges that
he began experiencing problems when one of his supervisors, Donald Duncan, warned one of his trainees in February 2017 that Banks “had sugar running through his veins” and that “he bats for the other team.” Banks reported these “defamatory” comments to the company, which immediately terminated Duncan, but Banks claims that the defamatory statement continued to be made by other Perdue employees after Duncan’s termination. One of his co-workers, David Bradley, “allegedly addressed Plaintiff with demeaning slurs and sent a highly offensive picture to Plaintiff’s cell phone after Duncan’s termination implying that Plaintiff would perform sexual acts on a male in exchange for money,” wrote Harwell, with becoming delicacy for a federal judge. “Plaintiff alleges that Perdue’s employees discussed whether Plaintiff was a homosexual when Plaintiff was present and made Plaintiff feel unwelcome in the workplace. After enduring more than two months of alleged false statements and harassment, Plaintiff resigned from his employment at Perdue and accepted a truck driving position with another company for less pay and fewer benefits.” Represented by James Lewis Cromer, of Cromer Babb Porter and Hicks, Columbia, SC, Banks filed a defamation suit against Perdue, which filed a motion to dismiss. Perdue successfully argued that it could not be held vicariously liable for alleged defamatory statements about Banks by a supervisor and co-workers. Judge Harwell agreed, finding that in order for the employer to be held liable, the plaintiff had the burden to show that the “agent” uttering the defamatory statements “was acting within the scope of his employment and in the actual performance of the duties of the corporation concerning the subject matter of the slander,” and that Banks had failed to allege facts supporting such a conclusion. It strikes us that Banks might have had a better shot going to the EEOC and alleging hostile environment sexual harassment by the supervisor and co-workers. Although district courts in the 4th Circuit have rejected anything that sounds like a sexual orientation harassment claim based on dicta in Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138 (4th Cir. 1996), if Banks could plausibly allege that these rumors about his sexual orientation were sparked by supervisors and co-workers perceiving Banks as failing to comport with male gender stereotypes, he might have a case under Title VII, as Judge Harwell construed it in refusing to entirely dismiss the complaint in Bennett (above).

VIRGINIA — Lambda Legal announced that U.S. District Judge Leonie Brinkema rejected the government’s motion to dismiss Lambda’s case challenging the Defense Department’s new “Deploy or Get Out!” directive, which has been used to end the military careers of people living with HIV. The policy was announced to go into effect on October 1. Lambda filed suit on behalf of Nicholas Harrison, and suit was also filed by OutServe-SLDN, seeks to exempt HIV-positive service members whose treatment makes them qualified to serve because there is not good reason for the newly-announced policy, under which personnel who cannot deploy overseas for more than 12 consecutive months for any reason must be discharged. “Even though the court must give due deference to the military,” said Brinkema in ruling from the bench, “that doesn’t mean the military is immune from a court’s review. I’m going to let this case go forward.” At the hearing, Brinkema stated that Harrison’s health appeared to be fine, apart from his HIV infection, for which he takes a daily pill. The law school had paid for his legal education so that he could become a JAG officer. “Let’s face it,” said Brinkema. The military invested significant money in this man, and he’s already served the country,” so “there has to be a good reason why Mr. Harrison is in the position he is in.” Lambda Legal Press Release, Sept. 15; BloombergLaw Daily Labor Report, Sept. 14.

CRIMINAL LITIGATION NOTES
By Arthur S. Leonard

MASSACHUSETTS — The Appeals Court of Massachusetts ordered a remand for resentencing in an anti-gay hate crime case, finding that the evidence did not support the trial court’s conclusions about the degree of seriousness of the victim’s injuries. Commonwealth v. Sudler, 2018 Mass. App. LEXIS 131, 2018 WL 4656256 (Sept. 28, 2018). Judge Eric Neyman does a good job for the panel in providing a descriptive account of the factual record concerning defendant Steven Sudler’s assault on the victim, which involved cutting the victim’s fingers with a knife during a physical confrontation after Sudler had repeatedly called the victim a “faggot” and, at one point, said “I hate you South Boston niggers.” (From the context of defendant and victim both being African-American men, it is clear that this remark was territorial,
not racial.) This unfolded in South Boston on the evening of August 3, 2014, when the victim was headed to the Andrew subway station to meet a friend. The victim identifies as bisexual, but obviously was perceived as gay by the defendant. Ultimately, the victim did get his own back; when Sudler renewed the confrontation and “launched” toward the victim, the victim, also armed with a knife, “stabbed the defendant in the shoulder.” A woman who had also been hanging with defendant and his friend (who was also convicted for his part in the fracas), grabbed some of the victim’s belongings and ran, chased by the victim, who stabbed her on the shoulder in “the ensuing scuffle.” Police and EMS arrived on the scene, and victim was critical of the EMS people, because they “did not offer him antibiotics or any other services,” wrote Neyman. “All they did was basically give him a Band Aid. That was basically it,” quoting from the record. There was plenty of testimony corroborating the victim’s account of what happened, and no mistake in convicting the defendant under the state’s intimidation statute, commonly referred to as the hate crime law. The problem was with the sentencing, since the defendant claimed on appeal to have been over-sentenced based on the trial court’s determination that the victim’s wounds were more serious than they turned out to be. “We conclude that the evidence was insufficient to support the defendant’s conviction under Sec. 39 [which requires bodily injury defined as a “substantial impairment of the physical condition”]. However, the court found that the prosecution had presented “abundant evidence to prove the lesser included offense of assault or battery with intent to intimidate,” so a remand for resentencing on the lesser included offense was appropriate. The appeals court rejected the defendant’s claim that the trial court erred in letting the prosecution exercise certain peremptory challenges to prospective jurors, accepting the prosecutor’s reliance on age as a factor in determining whom to exclude, as age is not a prohibited ground for a peremptory. The prosecutor preferred not to have teenagers on the jury, perhaps thinking that teenagers would consider this kind of knife scuffle to be no big deal.

Texas – A brief cautionary tale, stemming from the unsuccessful appeal of a murder conviction in Harmon v. State of Texas, 2018 Tex. App. LEXIS 7818 (9th Dist. Ct. App., Sept. 26, 2018). We see cases like this from time to time, often enough to suggest it is a recurring trope. Some men out to make some money used a phone app to set up a faux “homosexual encounter” between one of the men and an unsuspecting horny gay man, the victim in this case. The gay man comes to the designated apartment for the sexual encounter, and once he has disrobed in the bedroom with his “date,” the date texts his confederates who enter the room, BB gun at the ready to rob the victim. The victim puts up a bit of a struggle, is struck on the head several times with the BB gun. “Surrenders” and collapses to the floor, one of the men starts to tie him up with veterinarian tape (the kind that one of the men had access to because of his job), and ultimately the victim dies from strangulation. There was no plan to murder the victim, just to rob him, but evidently these young men hadn’t planned out what to do if he resisted, and they responded spontaneously and recklessly, in a panicky frenzy. They loaded the victim’s body into a car and left it out in a field, but their driver home, the appellant here, was too excited and was speeding, so they got stopped by the police and the driver was arrested on outstanding warrants. The passengers continued home to clean out the apartment of incriminating things. But ultimately the plot collapsed, somebody talked to the police, the body was found, and the men were prosecuted. This opinion concerns the appeal of one of the confederates, who was sentenced to 45 years, who was the one identified with the vet tape and who the jury apparently found was the one whose actions led to the strangulation of the victim (even if murder was not intended). On appeal he was claiming that the court inappropriately instructed the jury regarding the testimony of the other confederate, who allegedly initiated the violent response to the victim’s resistance and then turned state’s evidence against the appellant. But all that is for criminal law fans to read for themselves. Our purpose for including this case in Law Notes is specifically to sound the cautionary note about sex hook-ups arranged through apps.

California – Thompson v. Cagle, 2018 U.S. Dist. LEXIS 163444, 2018 WL 4586378 (E.D. Calif., September 24, 2018), concerns the complaint of heterosexual inmate Wayne Thompson that he and other laundry workers in a state prison were objectified and called “Chippendales” by the male civilian supervisor when they changed clothes to work in the laundry. There are no allegations of physical contact, extortion of sex, or other aggravating circumstances – other than a claim that Thompson was “stigmatized” for complaining. Thompson says he should not have been forced to work supervised by a “known homosexual,” who makes “cat calls.” U.S. Magistrate Judge Erica P. Grosjean, screening the complaint, surveys the law in the Ninth Circuit on verbal sexual harassment of prisoners.
and finds nothing to support an Eighth Amendment case on these facts. The Circuit has not adopted the “verbal abuse” test used in some circuits, citing Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004); see also Somers v. Thurman, 109 F.3d 614, 624 (9th Cir. 1997) (“To hold that gawking, pointing, and joking violates the prohibition against cruel and unusual punishment would trivialize the objective component of the Eighth Amendment test and render it absurd.”). In any event, there is no “+” alleged here. Judge Grosjean gave Thompson 30 days to file an amended complaint that states a claim, in default of which she recommends dismissal. In general, most prisoners must endure sexist, racist, anti-religious (fill in the blank), and LGBT-phobic remarks – or their opposite: “come hither” – so long as they are not accompanied by action. The pages of Law Notes are filled with cases alleging far worse “legal” verbal abuse directed at LGBT inmates than that alleged by Thompson, with no civil rights violation. Judge Grosjean wrote that Thompson could try to assert a First Amendment retaliation claim for his “stigmatized” allegation, if he could in good faith meet the standards of Rhodes v. Robinson, 408 F.3d 559, 567-8 (9th Cir. 2005).

CALIFORNIA – The legal concept that a court should usually “apply the law in effect at the time it renders its decision” – Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974) – is as old as the Republic. Accord, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). It has particular weight when injunctive relief is sought – and it was recently applied by the Supreme Court in a transgender student case in Gloucester County School Board v. G.G., 137 S. Ct. 1239 (2017) (vacating judgment and remanding for reconsideration “in light of the guidance document” newly issued by the Departments of Education and Justice regarding federal policy). GG was not told he had to file a new case from scratch. This is what U.S. Magistrate Judge Jennifer L. Thurston recommended in Shabazz v. Farrell, 2018 U.S. Dist. LEXIS 163463, 2018 WL 4616262 (E.D. Calif., September 24, 2018). Shabazz, a transgender inmate, has been seeking appropriate triadic medical care (including hormones, feminizing products and treatment, and surgery) in the California prison system since at least 2013. In 2015, she filed a federal civil rights suit for declaratory and injunctive relief. Law Notes covered earlier development in the case in “Federal District Court Adopts Magistrate Recommendation Allowing Eighth Amendment Challenges to California’s Inmate Transgender Rules,” regarding Shabazz v. Farrell, 2017 U.S. Dist. LEXIS 156661 (E.D. Calif., September 25, 2017) (reported October 2017 at page 404), which also discussed California’s adoption of new regulations on transgender inmate care as a result of the Quine litigation. That previous federal magistrate appointed counsel for Shabazz, and new Magistrate Judge Thurston considers whether that counsel may file a second amended complaint. Judge Thurston recommends denial of leave to amend. The proposed amended pleading names 29 defendants, as opposed to 5 in the earlier complaint, and seeks to update Shabazz’ saga and the changes in regulations and their application. Because Shabazz was denied certain treatments and feminizing products under the “old policy” and complains about continuing denials under the post-Quine “new policy,” Judge Thurston analyzes the motion as a “Supplemental Pleading” under F.R.C.P. 15(d), treating the denials as subsequent “events” rather than application of new law. She then considers whether the new defendants are “necessary” for relief under F.R.C.P. 19(a) and finds that they are not, moving to F.R.C.P. 20 (permissive joinder), Judge Thurston recommends that all leave to amend be denied, because the claims against the new defendants raise different questions of law and fact, primarily because Shabazz is now being denied treatment under the “new policy.” This is circular. If the court is to apply the law in effect when it renders its decision, it should not deny amendment because the law has changed. Judge Thurston attempts to blunt the effect of this recommendation by dropping a footnote: “[O]f course, the plaintiff may file a new action and request that it be related to this current action, if appropriate.” In another footnote, Judge Thurston writes that she did not consider other F.R.C.P. 15 amendment factors generally because she deemed the joinder recommendations to be “dispositive.” This seems backwards, since the court must necessarily assess the “new policy” on a continuing claim for injunctive relief. Counsel may have over-pleaded the case, filing three versions of its proposed second amended complaint and suing each member of each committee handling transgender issues and many of their subordinates – but this is due in this writer’s opinion to California’s repeated modification of its transgender inmate treatment rules and its adding of layers of decision-makers. Judge Thurston’s recommendation that the entire second amended complaint be scuttled uses a meat cleaver when a scalpel was needed. Judge Thurston does not express an opinion as to whether Shabazz must re-exhaust administrative remedies under the Prison Litigation Reform Act [PLRA] before filing a new case, but she finds that exhaustion was sufficient for the first amended complaint to proceed under the “old policy” for both Eighth Amendment and Equal Protection claims, even though Shabazz’s grievances did not mention the Equal Protection Clause. It was sufficient because the nature of the grieved subject was clear, under Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (intent of grievance exhaustion is to “alert the prison to the nature of the wrong for which redress is sought”).
Judge Thurston recommended denial of defendants’ motion for summary judgment on this point, but she did not grant Shabazz partial summary judgment either, as she could have under F.R.C.P. 56(d)(1). Thus, the recommendation is to hold a trial on exhaustion and then proceed to determine the need for injunctive relief under rules that are no longer in effect. Hopefully, the district judge can clean up this mess. Shabazz is represented by Carter Capps White from King Hall Civil Rights Clinic, University of California, Davis.

HAWAII – Chief U.S. District Judge J. Michael Seabright dismissed pro se gay inmate Robert Keaumipuni Low, Jr.’s first amended complaint for failure to state a claim in Low v. Bartolotti, 2018 U.S. Dist. LEXIS 5155503, 2018 WL 4354294 (D. Haw., September 12, 2018). Low alleged that an officer made homophobic remarks against him over a loudspeaker at a Maui jail when he called Low to medical for an appointment, saying: “Low, swing low . . . it’s time for your anal probe.” Judge Seabright does not mention it, but the complaint says the medical visit had nothing to do with an anal examination. Low says others overheard the remarks and that the remarks caused him severe emotional distress. Judge Seabright observes that Low already openly identified as gay, so the remarks did not “out” him. Moreover, the remarks were unaccompanied by any actual threats from others and were a single incident that is not actionable. Judge Seabright declines to adjudicate any Eighth Amendment claim because Low did not replead it in the amended complaint, although it would seem that the remarks would not satisfy even the “verbal abuse”4 theory adopted in some circuits – but not the Ninth Circuit – see Austin v. Terhune, 367 F.3d 1167, 1171-72 (9th Cir. 2004) (dismissing allegations of “mere verbal sexual harassment”). Judge Seabright evaluated the claim only under the Equal Protection Clause, finding the remark not necessarily a “slur” on Low’s sexual orientation (as opposed to a play on his name) – even though Low perceived it as a slur. Low attached to his complaint a Prisoner Rape Elimination Act (“PREA”) report that seemed to contribute to his undoing. It found the allegations “unsubstantiated,” but it also documented that Low was followed for two three-month intervals for any evidence of retaliation for making the complaint or any other PREA “concerns.” The report said there were none. Applying “heightened scrutiny” to claims of sexual orientation discrimination per SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 481, 484 (9th Cir. 2014), Judge Seabright nevertheless found proof lacking that the officer intended to deprive Low of Equal Protection or that Low was, in fact, denied anything that other inmates receive on an equal basis. Among other cases, Judge Seabright relied on Vega v. Artus, 610 F. Supp. 2d 185, 209 (N.D.N.Y. 2009) (harassing comments based on perceived homosexuality were insufficient to state a claim of discrimination under the Equal Protection Clause). Because Low had two chances to state a claim and it appeared to Judge Seabright that further amendment would be futile, he dismissed with prejudice and asserted a “strike” under the Prison Litigation Reform Act.

KENTUCKY – Federal inmate Pikeville Rashod L. James, pro se, sued a contractual health care provider for the Federal Bureau of Prisons because he was allegedly given an HIV test without his consent while hospitalized, and he was discharged without medical clearance and denied access to his medical records, in James v. Highlands Reg’l Med. Ctr., 2018 U.S. Dist. LEXIS 158994 (E.D. Ky., September 18, 2018). U.S. District Judge Gregory F. Van Tatenhove, screening the case, dismissed it for failure to state a claim under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) – a federal “equivalent” to 42 U.S.C. § 1983 – because the Supreme Court has ruled that there is no implied cause of action for private correctional companies providing services to federal prisoners, as there is for private providers for state and local prisoners. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69-74 (2001); see also Minneci v. Pollard, 565 U.S. 118 (2012) (extending Malesko to employees of private companies). Thus, Judge Van Tatenhove correctly states the current law of deliberate indifference: it applies to behavior of private contractors to state and local corrections but not to federal contractors. This writer has not yet seen a case wrestling with the issue of federal prisoners temporarily held under detainees in state or local facilities (or vice versa); but, other than a manifestation of the majority of the Supreme Court’s hostility to Bivens remedies in general, it has little theoretical basis. Judge Van Tatenhove also found that James failed to exhaust his administrative remedies under the Prison Litigation Reform Act. He does not address whether there is anything here other than malpractice in the first place.

MICHIGAN – This is pro se transgender inmate Floyd E. Kohn’s fourth civil rights lawsuit against Michigan correctional facilities, according to her Complaint in PACER. The first case was dismissed for failure to exhaust administrative remedies under the Prison Litigation Reform Act. Kohn lost summary judgment on the second case. The third case, alleging failure to protect her from harm and sexual harassment by officers and staff, is still pending. The current case, Kohn v. Unknown Brown, 2018 U.S. Dist. LEXIS 159499, 2018 WL 4475413 (W.D. Mich., September 19, 2018), also alleging failure to protect her from harm, was dismissed on screening for failure to state a claim by U.S.
District Judge Paul L. Maloney. In this case, Kohn alleges a severe beating in the mess hall, at a time when it was left completely unguarded by officers who were watching the Superbowl with their Lieutenant. Kohn names one officer and the Lieutenant; the other defendants are John Does. In her brief Complaint, broadly read, she raises three theories: (1) given her risk score under the Prison Rape Elimination Act, she should not have been in general population at the time of the attack; (2) the attack occurred because of the absence of security as a result of the deliberate indifference of the officers who left their posts to watch television and were permitted to do so by their supervisor, who was with them; and (3) her severe injuries would not have been so extensive if the officers had been present to have intervened, even if they could not reasonably have prevented the initiation of attack. Judge Maloney addresses only the second and third points, lumping them together and finding the officers’ absence from their posts to have been “at best” a claim of negligence and therefore not actionable under the Eighth Amendment and Farmer v. Brennan, 511 U.S. 825, 832 (1994). Judge Maloney gives passing reference to Kohn’s individual risk allegations by writing: “Plaintiff contends that he is especially susceptible to attack because he has feminine physical characteristics, including breasts.” (Emphasis added twice.) There is no reference to the third case pending in the same district court as comprising part of the risk factors of which defendants were on notice, although Kohn mentions it as such. (Judge Maloney does assess the other earlier cases that were dismissed for purposes of writing that this dismissal may count as Kohn’s “third strike.”) According to the Complaint, Kohn was placed in protective custody after the attack and some investigation occurred, although the summary screening dismissal did not require that defendants respond in any way or produce paperwork from the investigation. Kohn says she was told she should have “fought back.” Neither the Complaint nor the opinion says whether there was a video camera in the mess hall, but Kohn alleges that the attack continued for a substantial time on Superbowl Sunday in 2018. There undoubtedly are records. As to the deliberate total understaffing for the length of a football game, Kohn wrote: “there is nothing reasonable about not being there at all.” The Supreme Court has agreed, twice in one case, finding deliberate indifference in health care employee understaffing in Brown v. Plata, 563 U.S. 493 (2011). Even if individual officers may have been “negligent,” the absence of all mess hall officers condoned by their lieutenant rises to deliberate “understaffing”; and it is deliberate indifference to both a known risk to Kohn and to its consequences, given her history. Judge Maloney certified that any appeal would be frivolous. He is an appointee of President George W. Bush, and served as “Special Assistant” to the Michigan Department of Corrections for two years.

NEW YORK – This is a discovery dispute arising from the claims of transgender inmate Jessica Sunderland against officials and medical staff of the Suffolk County Jail and Sheriff’s Office regarding treatment for her gender dysphoria. At issue in Sunderland v. Suffolk County, 2018 U.S. Dist. LEXIS 159196, 2018 WL 4471635 (E.D.N.Y., September 17, 2018), is whether the court should assist plaintiff with discovery by contacting other transgender inmates who have been through the jail. Plaintiff has already received medical records and notices of claim relating to such other individuals, with identifying information redacted. Although filed as a new motion to compel, discovery ended in 2017 on this 2013 case; and U.S. Magistrate Judge A. Kathleen Tomlinson treats the motion as one for reconsideration of her earlier ruling allowing production of the materials with redaction. She finds the standards for reconsideration have not been met, including the failure to cite new case law not available previously. Nevertheless, Judge Tomlinson reviews the merits again. In McEvoy v. Hillsborough County, 2011 WL 1813014, at *1 (D.N.H. May 5, 2011), the court allowed discovery of redacted records of other inmates who underwent detoxification at a New Hampshire jail, with the understanding that identifying information could be sought if a special showing of need could be made. Judge Tomlinson finds that Sunderland’s argument that such special need exists here is belied by the fact that the records produced already show the interaction between medical staff and transgender patients who were granted or denied various treatments; and they are sufficient for arguing the mens rea required by the second arm of the deliberate indifference standard (deliberate indifference to known risk). Judge Tomlinson finds that Sunderland is really trying to manipulate the redaction order to allow her counsel to interview the patients whose identifying information was withheld, which was previously rejected. Judge Tomlinson distinguished two other cases, both involving claims of false arrest of protesters: Daniels v. City of New York, 2001 WL 228091 (S.D.N.Y. Mar. 8, 2001); and Fountain v. City of New York, 2004 WL 1474695 (S.D.N.Y. March 7, 2001). Daniels was pleaded as a class action and the identifiers were sought in part to find the class. Fountain allowed for discovery of redacted arrest records, but they were inadequate to show whether the arrests were invalid – so the court agreed to contact the redacted arrestees to see if they wanted to speak to plaintiff’s counsel. Neither case involved what Judge Tomlinson called more sensitive health records, in which privacy concerns require a different balance. Sunderland is represented by David Bradley Shanies and Joel Abbott
**OHIO** – On July 20, 2018, transgender inmate Dashawn Parker filed a *habeas corpus* petition in the U.S. District Court for the Northern District of Ohio, alleging she was being held in violation of the Constitution because of her lack of treatment for her gender dysphoria. A week later, she filed a civil rights case under 42 U.S.C. § 1983, asserting the same claims and pleading that correction officials merely mock her as “homosexual.” The complaint on its face indicates that she is virulently suicidal. Both cases are assigned to U.S. District Judge Benita Y. Pearson. In *Parker v. Bowen*, 2018 WL 4283042 (N.D. Ohio, September 7, 2018), Judge Pearson dismisses the *habeas* petition as improper, because it raised conditions of confinement, not fact or duration of imprisonment. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). *Habeas corpus* relief is not available to prisoners who are challenging the conditions of their confinement during legal incarceration. *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004). Judge Pearson acknowledges the other case: “The Court notes that Petitioner has also filed a civil rights action in this Court pertaining to conditions of *his* imprisonment. See *Dashawn Parker v. Richard Bowen*, No. 4:18 CV1744 (N.D. Ohio filed July 27, 2018) (Pearson, J.) [emphasis supplied] – but she has done nothing with it. In the civil rights complaint, Parker requests that her damages be paid to her estate if she has killed herself before her case is adjudicated. In this writer’s view, Judge Pearson’s screening the easy dismissal but not screening the civil rights case suggests elevation of docket control over risk to human life.

**PENNNSYLVANIA** – *Pro se* transgender prisoner Lakesha L. Norington, incarcerated in Indiana, filed a civil rights complaint in Pennsylvania, alleging violation of her civil rights concerning conditions in segregation in which she is harassed and strip searched by male officers in *Norington v. Wexford Health Sources, Inc.*, 2018 U.S. Dist. LEXIS 153059 (W.D. Pa., September 6, 2018). Chief U.S. Magistrate Judge Maureen P. Kelly’s Report and Recommendation [*“R & R”*] concludes that her case should be denied in forma pauperis status because she has accumulated “three strikes” under the Prison Litigation Reform Act [*“PLRA”*] and is not in imminent physical danger. Judge Kelly’s R & R concludes that Norington seeks to deceive the court about her strike history by filing in Pennsylvania. (Pennsylvania is apparently the location of the corporate offices of Wexford, one of the contractual providers at the Indiana prison where Norington is incarcerated.) Even if venue were correct, however, Norington cannot overcome her three strikes under the PLRA, and her attempt to conceal them only resulted in their judicial notice. The U.S. District Court for the Northern District of Indiana had already taken the extreme step of enjoining further filings by Norington under *Sloan v. Lesso*, 181 F.3d 857, 859 (7th Cir. 1999), because she owes more than $4,000 in unpaid filing fees (suggesting that she has more than 3 strikes). The R & R found that Norington’s allegations warrant no exception to the three-strikes rule because of “imminent physical danger,” because Norington plead only mental distress without physical danger, as to which the court cited *Sanders v. Melvin*, 873 F.3d 957, 959-60 (7th Cir. 2017) (“Mental deterioration . . . is a psychological rather than a physical problem”). The R & R said that Norington must pay the filing fee or face dismissal. There is no reference to adding the Indiana debt to the tab.

**PENNNSYLVANIA** – This is the fourth time *Law Notes* has written about the case of *pro se* inmate Corey Bracey, whose blood was forcibly drawn to test for HIV and hepatitis-C, when a state court order (possibly erroneous) was based on a statute that referred only to HIV testing. The case has been to the 3rd Circuit, which remanded for a decision on the merits. U.S. Magistrate Judge Martin C. Carlson recommended dismissal in *Bracey v. Huntington County*, 2018 U.S. Dist. LEXIS 119990 (M.D. Pa., July 19, 2018), reported in *Law Notes* last month (September 2018 at page 497). Here, U.S. District Judge Malachy E. Mannion adopts the recommendations on *de novo* review of Bracey’s objections in *Bracey v. Park*, 2018 U.S. Dist. LEXIS 160093 (M.D. Pa., September 19, 2018). Briefly, he finds no violation of substantive or procedural due process, and no violation of a constitutional right to privacy – and, in any event, the defendants are entitled to qualified immunity, since there is no controlling case to put them on notice their conduct was illegal. State claims are dismissed without prejudice. For a more detailed account, see the lengthy summary of the R & R in last months’ issue.

**TENNESSEE** – The events in this case concern the booking of transgender inmate Jessica L. Brown at the Hamilton County (Chattanooga) Jail. In *Brown v. Hamilton County*, 2018 U.S. Dist. LEXIS 161826, 2018 WL 4558465 (E.D. Tenn., September 21, 2018), U.S. District Judge Curtis L. Collier granted summary judgment against Brown on all her claims. Brown was identified as male at birth, but she had completed the third triad of transition (surgery) by the time of her booking, and she had changed her name and common legal records to conform, substituting the first name “Jessica” for her birth name “Jason.” She did not attempt to change her name on prior criminal records or with FBI fingerprint records. Although she presented as a woman, jail officers
booked her as a man and ridiculed her. Eventually, she was placed in the holding cell for women; but she alleges she was threatened by both male and female inmates. She said that a sergeant told her that her sex change was “hot.” Her fingerprints conformed to “Jason” Brown, and a private gossip publication, *Just Busted*, which reports about public arrest records, printed her current picture and former name, effectively outing her as transgender, which caused her embarrassment and employment problems. She sued Hamilton County and “unknown” John Does on the last day before the statute of limitations ran on her civil rights claims. Other than her deposition in September 6, 2017, this writer can find no documentary evidence of her participation in the case in PACER after that date. There is no affidavit from her on file in opposition to summary judgment. She alleged four counts: (1) the unknown defendants demeaned her and placed her in a dangerous situation; (2) gender discrimination by Hamilton County; (3) failure of hiring, training, and supervision practices by Hamilton County; and (4) violation of her right to privacy by Hamilton County. Brown tried to amend her complaint in 2018 by naming the Sheriff and one officer along with other “unknowns.” The defendants opposed the motion as untimely and barred by the statute of limitations. Brown’s attorneys withdrew the motion – so the summary judgment considered only the liability of the “unknowns” and Hamilton County. Judge Collier ruled that no federal case can proceed against “unknowns.” Nevertheless, although the motion to amend was withdrawn, the judge spent considerable time in *dicta* discussing whether an amendment naming John Does could relate back to the date of filing under F.R.C.P. 15(c). He ruled that it could not under clear Sixth Circuit precedent.

[Practice note: Counsel should beware of filing on the last day of the statute of limitations, if they plan on using “John Doe” defendants. For those who wish to examine this issue generally, see Epstein, Annotation, “Propriety of Use of Fictitious Name of Defendant in Federal District Court,” 139 A.L.R. Fed. 554 (2018).] Judge Collier thus dismissed the First Count against the “unknowns.” He construed the second and third counts together, noting few dispositive cases but assuming a constitutional violation for purposes of argument to avoid an “extensive” analysis. That said, the issue was whether Hamilton County was responsible for it under *Monell* theory. Here, the absence of policies and the failure to train or supervise was at issue. Judge Collier found, as a matter of law, that Brown could not show liability of Hamilton County under *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978), based on the isolated acts involved in the single incident surrounding Brown’s booking, citing *Thomas v. City of Chattanooga*, 398 F.3d 426, 433 (6th Cir. 2005). He granted summary judgment against Brown on the hiring, training and supervision claims because of the absence of prior instances that put the County on notice of policy or practice deficiencies. See *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005) (“prior instances of unconstitutional conduct” needed to show “that the County has ignored a history of abuse . . . likely to cause injury”). As to privacy, Brown’s mugshot was public information under Tennessee law, and her former name was used for booking because it matched her fingerprints. Judge Collier found no violation of privacy in these details, noting that they were covered by no shield law, as would be the case for victims, and citing Lee, “Monetizing Shame: Mugshots, Privacy, and the Right to Access,” 70 Rutgers U. L. Rev. 557, 557-58 (2018) (Although “[t]he mass publication of mugshots online permanently stigmatizes millions of Americans with the mark of criminality . . . the majority of states deem mugshots open records under their public records laws, [and] mugshot companies and the press have the constitutional right to publish them”). At least Hamilton County may not so easily escape accountability the next time they treat a transgender person like a space alien, since this opinion has been published online and thus documents the deficiencies of their existing policies sufficiently to put them on notice. Brown is represented by James, James & Joyner, Chatanooga.

**WASHINGTON** – This is a case about consultant misconduct by an outside expert used by the defendant, Washington Department of Corrections, Dr. Stephen Levine, whose name appears in many transgender prisoner cases. After his examination of the transgender plaintiff, Levine contacted a prison psychologist and requested that he ask plaintiff, Nathan Robert Goninan, a/k/a Nonnie M. Lotusflower (who seeks gender affirming surgery), a series of additional questions. These included: “Do you realize that the ACLU has a motive beyond getting you surgery? Why do you think you, in particular, were selected . . .? Do you realize what this lawsuit means for you in terms of more evaluations, deposition by lawyers asking personal questions, trial, appeal of whatever verdict is reached, risk that a verdict will take a long time to be given and that surgery if granted may not occur for another several years? This process builds up your hope for surgery and asks you to be convincingly distressed—suffering from your genitals . . . asks you to exaggerate your distress, and yet it may fail to win in the court. What do you think this would do to your emotional life?” These questions were asked at the behest of defendants’ expert while defendants knew Goninan had counsel and without notice to them. [Note: LEXIS’ “appearances” section in its report of this case incorrectly says that Goninan is “pro se.”] In *Goninan v. Wash. Dep’t of Corrections*, 2018 U.S. Dist. LEXIS 166603, 2018 WL (W.D. Wash., September 26, 2018), U.S. Magistrate Judge J. Richard Creatura.
denied motions for a protective order and sanctions, without prejudice. Judge Creatura found the questions “offending” and “wholly inappropriate.” He also found that Levine’s report – which recommended against surgery for psychological reasons – was finished and that he did not plan to reassess Goninan for two years. Judge Creatura found no present need for a protective order. As to sanctions, he sternly warned the named parties and their counsel (who claimed they had no knowledge that Levine was going to do this or had done it before the motion was made) that they were now on notice to warn their agents and subordinates against any recurrence of such conduct or face future sanctions or protective orders. He specifically noted that in the context of sanctions – unlike liability in general under 42 U.S.C. § 1983 – respondent superior was applicable. Parties and their counsel are responsible for improper conduct by their agents and experts. See Hanshaw Enterprises, Inc. v. Emerald River Development, Inc., 244 F.3d 1128, 1144 (9th Cir. 2001) (upholding sanction against corporation for bad faith acts of its agent). Defendants and defense counsel are now on notice – and so is everyone who reads this report and has to deal with Levine in other cases. There is no in limine discussion by Judge Creatura about Levine’s report. Checking PACER, counsel included a motion to strike sections of Levine’s report that were fruits of the improper questions, but this is not addressed in the opinion – nor is any relief given on the argument that defendants interfered with Goninan’s attorney-client relationship – an issue that has both First Amendment implications in litigation and ethical considerations under the Code of Professional Responsibility. Perhaps the evidentiary question is being bucked to the trial judge; perhaps the ethical question will be heard in another forum – or perhaps counsel has made a tactical decision to allow defendants an impeccable expert rather than risk a new one. PACER search is hampered by inability to see a number of documents filed under seal. Goninan’s counsel have apparently consulted with Dr. Randi Ettner. This writer expects we will hear more about this case. Goninan is represented by the ACLU of Washington and the law firm of Corr, Cronin, Michelson, Baumgardner, Fogg & Moore, LLP, Seattle.

**LEGISLATIVE & ADMINISTRATIVE NOTES**

*By Arthur S. Leonard*

**U.S. DEPARTMENT OF STATE** – Late in September the State Department announced that effective October 1 it was suspending a program adopted by the State Department under Secretary of State Hillary Clinton in 2009, under which same-sex partners of foreign diplomats could obtain a derivative G-4 visa in order to be able to live in the United States with their diplomat partner who was on assignment here from a foreign government or as an employee at the United Nations. As part of its agenda to reverse every pro-gay administrative policy of the Obama Administration, the State Department will no longer issue such visas unless the same-sex couple are legally married. UN-Globe, the organization of LGBT United Nations employees, issued a bulletin to its members on September 28, stating: “If you are a staff member on a G-4 visa in the United States and in a domestic partnership, and your partner is on a derivative G-4 visa, please know that the State Department is now requiring that you be legally married in order to continue to be able to secure a derivative G-4 visa for your partner. The State Department described this as restoring “parity” to its treatment of same-sex and different-sex couples, since the domestic partnership derivative visas were made available only to same-sex couples. UN-Globe advised that those who are “already in New York City” consider going to City Hall and getting married in order that partners can continue to live in the U.S. on the derivative visa. The deadline for marrying to keep the visa is December 31. This change is problematic for diplomats from countries that don’t recognize same-sex marriages, and especially countries where entering into such a marriage elsewhere might subject the people involved to persecution if they return to their home countries. Globe advised consulting lawyers to discuss the tax implications of getting married. The move provoked adverse editorial comment in the press in the United States, nobody being taken in by the “parity” explanation.

**U.S. CONGRESS** – A House-Senate Conference Committee has dropped from the FY 2019 Labor, HHS & Education Appropriations Bill the Aderholt Amendment, which had been added to the bill by the House Appropriations Committee’s Republican majority. The Amendment would have allowed child welfare agencies that receive federal funds to turn away qualified prospective parents based on the agency’s religious beliefs. The bill was initially approved by the House’s Republican majority, as part of their agenda of providing persons and institutions with religious objections to LGBTQ people to discriminate in providing goods and services whenever possible, since the Republican Party is dedicated to reducing LGBT people to the status of second-class citizens as part of the Trump Administration’s goal of establishing a Theocracy in the United States whose Evangelical Christian code will apply to everybody except the President (and perhaps other selected members of the Party who are elected officials and are only “religious for show”). The official policy of the Administration, as evidenced by
revocation of Obama Administration rules and interpretations, is to reduce the Establishment Clause of the First Amendment to a nullity while rendering broad preemptive effect to the Free Exercise Clause of the same Amendment.

CALIFORNIA – Governor Jerry Brown signed AB 2119, making California the first state to explicitly guarantee gender-affirming health care for transgender youth in the state’s foster care system. The measure was introduced by Assemblymember Todd Gloria.

IDAHO – The city of Meridian has become the 14th municipality in Idaho to ban discrimination based on sexual orientation or gender identity, with the City Council voting 4-2 to add these categories to the municipal civil rights ordinance in a vote on September 25. Violations of the ordinance could result in conviction of an “infraction” and a fine of $250. (Some of the other municipalities imposed heftier penalties.) A local pastor, opposing the measure, said it would grant “special rights” to LGBT people. Of course, he would be happy for religious objectors to have “special rights” to discriminate. AP State News, Sept. 26.

NEW JERSEY – The N.J. Education Department has issued guidelines for how schools should comply with a 2017 law that reinforces protection for transgender students, and which specifically prohibits districts from barring transgender students from using bathrooms and locker rooms that match their gender identity, reported American School and University, 2018 WLNR 30142818 (Sept. 29).

NEW YORK – The New York City Council voted 41-6 on September 12 to add an “x” category to birth certificates for people who are non-binary. It is unlikely that newborns or their parents are going to invoke this provision; the intention was to allow people to change the gender marker recorded at birth based on observation of genitalia to accord with the gender identity that a person claims later in life. Those wishing to get a new birth certificate with the “x” gender marking can do so by presenting a personal affidavit concerning their gender identity, and will not need a letter from a doctor or an affidavit from a licensed health care practitioner. The bill was sponsored by out Council Speaker Corey Johnson.

OHIO – The Cuyahoga County Council voted on September 25 to create a commission to enforce a newly-approved ordinance banning discrimination, inter alia, on the basis of sexual orientation and gender identity or expression. The legislation passed on a party-line vote of 8-3. The county’s existing ordinance already prohibited discrimination because of race, color, religion, military status, national origin, disability, age, ancestry, familial status or sex. It covers employment, housing, and public accommodations, including access to public bathrooms and locker rooms. The newly-created County Commission on Human Rights is authorized to impose civil penalties, award attorney fees, and to issue cease and desist orders against discriminatory practices. The enactment makes the county the 20th local jurisdiction in Ohio to protect LGBTQ people from discrimination. State law does not address the issue. The Republican Party of Cuyahoga County opposed the measure, with Chairman Rob Frost testifying that the legislation “tramples religious freedom,” channeling the views of the Trump Administration, which has announced through Attorney General Jeff Sessions that in a series of policy pronouncements that people with religious objections should be free to discriminate against LGBT people.

LAW & SOCIETY NOTES

By Arthur S. Leonard

INTERACT: ADVOCATES FOR INTERSEX YOUTH, LAMBDA LEGAL, and the law firm PROSKAUER ROSE LLP announced publication of the nation’s first intersex-affirming hospital policy guide, corresponding to enactment of the first legislation in the United States (in California) that calls for the creation of clear policies to encourage delaying cosmetic surgical procedures on newborn intersex children.

The administration of CHRISTIAN AZUSA PACIFIC UNIVERSITY sought to accommodate the needs of LGBTQ students on campus by revoking a ban on same-sex relationships. When word of this action by the evangelical Christian institution was publicized in the school’s student newspaper and subsequently in general media as a significant step, there was an outpouring of protest from Christian news outlets, pundits, and some alumni, which persuaded the board of trustees promptly to overrule the administration’s action. Dailynews.com, Sept. 28.

INTERNATIONAL NOTES

By Arthur S. Leonard

AUSTRALIA – Judge Peter Zahra of the New South Wales District Court has sentenced Martin Peter Jaksic to three years in jail for infecting his lover with HIV. According to an Australian Associated Press report of Sept. 26, Jaksic “repeatedly had unprotected sex with his lover, failing to reveal he was HIV positive.” Said Judge Zahra as he pronounced the sentence, “The
offender’s conduct was a gross betrayal of trust and a contemptible and callous disregard for the victim’s life.” Jaksic pleaded guilty in March to “recklessly causing grievous bodily harm” to his then-partner more than six years ago. The judge commented that Jaksic appeared to have been “indifferent to the consequences of his behavior.”

**CANADA** – U Sports, described as the governing body of university athletics in Canada (similar to the NCAA in the U.S.), has announced a transgender policy on September 27 that will allow athletes to compete on teams that correspond with their gender identity. Key to this ruling was a determination that hormone treatments used by transgender people to conform their bodies to their gender identity do not significantly impact athletic performance. This was the conclusion of a 2016 report from the Canadian Centre for Ethics in Sport. The policy will apply only to athletic competition staged under the auspices of U Sports. The policy provides that student athletes are limited to five total years of collegiate competition eligibility, and may only compete on sports teams of one gender during a given academic year. *Red Deer Advocate*, 2018 WLNR 30072954, Sept. 27.

**CHILE** – The Chamber of Deputies approved a measure on September 12 under which person over the age of 18 will be legally allowed to change their name and sex on official identification documents, based on their self-identification. The vote, which followed weeks of debate, was 95-46. Teenagers between the ages of 14 and 18 will be able to register their sexual identities with parental consent or at least one legal representative present, and without parental representation, adolescents can seek judicial intervention. The measure guarantees the right of transgender people to be addressed by public and private institutions according to their self-defined gender, and surgical intervention is not required. President Sebastian Pinera had 30 days to decide whether to approve the measure. Some conservative legislators threatened to mount a challenge in the Constitutional Court. *** The Pinera government was summoned to a meeting with the Inter-American Commission on Human Rights to explain why the country has not implemented marriage equality, despite a commitment to do so that it signed in 2016. The agreement was signed in settlement of a case brought to the Commission by an LGBTI rights group and the predecessor of the present government. Chile is also bound by a 2018 ruling of the Inter-American Court of Human Rights, which opined that the American Convention requires all adhering countries to allow same-sex couples to marry. But the current right-wing government has refused to bring to a vote a bill introduced by the previous government to effectuate this agreement, even though observers contend that the measure could pass both houses of the legislature. *Global Times*, 2018 WLNR 30012332 (Sept. 28).

**CHINA** – Ming Jue (a pseudonym), a schoolteacher in Shandong Province who claims he was discharged for being gay, applied to the local labor dispute arbitration committee for a hearing on his discrimination claim, and the committee accepted the case on September 27. This was reportedly the first labor case filed by a gay teacher in China. Ming said he had worked as a kindergarten teacher in Qingdao for ten years and was dismissed after a parent complained. *Global Times*, 2018 WLNR 30012332 (Sept. 28).

**HONG KONG** – The Hong Kong government, which enjoys some measure of self-government, announced on September 18 that overseas same-sex partners of Hong Kong citizens would qualify for the right to live and work in the city, as a result of a landmark court ruling earlier this year under which a British lesbian was held entitled to reside in Hong Kong with her same-sex partner. Under revised immigration policy which would come into effect on September 19, anyone who had entered into a same-sex civil partnership, same-sex civil union, or same-sex marriage abroad would be eligible to apply for a dependent visa. However, legal marriage in Hong Kong will remain limited to different-sex couples, and the government said there should not be any expectation that the government plans to fully legalize same-sex partnerships among Hong Kong residents. *Timeslive.co.za/news*, Sept. 18.

**ROMANIA** – The Constitutional Court of Romania approved (by vote of 7-2) a proposal to hold a referendum on the definition of family. The vote taking place in October will determine whether the constitution will be amended to adopt a measure initiated by a group calling itself Coalition for Family, which would replace a reference in Article 48.1 to a family as being founded on the “freely consented marriage of the spouses” with a specific reference to one man and one woman. The vote was to be held on October 6 and 7. However, in the meantime the Constitutional Court ruled late in September that same-sex couples should have the same family rights as heterosexuals under the existing constitutional language, and should “benefit from legal and juridical recognition of their rights and obligations.” This came in the context of a ruling by the European Court of Justice that Romania was obligated to recognize the marriage of one of its nationals who married an American while posted in another European Union country that affords marriage equality, at least to the extent that Romania recognizes has a limited civil union status for same-sex
The new Constitutional Court ruling would seem to hold that same-sex couples should enjoy all the rights available to different-sex couples in marriage. If the proposed amendment, which was supported by three million signers of a petition to place it on the ballot, passes, the question will arise whether it creates a clash with Romania’s obligations as a European Union member and an adherent to the European Court of Justice. Complicated! See New York Times, September 28 (Associated Press Report).

PUBLICATIONS NOTED

1. Berman, Mitchell N., Our Principled Constitution, 166 U. Pa. L. Rev. 1325 (May 2018) (Interesting to note that the author says Obergefell — the same-sex marriage case — was not a hard case for the Court, when Chief Justice Roberts, in his dissent, said that the decision had nothing to do with the Constitution, and the ruling was 5-4.)
3. Cahill, Courtney Megan, After Sex, 97 Neb. L. Rev. 1 (2018) (how should the law deal with reproduction without sex?).
7. Hoffer, Douglas J., Regulating the Limits of Speech, 91-Aug. Wis. Law. 36 (July/August 2018) (some discussion of Masterpiece Cakeshop’s failure to address the free speech claim advanced by the baker who refused to make a wedding cake for a same-sex couple).
12. NeJaime, Douglas, and Reva Siegel, Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop, 128 Yale L.J. Forum 201 (September 14, 2018) (“Passages of the majority opinion repudiate longstanding arguments advanced by exemption advocates and instead affirm an approach to public accommodations law that limits religious accommodation to prevent harm to other citizens who do not share the objector’s beliefs.”).

EDITOR’S NOTES

Correction: In the article on the upcoming Supreme Court Term published in the September issue, we misattributed 2nd Circuit Chief Judge Robert Katzmann’s concurring opinion in a three-judge panel ruling dealing with a sexual orientation discrimination claim under Title VII to the wrong case, Zarda v. Altitude Express. The concurrence was filed with the per curiam opinion issued by a different panel of the 2nd Circuit in Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2nd Cir. Mar. 27 2016), a case decided shortly before the panel decision in Zarda. Petitions for rehearing en banc were filed in both cases, but the Circuit granted the petition in Zarda, and Chief Judge Katzmann wrote the opinion for the en banc court, channeling many of the arguments made in his Christiansen concurring opinion. Altitude Express filed a cert petition, which was pending as the new term began on October 1.

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