Summer Wedding Cake is Served
**EXECUTIVE SUMMARY**

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U.S. Supreme Court Grants Certiorari in Oregon Wedding Cake Case, but Remands for “Further Consideration”; Sets Early Argument Date for Title VII Cases

By Arthur S. Leonard

The U.S. Supreme Court granted a petition for a writ of certiorari in Klein v. Oregon Bureau of Labor and Industries, No. 18-547, on June 17, but at the same time vacated the Oregon Court of Appeals decision in the case, 289 Or. App. 507 (Dec. 28, 2017), and remanded the case to that court for “further consideration” in light of the Court’s decision last year in Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018). The Court did not issue any explanation for its ruling, beyond the direction of “further consideration” specifying Masterpiece Cakeshop as the ground for such consideration. Just a few weeks later, the clerk posted October 8 as the hearing date on the dockets for Bostick, Altitude Express, and Harris Funeral Homes, the cases in which the Court takes on the question whether discrimination “because of sex” under Title VII includes sexual orientation and gender identity discrimination claims.

Both Klein and Masterpiece involved the question whether a baker who refuses to make a wedding cake for a same-sex couple has a federal constitutional defense to a discrimination charge in the state administrative and judicial fora. In both Oregon and Colorado, state law forbids discrimination because of sexual orientation in places of public accommodation, and businesses selling wedding cakes are definitely public accommodations under both laws. Without ruling directly on the question presented in Masterpiece, the Supreme Court last year vacated the Colorado Court of Appeals and Colorado Commission rulings based on the Court’s conclusion that the Commission forum was “hostile to religion” as evidenced by statements by two of the Commissioners and “inconsistent” action on a religious discrimination charge by a provocateur who sought unsuccessfully to order anti-gay cakes from other bakers.

It takes at least four votes on the Supreme Court to grant a writ of certiorari, but it takes at least five votes to vacate and remand a lower court ruling. According to its usual practice, the Court did not specify how many justices voted for the cert grant or the “vacate and remand” order.

The issue on remand for the Oregon Court of Appeals appears to be whether some statements made by Brad Avakian, Commissioner of the Oregon Bureau of Labor and Industry (BOLI), evinced the kind of hostility to religion that the Supreme Court identified as problematic in the Masterpiece case.

When Melissa Klein, proprietor of Sweetcakes by Melissa, rejected a wedding cake order from Rachel and Lauren Bowman-Cryer on religious grounds, the women filed complaints with the Oregon Department of Justice and the Bureau of Labor and Industries. The media found the case newsworthy, resulting in interviews with Melissa Klein and her husband in which they sought to justify their action on religious grounds. Commissioner Avakian reacted to the ensuing controversy by posting a statement to his Facebook page and speaking with The Oregonian, a wide-read newspaper in the state.

Avakian’s Facebook post included a link to a television station’s news story about the refusal of service and a statement: “Everyone has a right to their religious beliefs, but that doesn’t mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives.” The Oregonian subsequently quoted Avakian as saying that “everyone is entitled to their own beliefs, but that doesn’t mean that folks have the right to discriminate.”

Under BOLI’s procedures, an administrative law judge (ALJ) holds a hearing and issues a “proposed final order,” to which the parties can file “exceptions” as an appeal to the Commissioner. Before the hearing in this case, the Kleins moved to disqualify Commissioner Avakian from taking any role in the case, arguing that his public statements had prejudged the case so he was not neutral. The ALJ denied the motion to disqualify and went on to find that the Kleins had violated the statute by denying services to the couple “on account of” their sexual orientation, as prohibited by the statute. The ALJ rejected the Kleins argument that they had not discriminated because of the women’s sexual orientation, or that their actions were protected by the First Amendment free speech and free exercise of religion provisions. But the ALJ also rejected BOLI’s argument that statements made by Mr. Klein during interviews were communicating a future intent to discriminate, which would itself violate a specific prohibition in the statute. Rather, the ALJ ruled, they were an account of the reasons for their denial of services in this case. The ALJ ordered damages to the couple totaling $135,000, mainly for emotional suffering and having to put up with the media attention.

The Kleins and BOLI both filed exceptions to the ALJ’s proposed order. Commissioner Avakian affirmed the ALJ’s ruling on discrimination, but disagreed with the ruling on statement of future intent to discriminate. Avakian concluded that the record supported the opposite finding, that the interviews and a sign taped to the bakery’s window communicated intent to discriminate on the same basis in the future, but he approved the ALJ’s proposed damage award without adding anything for this additional violation. The Kleins then petitioned for judicial review.

The Oregon Court of Appeals affirmed the ALJ’s decision on discrimination, but rejected Commissioner Avakian’s reversal of the ALJ’s ruling on communicating an
intention to discriminate in the future. The court also rejected the Kleins’ argument on appeal that Avakian should have been disqualified from ruling on the case because of his Facebook and Oregonian interview statements. As to another flashpoint in the case, the court deemed the amount of damages awarded appropriate, noting that the amount was in line with damages awarded in other similar cases. The Kleins sought review in the Oregon Supreme Court, but were turned down without comment.

The Kleins’ petition for certiorari to the U.S. Supreme Court mentions the issue of Avakian’s statements and the ALJ and Oregon court’s rejections of disqualification, but it does not focus on that issue in its statement of questions presented, even though the petition was filed months after the Supreme Court’s ruling in Masterpiece Cakeshop made that a potentially viable alternative route to getting the agency’s decision overturned. Counsel for the Kleins, instead, were focused on getting the Supreme Court to reconsider its 1990 ruling, Employment Division v. Smith, 494 U.S. 872, in which the Court abandoned its long-established free exercise clause jurisprudence, substituting a rule that people have to comply with neutral state laws of general application—such as most anti-discrimination laws—even though complying might burden their free exercise of religion. Their second “question presented” asked the Court to overrule Smith, and their third “question presented” asked the Court to “reaffirm” a “hybrid rights doctrine” suggested in dicta in Smith, where there would be more stringent judicial review in cases where other constitutional rights in addition to free exercise of religion were implicated.

The Supreme Court’s decision to vacate the Oregon Court of Appeals decision for “further consideration” by the state court suggests that there are not enough votes on the Court to reconsider Smith as of now, but we can’t know how many votes short the proponents on the Court of reconsidering Smith might be. Smith has long been a controversial precedent. The decision’s cutback on protection for religious objectors led Congress to pass the Religious Freedom Restoration Act and many states to pass their own versions of that law. But Smith has become a bulwark for vindicating the rights of same-sex couples to obtain wedding-related goods and services, as most courts confronted with the issue have concluded that such businesses do not have the right to deny them to same-sex couples.

The Kleins are represented by First Liberty Institute of Plano, Texas, Boyden Gray & Associates of Washington, D.C., and Oregon local counsel Herbert G. Grey. Ten amicus briefs, all urging the Court to grant the petition for certiorari, were filed by conservative and religious litigation and policy groups, many extolling the case as a vehicle for overturning Employment Division v. Smith. Lambda Legal represented Rachel and Laurel Bowman-Cryer with an amicus brief at the Oregon Court of Appeals.

Scheduling oral arguments is very much at the discretion of the Court. Although certiorari was granted in several other cases prior to the April 22 grant of cert in the three Title VII cases, evidently the Court is eager to get these hearings done early. October 8, a Tuesday, is actually the second hearing date of the Term. Because October begins on a Tuesday this year, and the Constitution mandates that the Court’s term begin on the first Monday in October, October 7 will be the first public session for arguments. The decision to hold these arguments early may reflect the Court’s anticipation that these cases will be contentious and require extended discussion and circulation of drafts, so an early hearing will provide more headroom to get them done before the end of the Term. On the other hand, the Court might be aiming to try to get these opinions out by the end of 2019, so that their impact, regardless how they are decided, can be absorbed by the public well before the presidential and congressional campaigns of 2020 start heating up. There is no way to know the Court’s thinking on this, because they don’t issue explanations for anything other than the Orders and Opinions that they post on their website.

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High Court of Botswana Strikes Down Anti-Sodomy Laws

By Vito John Marzano

On June 11, 2019, Judge Michael Leburu delivered the unanimous, albeit lengthy, opinion of the three-judge panel of the High Court of Botswana striking down the country’s ban on same-sex intercourse. In the Matter between Letsweletse Motshidiemang and Attorney General, MAHGB-00059-16. The High Court declared that Penal Code §164(a) and (c) and §165, which proscribed and criminalized sexual intercourse, or an attempt thereof, between same-sex partners, violated the Constitution of Botswana under section 3, which protects an individual’s rights to liberty, privacy, and dignity; section 9, which further protects an individual’s right to privacy; and section 15, which prohibits discrimination based several characteristic including sex. The Republic of Botswana, formerly the British protectorate of Bechuanaland, became an independent member of the British Commonwealth of Nations in 1966, and has a population last estimated at 2.25 million people. It is located along the northern border of the Republic of South Africa.

A 24-year-old student at the University of Botswana, Letsweletse Motshidiemang, filed the petition to strike down the aforementioned statutes. He argued that the proscription against same-sex activity limits the only means by which he can express his physical love with another man—anal intercourse. This limitation constrains his ability to live openly in society and forces him to live in secrecy, lest he face up to seven years in jail. The statute, as the High Court noted, goes beyond performance of the act to ban even attempting to engage in the act. The provisions, the applicant claimed, were not made for the peace, order, and good government of Botswana. Mr. Motshidiemang contended that the provisions limit his bodily autonomy and interfered with
personal and intimate aspects of his life. Further, he argued that his private conduct does not harm the public interest or public good. Although the laws appear non-discriminatory on their face, they disproportionately impact men because women have other means of penetrative sex. The laws fortify societal stigma endured by homosexuals.

In support, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) filed an amicus curiae brief. It contained an expert affidavit of a medical sociologist explaining that, among other things, the laws resulted in higher levels of violence and discrimination suffered by LGBTI Batswana (the term describing inhabitants of the country) in society and in healthcare services.

In opposition, the Government did not supply any expert evidence. It argued, in sum, that the law does not prohibit being a homosexual, only certain conduct. The law only proscribes anal intercourse regardless if practiced by men or women. The Government describes the applicant as a “cry baby” who can utilize other modes of sexual intercourse. Further, the Constitution permits limitations on fundamental freedoms when justified by serving the public good.

Portending its reasoning early in the decision, Judge Leburu opines, “What regulatory joy and solace is derived by the law, when it proscribes and criminalizes such conduct of two consenting adults, expressing and professing love to each other, within their secluded sphere, bedroom, confines and/or precinct? Is this not a question of over-regulation of human conduct and expression, which has a tendency and effect of impairing and infringing upon constitutionally ordained, promised and entrenched human rights?”

In providing a historical background of anti-sodomy laws, the court discussed biblical verses that speak against homosexuality. It then noted that 16th century England incorporated anti-sodomy laws into the common law, which trickled down to its colonies. However, as society became more tolerant and recognized that such laws unnecessarily burden the private conduct of consenting adults, the United Kingdom and its former colonies (to wit – Mozambique, Angola, South Africa, and Canada) repealed those laws. Botswana inherited this law when it became independent in 1966.

Turning to the legal analysis, the High Court rejected the Government’s argument that it should defer to Parliament on issues of morality. The decision noted, among other things, that the High Court has original jurisdiction to decide any civil proceeding under any law. Issues of constitutionality are properly left up to the judiciary. Unless the Government could muster some limitation on the foregoing, the court need not defer to the legislature. Moreover, the High Court noted that Parliament enacted legislation that prohibited discrimination based on sexual orientation, and that national goals included making Botswana a more tolerant, just, and compassionate nation.

The Government relied on Kanane v. the State [2003] (2) BLR 67 (CA), in which the Court of Appeals upheld these laws. But the High Court distinguished that case by pointing to the presence of previously unraised arguments and circumstances, for instance, 2008 amendments to the laws made them more gender neutral.

Judge Leburu explains that the Constitution is crafted in broad, inclusive and open-ended language that is laden with values and beliefs associated with democracy and the rule of law. It serves not only the current generation, but those yet born. It does not sit as a lifeless museum piece. Courts must continue to breathe growth and development of the State through it. The courts, when interpreting acts of Parliament, must always determine whether those laws serve the public good or public interest.

Accordingly, and in contrast to the legal gobbledygook known as originalism practiced by some members of the Supreme Court of the United States, the High Court interprets the Constitution “as a living and dynamic charter of progressive human rights, serving the past, the here and now, as well as the unborn constitutional subjects.” Provisions are read in conjunction with each other to give meaning and effect. The literal meaning of a word does not ascertain its true meaning per se, but one should consider its setting, the context of its use, and the purpose for which it was intended. “Mere classical linguistic formalism is thus discouraged.”

The High Court first rejected the applicant’s void for vagueness argument. It based this on the accepted definition of what the words in the statutes meant. Historically, “carnal knowledge” and “against the order of nature” mean anal intercourse. This was the primary focus of the Kanane decision.

Next, the High Court addresses the right to privacy. Judge Leburu traces this right from the Code of Hammurabi to Biblical references of Adam and Eve to more recent times. Privacy, as the High Court describes, “is essential to who we are as human beings.” Judge Leburu references several constitutional provisions that he acknowledges may indicate that the right is limited to unreasonable search and seizure. But he reasons that privacy is multifaceted and multipronged. He goes on to cite international treaties and developments in other courts. For the U.S.-based reader, he references the seminal case where the Supreme Court first found the right to privacy in terms of sexual activity, Griswold v. Connecticut, 381 U.S. 479 (1965), Judge Leburu also points to Lawrence v. Texas, 539 U.S. 558 (2003), where the Supreme Court struck down the remaining anti-sodomy laws in the United States.

In any event, the High Court concludes that the challenged provisions impair the applicant’s right to express his sexuality in private with his preferred adult partner. The applicant enjoys a right to a sphere of private intimacy and autonomy provided it is consensual and not harmful to others. As the High Court puts it, “There is no complainant/victim in that regard.”

Turning to liberty, equality, and dignity, Judge Leburu views this as a triumvirate of core values of fundamental rights, or, a “triangle of constitutionalism.” Section 3 of the Botswana Constitution protects these rights. As it relates to liberty, the decision references, among others, Justice Kennedy’s opinion in Planned Parenthood of South Eastern Pa v. Casey, 505 U.S. 833 (1992), wherein he held that matters of personal intimacy and choice are central and key to personal liberty and autonomy and not the business of the law.

As a nation, there is a need to respect diversity and plurality. Thus, personal
autonomy on issues of sexual orientation and choice must be respected. Notably, Judge Leburu writes, “Sexual orientation is innate to a human being. It is not a fashion statement or posture. It is an important attribute of one’s personality and identity; hence all and sundry are entitled to complete autonomy over the most intimate decisions relating to personal life, including choice of a partner. The right to liberty therefore encompasses the right to sexual autonomy.” Liberty transcends mere freedom from physical restraints, but includes private choices free from undue influence and irrational and unjustified interference by others. Thus, sections 164(a), (c) and 165 abridge the applicant’s right to choose a sexual intimate partner and are unconstitutional.

Next, Judge Leburu notes that dignity is another core value of fundamental rights, and means “worthy of honor and respect.” Sexual intercourse does not serve solely the purpose of procreation, but also serves as an expression of love and intimacy. The attacked provisions limit the right to sexual expression in the only available means, which impacts the applicant’s worth as a human being. “Put differently, it violates his inherent dignity and self-worth.”

The High Court proceeds to cite several international cases to support this position. Ultimately, it comes to the only logical conclusion, that the challenged provisions are effectively discriminatory and therefore unconstitutional. The Government, as noted by the court, did not provide a “scintilla or iota” of justification for the statutes.

Arthur Leonard, LGBT Law Notes Editor-In-Chief, succinctly sums up the matter “In line with the India Supreme Court’s sodomy law decision, this is a decisive rejection, albeit in different language, of the idea that constitutional provisions should receive static, legalistic interpretations out of sync with the reality of people’s lives.” As such, it is in line with similar rulings in other English-speaking countries.

On July 6, 2019, the Government appealed this matter to the Court of Appeals, the Court of last resort in Botswana. The Court of Appeals is composed of expatriate judges from the Commonwealth. Although unfortunate, the Court of Appeals previously upheld a High Court decision that found that the Government’s refusal to register LEGABIBO was irrational and in violation of the right to freedom of association in the Botswana constitution (see Attorney General v. Thuto Rammoge and 19 Others, [2016] CACGB-128-14).}

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and, shortly thereafter, K.L. filed a petition seeking to establish parentage, custody, visitation, and child support.

K.L. argued that she is a lawful mother to M.F. under Kansas law, including the Kansas Parentage Act (the KPA, found at K.S.A. 2018 Supp. 23-2201 et seq.) and controlling case law, including the 2013 case of Frazier v. Goudschaal (296 Kan. 730). Specifically, K.L. claimed on appeal that the lower court had erred by (1) failing to find that there had been a “meeting of the minds” between the parties about whether they were going to co-parent; (2) failing to find that K.L. had notoriously represented herself as M.F.’s parent; and (3) misapplying the “parental preference” doctrine, which asks whether a parent can name another as a parent and then change her mind.

The Kansas court’s analysis largely avoided any substantive inquiry into potential indicia of a co-parenting agreement; how the parties may have conducted themselves as a family; or the child’s relationship and potential bond with the putative parent, including any potential impact of the years of cessation of contact. The court seemed likewise uninterested in the larger constitutional and civil rights questions raised by parentage claims of LGBT individuals, and, instead, demonstrated concern for the rules of evidence on appeal. In particular, the court refused to consider reasons to disturb the factual findings of the lower court and, in its mostly formalistic application of civil procedure and its analysis thereof, succeeded in emphasizing the need to obtain official legal documents – regardless of the actual conduct of the parties – to safeguard parental rights in Kansas.

Most notably, the court found persuasive and essentially dispositive that K.L. and T.F. had never executed a written co-parenting contract, citing the KPA’s provision “that parenthood may be presumed if an individual ‘in writing recognizes [parenthood] of the child.’” Without a doubt, K.L.’s reliance on what she believed to be an oral understanding weakened the possibility of having her parental rights recognized and protected in Kansas.

Similarly, where the district court had found that there was not an “open and notorious” assumption of parenting responsibilities for the child by K.L., the Court of Appeals was unwilling to engage in further analysis of what conduct by K.L. might constitute such; an unfortunate choice on the court’s part, given that clear and convincing evidence of such conduct, according to the KPA, establishes a presumption of parentage.

Lastly, because of neglecting to set forth the standard of review or providing a pinpoint citation in the record on appeal, the court refused entirely to consider proper application of the so-called “parental preference doctrine”, which seems to be a concept in Kansas law akin to the equitable estoppel consideration in New York parentage cases, focusing on the extent to which the biological or adoptive parent has fostered, facilitated, and held out the other party as a parent.

Sadly, this decision solidifies obstacles for non-biological/non-adoptive parents under Kansas law, and, unlike the positive trend in New York cases to ensure that the “voice” of the child be included in some way in the record, M.F.’s relationship with K.L. apparently played no role whatsoever in the court’s reasoning. Other than stating that “the child was too young and her speech not well enough developed when the parties separated for the Court to determine how she referred to petitioner,” the child’s wishes are utterly absent from the opinion, and the duty to protect what may be the most fundamental of human bonds is not given even the dignity of mention.

K.L. is represented by Carolyn Sue Edwards of Wichita; T.F. by Christopher J. Vinduska and Alex P. Flores, of Klenda Austermann LLC, also of Wichita.

Christian Kummer is a student at Middlebury College (class of 2022) and Summer 2019 Intern at The LGBT Bar Association of Greater New York (LeGaL); Brett M. Figlewski is the Legal Director of LeGaL.

9th Circuit Instructs District Court on Next Stage in Trans Military Litigation

By Arthur S. Leonard

A three-judge panel of the San Francisco-based U.S. Court of Appeals for the 9th Circuit issued a ruling on June 14 on several appeals filed by the Justice Department in Karnoski v. Trump, one of the lawsuits challenging President Trump’s transgender military policy. The result was not a complete win for the government or the plaintiffs, but the case will go forward before U.S. District Judge Marsha J. Pechman in Seattle using different legal tests than those she had employed in issuing the rulings that the government had appealed. Because one of the other challenges to the policy is pending in a district court in Riverside, California, which is also within the 9th Circuit, the court’s ruling effectively applies to both cases. Karnoski v. Trump, 2019 U.S. App. LEXIS 17878, 2019 WL 2479442 (9th Cir., June 14, 2019).

Since neither party is likely to be fully satisfied with the ruling, which does not fully embrace either party’s position on the appeals, it is possible that one or both will seek reconsideration by a larger panel of the circuit court. In the 9th Circuit, such panels consist of the Chief Judge of the Circuit and ten active circuit judges drawn at random, together with any senior judges who sat on the panel. The panel that issued the June 14 ruling had two senior judges – Raymond C. Fisher and Richard R. Clifton – and one active judge, Conseulo M. Callahan. Fisher was appointed by Bill Clinton, while Clifton and Callahan were appointed by George W. Bush. District Judge Pechman was appointed by Bill Clinton.

For purposes of simplicity, this description of where the lawsuit stands will refer to the policy announced by then-Defense Secretary Ashton...
Carter in June 2016 as the 2016 policy, the policy announced in tweets and a White House memorandum by President Donald Trump in July and August 2017 as the 2017 policy, and the policy recommended to Trump by then-Defense Secretary James Mattis in February 2018 as the 2018 policy.

The 2016 policy ended the long-standing regulatory ban on military service by transgender people, but delayed allowing transgender people to enlist until July 2017. In June 2017, Secretary Mattis announced that the ban on enlistment would be extended to the end of 2017. The July tweet and August 2017 memorandum announced a return to the ban on service and enlistment that predated the 2016 policy, but delayed re-implementation of the ban until March 2018, pending submission of an implementation plan to the president by Mattis, while providing that the ban on enlistment would remain in effect.

The plan Mattis recommended in February 2018, and that Trump authorized him to adopt, abandoned the total ban concept and is complicated to explain. The policy attempted to shift its focus, at least in terms of concept, from transgender status to the condition of gender dysphoria as described in the American Psychiatric Association’s Diagnostic and Statistical Manual. The 2018 plan allows some transgender people to serve under certain conditions, depending upon whether and when they were diagnosed with gender dysphoria, whether and when they intended to transition or had transitioned, and whether they were willing to serve in their gender as identified at birth. People who had been diagnosed with gender dysphoria were barred from enlisting, and currently serving transgender personnel who had not been diagnosed and initiated the process of transitioning by the time the 2018 policy went into effect could continue serving only if they foresaw transitioning while in the service. However, those who were serving and had begun transitioning before the 2018 policy went into effect could continue serving in the gender to which they had transitioned. People who identify as transgender but have not been diagnosed with gender dysphoria and are content to serve in the gender identified at birth can enlist and serve, but must leave the service if they are subsequently diagnosed with gender dysphoria. The bottom line, which was a motivation for Trump’s initial tweet, is that once the 2018 policy was in place, the military would not be funding sex-reassignment surgery for anyone and people could not transition in the military.

Beginning in August 2017 and continuing through that summer, challengers file four lawsuits challenging the 2017 policy on constitutional grounds in Baltimore, Washington (D.C.), Seattle, and Riverside (California). All of the major LGBT litigation groups were representing the plaintiff in one or more of the cases. Within months, each of the federal district judges had granted motions for preliminary injunctions to prevent the 2017 policy from going into effect. In order to issue the injunctions, all four judges had to find that some or all of the plaintiffs’ legal arguments had a fair chance of succeeding on the merits, and that the injunctions were necessary to prevent irreparable harm to the plaintiffs by preserving the status quo without harming the public interest. The district judges refused to “stay” their injunctions, and on the east coast they were backed up by the 4th and D.C. Circuits, leading the government to abandon an attempt to appeal the denial of stays for the west coast cases in the 9th Circuit. The district judges also rejected motions by the government to dismiss the cases. Thus, on January 1, 2018, the Defense Department was required to accept enlistment applications from transgender people, and the 2016 policy remained in effect for transgender people who were actively serving in the military.

Meanwhile, Secretary Mattis appointed a Task Force as directed by the August 2017 White House memo to prepare a report in support of an implementation policy recommendation, which he submitted to the White House in February 2018, urging the president to revoke the 2017 policy and to allow Mattis to implement his recommended policy. The Task Force was described in various ways at various times by the government, but the names and titles of the members were not listed in the written report released to the public, and the government has resisted discovery requests for their identity and information about how the Task Force report was prepared.

Once Secretary Mattis had the go-ahead from Trump to implement his recommendation, the Justice Department moved in all four courts to get the preliminary injunctions lifted, arguing that the 2018 policy was sufficiently different from the 2017 policy to render the existing injunctions irrelevant. All four of the district judges rejected that argument and refused to dissolve or modify their injunctions. The government appealed and ultimately was able to persuade the Supreme Court earlier this year to stay the injunctions and allow the policy to go into effect early in April. Although the 2018 policy has been in effect for over two months, there have not been reports about discharges of serving transgender personnel.

Significantly, the 9th Circuit panel implied without ruling that the preliminary injunction against the 2017 policy seemed justified.

Meanwhile, the parties in the four cases were litigating about the plaintiffs’ attempts to conduct discovery on order to surface the information necessary to prove their constitutional claims against the policy. The government fought the discovery requests doggedly, arguing that the internal workings of its military policy-making should not be subject to disclosure in civil litigation, referring to but not formally invoking concepts of decisional privilege and executive privilege, which courts have recognized to varying extent in prior cases challenging government policies.

In the *Karnoski* case in Seattle, Judge Pechman was highly skeptical about the government’s arguments, having questioned whether the policies were motivated by politics rather than professional military judgment, and
she issued an order for the government to comply with a large portion of the requests for documents and information after prolonged negotiations by the lawyers largely came to naught. The government appealed her discovery orders to the 9th Circuit, together with refusal to rethink the preliminary injunction in light of the substitution of the 2018 policy for the 2017 policy.

The June 14 opinion describes how the case should go forward, taking account of the Supreme Court’s action in having stayed the preliminary injunctions but not dissolved them. The 9th Circuit panel agreed with the D.C. Circuit, which had concluded earlier in the year that the D.C. district court was wrong to conclude that the 2018 policy was just a version of the 2017 policy with some exceptions. The appellate courts held that the 2018 policy recommended by Mattis was no longer the total ban announced in 2017, so the district court should evaluate the 2018 policy.

The court rejected the government’s argument that shifting the exclusionary policy from “transgender status” to “gender dysphoria” eliminated the equal protection issue, finding from the wording of the Task Force report and the policy as summarized in writing by Mattis that the policy continued to target transgender people in various ways, regardless whether they have been diagnosed with gender dysphoria, through the conditions it places on their service. This was a “win” for the plaintiffs on an important contested point.

Judge Pechman had concluded that gender identity is a “suspect classification,” similar to the approach courts take in sex discrimination cases, but tempered by consideration of the degree to which the policy merits deference as a product of professional military judgment.

Judge Pechman had concluded that the 2017 policy did not merit judicial deference, because there was no evidence before the court that it was the product of professional military judgment. Rather, as all the district judges had concluded, based on the way the policy was announced in a surprise tweet and the failure of the government to provide any information about how it was formulated, the court’s analysis should not be tempered by judicial deference.

Now, however, said the 9th Circuit panel, the government had described, in a general way, how Mattis’s Task Force was put together, and the 2018 policy was allegedly the result of many meetings, study, much interviewing of military personnel, and a 44 – page report. If one accepts the government’s description of the process – still not identifying by name the Task Force members or getting into any real detail about the basis for their conclusions – the court said, there is an argument that the 2018 policy should be accorded judicial deference, but whether to do so, and how that would interrelate with the heightened scrutiny standard, were questions to be addressed by the district court. Thus, the task for Judge Pechman now is to determine whether the 2018 policy is sufficiently a product of military judgment to justify applying a deferential standard of review. Some degree of cooperating by the government in the discovery process is crucially necessary for such an analysis to take place.

However, as to discovery, the 9th Circuit panel expressed concern that Judge Pechman had not accorded sufficient weight to the concepts of decisional and executive privilege in formulating her discovery order, and directed that she refer to guidelines set out in some recent court opinions. In particular, the court disagreed with her order that the government provide detailed privilege logs with descriptions of all the documents for which there were privilege concerns, and suggested that an approach focused on broadly described categories of documents and information could suffice for an initial determination of the degree to which privilege might be claimed to block disclosure.

The bottom line is that the Karnoski case goes back to Judge Pechman for a fresh analysis of whether plaintiffs should be entitled to a preliminary injunction against the 2018 policy, using heightened scrutiny and taking account of privilege claims in the discovery process, along the lines outlined by the court. This opinion also sends a message to the district court in Riverside, where similar government motions are pending. Meanwhile, the discovery battles continue in the cases pending in Baltimore and Washington.

In light of the Trump Administration’s general policy of fighting against demands for disclosure of internal executive branch decision-making, whether by Congressional committees or litigants, it is difficult to predict when there will be sufficient discovery to provide a basis for further rulings on preliminary injunctions or the ultimate merits of the four court challenges. The lawsuits succeed in blocking implementation of the total ban and the 2017 policy, and in delaying implementation of the 2018 policy for more than a year.

The litigation will not be finally resolved before Inauguration Day in January 2021 unless the Trump Administration is willing to negotiate some sort of compromise settlement satisfactory to the plaintiffs. If any of the current Democratic presidential candidates is elected and takes office, a quickly-issued executive order restoring the 2016 policy could put an end to the entire transgender military service drama and restore sanity to an issue that has been clouded by politics and substantial misinformation, such as Trump’s recent grossly-exaggerated statements about the cost of health care for transgender personnel.
The U.S. Supreme Court had been asked in *Masterpiece* to reverse rulings by the Colorado Court of Appeals and the Colorado Civil Rights Commission, which had ruled that baker Jack Phillips violated the state’s anti-discrimination law by refusing to make a wedding cake for a same-sex couple. Phillips argued on appeal that his 1st Amendment rights to free exercise of religion and freedom of speech were unconstitutionally violated by the state proceedings. The Supreme Court ruled, in an opinion by Justice Anthony Kennedy, that the Colorado Civil Rights Commission had not provided Phillips with a respectful, neutral forum to consider his religious freedom claim. See 138 S. Ct. 1719 (2018). The Court reversed the Colorado court and commission rulings on that basis, focusing particularly on comments made by Commission members during the public hearing in the case, as well as the fact that at the time Phillips rejected the business, Colorado did not allow same-sex weddings so Phillips could have thought that he was not obligated to provide a wedding cake for such an event. The Court did not rule directly on Phillip’s constitutional claims of privilege to violate the anti-discrimination statute, although it observed that in the past it had not accepted religious free exercise defenses to discrimination charges.

The *Masterpiece* decision was announced on June 4, 2018. On June 6, ADF filed a Supplementary Petition with the Supreme Court, arguing that the case should be sent back to the Washington Supreme Court for “reconsideration” in light of *Masterpiece*. In various different lawsuits, ADF has been trying to “spin” *Masterpiece Cakeshop* as what it is not: a decision that businesses have a 1st Amendment right to refuse to provide goods or services for same-sex weddings. In its Supplementary Petition to the Court, however, reacting to the Court’s *Masterpiece* opinion, ADF asserted that Stutzman, like Colorado baker Jack Phillips, had been subjected to a forum that was “hostile” to her religious beliefs.

The U.S. Supreme Court granted ADF’s request, vacating the Washington Supreme Court’s 2017 decision and sending the case back with instructions to “further consider” the case “in light” of *Masterpiece Cakeshop*. The Washington court took exactly a year from the date of ADF’s Supplementary Petition to produce a lengthy decision explaining why there was no reason to change its original decision.

The Washington court was flooded with amicus briefs, as the U.S. Supreme Court had been, as many saw this as the next major “culture wars” case around the issue of same-sex marriage and religious exemptions from anti-discrimination laws.

After Stutzman told Ingersoll, a longtime customer of her business, she would not sell him flowers for his wedding, his fiancé, Freed, put up an indignant post on his Facebook page and the story went viral, quickly drawing the attention of the Attorney General’s office, which sent Stutzman a letter, asking for her to agree in writing not to discriminate against customers based on their sexual orientation. She has argued throughout the case that she did not discriminate based on sexual orientation, as she had happily sold Ingersoll flowers in the past and would do so in the future, but not for a same-sex wedding due to her religious belief that marriage was only between a man and a woman. When Stutzman refused to sign the statement requested by the letter, the Attorney General filed suit in Benton County Superior Court. Several days later, Ingersoll and Freed filed their own lawsuit, represented by the ACLU of Washington, and the cases were consolidated by the court, which
ruled against Stutzman on February 18, 2015. Stutzman counterclaimed against the plaintiffs, asserting her religious freedom.

Justice McCloud explained the Washington Supreme Court’s understanding of the holding of the U.S. Supreme Court in Masterpiece: “In Masterpiece Cakeshop, the Supreme Court held that the adjudicatory body tasked with deciding a particular case must remain neutral; that is, the adjudicatory body must ‘give full and fair consideration’ to the dispute before it and avoid animus toward religion. Disputes like those presented in Masterpiece Cakeshop and Arlene’s Flowers ‘must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.’”

Under this standard, wrote McCloud, there was no basis for the Washington court to change its opinion. “We have painstakingly reviewed the record for any sign of intolerance on behalf of this court or the Benton County Superior Court, the two adjudicatory bodies to consider this case,” she wrote. “After this review, we are confident that the two courts gave full and fair consideration to this dispute and avoided animus toward religion.”

Because the Supreme Court had vacated the earlier decision, however, the court’s new opinion incorporates its entire analysis from the earlier decision. In a footnote, Justice McCloud wrote, “The careful reader will notice that starting here, major portions of our original (now vacated) opinion are reproduced verbatim.”

However, the opinion also responds to arguments that ADF tried to make building on Masterpiece, attempting to persuade the court that Stutzman was sued because of hostility to her religious beliefs by the Attorney General. The court refused to take the bait. McCloud wrote, “Apparently realizing the limits of Masterpiece Cakeshop, appellants attempt to stretch its holding beyond recognition and to relitigate issues resolved in our first opinion and outside the scope of Masterpiece Cakeshop. We reject this attempt and instead comply with the Supreme Court’s explicit mandate to ‘further consider’ our original judgment ‘in light of Masterpiece Cakeshop.’”

Consistent with that, the court denied motions by both ADF and the Attorney General’s office to supplement the record, finding that the additional materials being offered to the court were not relevant to the task it had been set by the Supreme Court.

ADF was trying to make something of an entirely unrelated incident that occurred while this case was pending, when it was reported that the owner of a café in Seattle had “expelled a group of Christian customers visiting his shop” but that despite publicity to the incident the Attorney General had not taken any action against the owner of the café. ADF sought to draw an analogy to an incident Justice Kennedy relied upon in concluding that the Colorado Civil Rights Commission was hostile to religion. The Commission had refused to proceed against several Colorado bakers who had rejected an order from a provocateur named William Jack, who sought to order cakes inscribed with anti-gay symbolism. “The crux of appellants’ argument is that the attorney general sought to enforce the WLAD in the case before us but not in the incident at the coffee shop,” wrote McCloud, “revealing ‘hostility towards Mrs. Stutzman’s beliefs.’”

The Washington court agreed with Ingersoll and Freed, who argued that the attorney general’s response to the coffee shop incident was irrelevant. That was a prosecutorial decision, not an adjudicatory decision. “As discussed above,” wrote McCloud, ‘the Supreme Court in Masterpiece Cakeshop held that the adjudicatory body tasked with deciding a particular case must remain neutral. That Court was explicitly sensitive to the context in which the lack of neutrality occurred: during the adjudication by the adjudicatory body deciding the case.” The Attorney General here was acting as attorney for a party in the case – the state of Washington – and not as an adjudicator.

“It would take a broad expansion of Masterpiece Cakeshop to apply its holding – that the adjudicatory body hearing a case must show religious neutrality – to a party. That is especially true here, where the party supposedly exhibiting antireligious bias is Washington’s attorney general,” wrote McCloud. “By arguing that Masterpiece Cakeshop’s holding about adjudicatory bodies applies to the attorney general’s enforcement decision, appellants essentially seek to revive their selective-enforcement claim, a claim that was rejected by the superior court, and abandoned on appeal.”

The court pointed out that prosecutorial discretion leaves it to the judgment of prosecutors deciding which cases to bring. “Courts are wary to question a prosecutor’s decision of which claims to pursue and thus generally ‘presume that prosecutors have properly discharged their official duties.’” The court rejected ADF’s seeming argument that selective enforcement claims implicating free exercise of religion defenses should not be subjected to the same “demanding standard to which all other selective-enforcement claims are subject.”

The court also pointed out that because this is a consolidation of cases, ADF’s argument is beside the point, since it has nothing to do with plaintiffs Ingersoll and Freed. A “selective enforcement” claim has no relevance to a lawsuit brought by private individuals who are victims of discrimination.

Most of the court’s opinion, however, was devoted to restating the legal analysis from its 2017 decision, finding that the First Amendment and Washington state constitutional provisions did not provide a shield for Stutzman against the discrimination charges. Interestingly, the Washington courts have found that their state constitution provides greater protection for free speech and free exercise of religion than the U.S. Supreme Court has found in the 1st Amendment, but even under those more demanding standards, the court rejected Stutzman’s state constitutional defenses. The state has a compelling interest to prevent discrimination by businesses, reiterated the court.

“Discrimination based on same-sex marriage constitutes discrimination...
on the basis of sexual orientation,” McCloud concluded. “We therefore hold that the conduct for which Stutzman was cited and fined in this case – refusing her commercially marketed wedding floral services to Ingersoll and Freed because theirs would be a same-sex wedding – constitutes sexual orientation discrimination under the WLAD. We also hold that the WLAD may be enforced against Stutzman because it does not infringe any constitutional protection. As applied in this case, the WLAD does not compel speech or association.” And, even if the court assumed that application of the WLAD “substantially burdens Stutzman’s religious free exercise,” that did not violate the First Amendment or the analogous provision of the Washington constitution, “because it is a neutral, generally applicable law that serves our state government’s compelling interest in eradicating discrimination in public accommodations.”

Disappointed Gay Dad Asks Supreme Court to Overturn Key New York Precedent

By Arthur S. Leonard

In *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (2016), the New York Court of Appeals overruled a 25-year-old precedent and held that when there is clear and convincing evidence that a same-sex couple agreed to have a child and raise the child together, where only one of them will be the child’s biological parent, and both of the parties performed parental duties and bonded with the children, the other parent would have the same rights as the biological parent in a later custody dispute. Now a gay biological dad who lost custody of twins to his former same-sex partner by application of the *Brooke S.B.* precedent asked the U.S. Supreme Court on May 10 to rule that his 14th Amendment Due Process rights have been violated. *Frank G. v. Joseph P. & Renee P.F.*, No. 18-1431 (Filed May 10, 2019); *Renee P.F. v. Frank G.*, 79 N.Y.S.3d 45 (App. Div., 2nd Dep’t., May 30, 2018), leave to appeal denied, 32 N.Y.3d 910 (N.Y.C.A., Dec. 11, 2018).

Frank G. and Joseph P. lived together in a same-sex relationship in New York and made a joint decision to have a child. Joseph P.’s sister, Renee, had previously volunteered to be a surrogate for her gay brother, both donating her eggs and bearing the resulting child or children. Renee became pregnant through assisted reproductive technology using Frank’s sperm. The three entered into a written agreement under which Renee would surrender parental rights but would be involved with the resulting child or children as their aunt.

After the twins were born, both men participated in parenting duties. Joseph sought to adopt the twins under New York’s second-parent adoption rules, and he remembered completing paperwork that Frank was supposed to complete and submit, but that never happened. The men were not sexually exclusive and eventually arguments about Frank’s sexual activities led to Joseph moving out. He continued to have regular contact with the children until Frank suddenly cut off contact after another argument. Frank subsequently moved with the children to Florida in December 2014. Frank did not notify Joseph or Renee of that move. When they found out, Joseph filed a guardianship petition. (Under New York precedents at the time, he did not have standing to file a custody petition.)

As lower court rulings were questioning the old New York precedent, Joseph withdrew his guardianship petition and both he and Renee filed custody petitions. Renee clearly had standing to seek custody as the biological mother who had remained in contact with the children.

Frank moved to dismiss the custody lawsuit, but the trial judge, Orange County Family Court Judge Lori Currier Woods, rejected the motion, holding that both Joseph and Renee had standing to seek custody and ordering temporary visitation rights for Joseph and Renee while the case was proceeding. Frank appealed to the Appellate Division, 2nd Department. While his appeal was pending, the Court of Appeals decided *Brooke S.B.*. Applying that case, the Appellate Division affirmed the trial court’s standing decision in favor of Joseph and Renee and returned the case to Judge Woods.

After a lengthy trial, which the trial court’s unpublished opinion (reprinted in the Appendix to the cert petition) summarizes in detail, the trial court awarded custody to Joseph, with visitation rights for Frank. Frank appealed again. The Appellate Division affirmed the trial court’s order. Frank unsuccessfully sought review by the New York Court of Appeals.

Frank is represented on the Supreme Court petition by Gene C. Schaerr of the Washington, D.C. firm of Schaerr/ Jaffe LLP. Schaerr, a Federalist Society stalwart and a Mormon from Utah, where he graduated from Brigham Young University’s Law School, was prominently involved in the marriage
equality battle, representing the state of Utah in defending its ban on same-sex in federal court, and he submitted an amicus brief to the Supreme Court in Obergefell v. Hodges on behalf of conservative legal scholars who argued that allowing same-sex marriage would be harmful to the institution of marriage, presenting social statistics from Europe purporting to show that the adoption of same-sex marriage in some countries caused rates of heterosexual marriage to fall. Social scientists have contended that the downward trend in marriage rates in Europe was well under way long before the countries in question extended legal recognition to same-sex relationships, and causation was not shown. In other words, Schaerr is an anti-LGBT cause lawyer, and the slanting of facts recited in the Petition for Frank as compared to the detailed fact findings summarized in the trial court’s unpublished opinion, which is appended to the cert Petition, is striking.

Family law is primarily a matter of state law, but the U.S. Supreme Court occasionally gets involved in family law disputes that raise constitutional issues. Since early in the 20th century, the Supreme Court has ruled that a legal parent of a child has constitutional rights, derived from the Due Process Clause, relating to custody and childrearing. The Petition argues that the rule adopted by the New York Court of Appeals and the appellate courts of some other states, recognizing parental status for purposes of custody disputes between unmarried same-sex partners, improperly abridges the Due Process rights of the biological parents. Some state courts have issued decisions similar to Brooke S.B., while others have refused to recognize standing for unmarried same-sex partners to seek custody. There is definitely a split of authority on the issue, but it is not necessarily the kind of split that would induce the Supreme Court to take a case. The Supreme Court is most concerned with variant interpretations of federal statutes or of the U.S. Constitution, but the state court cases addressing the issue of same-sex partner standing have generally not discussed constitutional issues and have reached their conclusions as an interpretation of their state custody statutes. Although it is true that same-sex partner parental rights vary as between different states, this does not necessarily create the kind of patchwork as to federal rights upon which the Court would focus.

Furthermore, the Court has not invariably ruled in favor of biological parents on the rare occasion when it has agreed to consider legal issues arising from custody disputes. For example, in one notable case, it upheld a California law creating an irrebuttable presumption that a man who was married to a birth mother is the father of the resulting child, even when it was obvious, and nobody disputed, that another man was responsible for impregnating the woman. In that case, even though the woman and her husband were living on opposite coasts when she became pregnant in a relationship with the plaintiff, the court upheld denying that man standing to seek custody of the child.

Most of the Supreme Court rulings on disputed custody issues have placed substantial weight on the rights of the biological parent, including a presumption that the biological parent will make decisions in the best interest of the child. In this Petition, Frank claims that the New York courts violate the 14th Amendment by not applying such a presumption for the biological father in the context of a same-sex couple custody dispute.

The Supreme Court’s deadline for filing a brief in response to a petition for certiorari in this case was June 14, but the Court’s docket does not show the filing of a brief or appearance of counsel on behalf of Joseph or Renee as of June 19. However, four conservative organizations have filed motions with the Court to accept amicus briefs in support of Frank’s petition. Frank’s attorneys have consented to the filing of these briefs, of course, but Joseph has not consented, so it is up to the Court whether they can be filed.

If the Supreme Court decides to take this case, the Brooke S.B. precedent, which LGBT rights litigators struggled for many years to obtain, may fall.

4th Circuit Finds Federal Hate Crime Law Can Be Used to Address Unarmed Assault on Gay Employee in Amazon Warehouse

By Eric Lesh

Does an unarmed anti-gay hate crime assault in a workplace interfere with interstate commerce? In U.S. v. Hill, 2019 WL 2454848, 2019 WL 2454848 (4th Cir., June 13, 2019), a 4th Circuit panel upheld the constitutionality of the federal Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Hate Crimes Act), as applied to such an assault, following the conviction of a defendant who violently beat his Amazon coworker because of his coworker’s sexual orientation.

The 4th Circuit ruling reversed a decision by U.S. District Judge John A. Gibney, Jr., 2018 WL 3872315 (E.D.Va., Aug. 15, 2018), who held that it was unconstitutional for a jury to convict defendant, James Hill of a hate crime due to his unprovoked unarmed attack on his coworker, Curtis Tibbs, whom he perceived to be gay. The case of whether the federal statute can be used to prosecute a defendant “for an unarmed anti-gay hate crime assault in a workplace interfere with interstate commerce?” was one of first impression for a federal appellate court. At its core, the case revolves around the Commerce Clause – one of Congress’ enumerated powers under the Constitution – and whether “bias-motivated violence” is categorically noneconomic activity and thus outside the scope of Congress’ power to regulate and the government’s power to prosecute.

Hill and Tibbs were co-workers at an Amazon Fulfillment Center in Chester, Virginia, where they worked on a conveyor belt where items were being selected, sorted and packed for
shipment to customers around the United States. On May 22, 2015, shortly after the beginning of Tibbs’ shift, Hill approached Tibbs from behind as they were both preparing boxes and — “without provocation or warning repeatedly punched him in the face,” causing significant bruising, facial lacerations, and a bloody nose. Tibbs was sent to a hospital for treatment, and the shipping activity was shifted elsewhere in the Center while the blood was being cleaned up in Tibbs’ work area. Tibbs was sent home from the hospital, missing most of his scheduled shift. Hill readily admitted that he assaulted Tibbs because he thought Tibbs was gay. The explanation Hill offered to police for the attack was his personal belief that he “didn’t like homosexuals,” that Tibbs “disrespected him because he is a homosexual,” and that Defendant “does not like homosexuals.”

The local Virginia prosecutor initially charged Hill with misdemeanor assault and battery in state court, but later referred the case to federal prosecutors because, outrageously, the Commonwealth of Virginia does not recognize violence based on sexual orientation as a hate crime. After Hill’s indictment under the Hate Crimes Act, he moved to dismiss, arguing that the Act, both on its face and as applied to him, exceeded Congress’s power under the Commerce Clause, because the assault did not affect interstate commerce. District Judge Gibney agreed with Hill’s as-applied challenge and dismissed the indictment with stating a conclusion as to the facial challenge. The 4th Circuit panel reversed and remanded, finding that Defendant “does not like homosexuals.”

In a dissenting opinion, Judge G. Steven Agee wrote that applying the Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Circuit Judge James A. Wynn Jr.’s opinion for the court said, “Congress paid close attention to the scope of its authority under the Commerce Clause when it enacted the Hate Crimes Act, which was designed to strengthen federal efforts to combat violent hate crimes – crimes targeting victims based on certain enumerated characteristics.” To ensure that conduct criminalized under the Hate Crimes Act would have “the requisite connection to interstate commerce,” Congress highlighted several Supreme Court decisions setting the scope of their authority under the Commerce Clause — including United States v. Lopez, 514 U.S. 549, 552 (1995), which held that a federal statute proscribing possession of guns in school zones violated the Commerce Clause, 514 U.S. at 567, for failure to require the necessary nexus with interstate commerce, and United States v. Morrison, 529 U.S. 598 (2000), also holding that a federal statute providing a civil remedy for victims of gender-motivated violence violated the Commerce Clause for failing to require the requisite federal nexus.

To avoid the Commerce Clause problem, Congress included legislative findings in the Act describing how bias-motivated violence interferes with commercial activity, and included specific circumstances under which the Act could apply, including when the prosecution shows that the conduct “interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct.” The court further found that Congress has the power to regulate violent conduct “when it interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct,” including bias-motivated assaults under the Hate Crimes Act. In sum, the court wrote, “if individuals are engaged in ongoing economic or commercial activity subject to congressional regulation – as Tibbs was at the time of the assault – then Congress also may prohibit violent crime that interferes with or affects such individuals’ ongoing economic or commercial activity, including the type of bias-motivated assaults proscribed by the Hate Crimes Act.”

Finally, the court rejected Hill’s alternative argument that the district court reversibly erred in refusing to give the jury his proposed instructions regarding the Hate Crime Act’s interstate commerce element.

In a dissenting opinion, Judge G. Steven Agee wrote that applying the statute in this instance violated Congress’ legislative power for two reasons. First, that the Hate Crimes Act did not on its face limit the class of activities to those that fall under Congress’ Commerce Clause authority, and second, that “the root activity regulated in this case – a bias-motivated punch – is not an inherently economic activity and therefore not within the
The court’s characterization of the case as involving an “unarmed” assault goes to the core of the Commerce element. In some past applications of the Act involving assaults with weapons, jurisdiction was predicated on proof that the weapons had moved in commerce. There were also past cases where the commerce element was satisfied by defendants having used vehicles on the interstate highways in their commission of the hate crime.

Because of its potential significance for the viability of the federal Hate Crimes Act as a prosecutorial tool, the case attracted amicus briefs from Lambda Legal, Consumer Litigation Associates, and Freestate Justice Inc. Hill was represented by the Office of the Public Defender in Alexandria, VA.

Eric Lesh is the Executive Director of the LGBT Bar Association of New York (LeGaL).

4th Circuit Finds Maryland Can’t Be Sued for Sexual Orientation Discrimination Under State Fair Employment Practices Act in Federal Court

By Arthur S. Leonard

Michael Pense, discharged from his position with the Maryland Department of Public Safety and Correctional Services shortly after his employer learned that he is an HIV-positive gay man, filed suit in federal court, asserting claims under Title VII and the Americans With Disabilities Act, with supplementary claims under the Maryland Fair Employment Practices Act (FEPA), which covers both sexual orientation and disability discrimination claims. The state moved to dismiss the FEPA claims, arguing that 11th Amendment sovereign immunity deprives the federal court of jurisdiction over those claims. U.S. District Judge Paul W. Grimm rejected the motion, finding based on prior district court rulings that Maryland law bars the state from raising a sovereign immunity defense in an employment discrimination case. On appeal of this point, the U.S. Court of Appeals for the 4th Circuit reversed, holding that federal sovereign immunity had not been waived by the state. Pense v. Maryland Department of Public Safety and Correctional Services, 2019 U.S. App. LEXIS 17369, 2019 WL 2426174 (June 11, 2019). Circuit Judge Robert King wrote the opinion for the court.

Because the 4th Circuit has yet to rule that sexual orientation discrimination claims are actionable under Title VII, the supplementary FEPA claim is Pense’s best vehicle for getting the federal court to rule on his sexual orientation discrimination claim, as sexual orientation is expressly a prohibited ground for discrimination under the state law. In this appeal, the state is not questioning the federal district court’s jurisdiction to hear Pense’s federal claims, but argues that it has not waived immunity from suit in federal court on the state law claims.

Maryland’s statute allowing suits against the state for violation of the FEPA, Md. Code Ann., State Gov’t Sec. 20-903, states: “The State, its officers, and its units may not raise sovereign immunity as a defense against an award in an employment discrimination case under this title.” A separate venue provision, Sec. 20-1013(b), states that an FEPA action “shall be filed in the circuit court for the county where the alleged unlawful employment practice occurred.” The district court saw Sec. 20-903 as a general waiver of immunity for any claims under the FEPA, including those filed in federal court. The 4th Circuit, however, rejected that reading as inconsistent with U.S. Supreme Court’s 11th Amendment case law, which requires that a waiver of sovereign immunity with respect to federal court jurisdiction over claims against a state must be explicitly stated in state law.

Although the Eleventh Amendment, by its terms, only precludes federal court jurisdiction over claims against a state brought by citizens of other states or foreign nations, the Supreme Court has construed the amendment as also barring suits against a state by its own citizens, unless the state has waived any immunity claim. Judge King found that a Supreme Court precedent on point, Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), “sets forth a ‘stringent’ test for finding a waiver of Eleventh Amendment immunity that requires ‘a clear declaration that [the State] intends to submit itself to [federal court] jurisdiction.’ Consequently,” he continued, referring to subsequent Supreme Court sovereign immunity decisions, “although a State’s general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment.” In other words, ‘a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.’
Sixth Circuit Rejects Class Action Discrimination Claim on Behalf of HIV-Positive Patients against Insurer over Policy Change on Drug Coverage

By Matthew Goodwin

On June 4, 2019, the U.S. Court of Appeals for the 6th Circuit upheld a decision by U.S. District Judge Thomas L. Parker (W.D. Tenn.) to grant a motion to dismiss a class action suit in an action by an HIV-positive man alleging discrimination in violation of the Affordable Care Act’s anti-discrimination provisions (Section 1557) by BlueCross/Blue Shield of Tennessee. Doe v. BlueCross Blueshield of Tenn., Inc., 2019 WL 2353207, 2019 U.S. App. LEXIS 16785.

The plaintiff, named in the opinion by Circuit Judge Jeffrey Sutton only as John Doe, takes the drug Genvoya to treat his HIV infection. Doe had been purchasing the medication from a local pharmacy, but the pharmacy informed him that BlueCross would no longer cover it when purchased from them, as it had adopted a policy requiring that certain high-cost prescriptions – including Genvoya – be purchased either from a designated specialty pharmacy or through mail order.

Doe preferred to use his regular pharmacy because, he alleged, the pharmacists there knew him and “his medical history and could spot the effects of harmful drug interactions. He also worried that medicine deliveries to his house might compromise his privacy or risk heat damage to the medicine.” Doe asked to opt out of the mail order/specialty pharmacy requirement, but BlueCross refused. The out-of-pocket cost of the medication is upwards of $1,000 per month, which meant Doe effectively had no choice but to accept the mail order/specialty pharmacy stipulation of the plan in order to be covered for this treatment, which would otherwise be unaffordable for him.

The ACA incorporates by reference prohibitions against discrimination based on race, color, national origin (Title VI of the Civil Rights Act), sex (Title IX), age (Age Discrimination Act of 1975 a.k.a. the Age Act), and disability (Section 504 of the Rehabilitation act of 1973).

Doe claimed that the defendant’s policy resulted in disparate-impact discrimination against him and those similarly situated. Doe’s theory of liability was that such disparate-impact discrimination violated of Section 504 of the Rehabilitation Act. In other words, Doe argued that he and others who, like him are disabled due to HIV infection, were disparately impacted by the defendant’s policy, and this amounted to discrimination.

However, while the anti-discrimination provisions of the ACA incorporated all of the above-mentioned four statutes, it did not clarify what standard of liability applied to claims brought under the ACA merely by citing those statutes. Each of those four statutes has its own standard of liability. Doe argued that all four standards were incorporated into the ACA and that a plaintiff suing thereunder was free to choose the most relaxed standard – i.e. disparate impact versus intentional discrimination. Importantly, whether Section 504 of the Rehabilitation Act permits recovery on a disparate impact theory is a question of first impression in the 6th Circuit.

In May of 2016, during the Obama Administration, the Department of Health and Human Services (HHS) issued final regulations for the antidiscrimination standards of the ACA. HHS took the view that a private right of action for disparate-impact discrimination claims was authorized for any of the four civil rights laws referenced in the ACA. Apparently, Doe based his suit, in part, on this guidance.
The court first addressed defendant’s argument that the ACA did not permit a private right of action to enforce its anti-discrimination provisions. The court disagreed, finding that the incorporation of the four civil rights statutes into the ACA, all of which authorized a private right of action, thereby authorized a private right of action under the ACA.

The court next turned to Doe’s discrimination arguments, undertaking a textual and historical analysis, and rejected HHS’s regulatory interpretation, calling it plainly inconsistent with the anti-discrimination provisions of the ACA and thus not entitled to *Chevron* deference. Instead, the court held that Section 504 does not permit recovery on a disparate impact theory, and thus an ACA action premised on Section 504 would have to allege facts supporting a disparate treatment theory.

As such, in order to prevail on his ACA claim under Section 504, Doe was required to show (1) he is an individual with a disability; (2) he is otherwise qualified for participation in a health program or activity; (3) he was excluded from participation in, denied the benefits of, or subjected to discrimination under the program solely by reason of his disability; (4) the program received federal assistance. Addressing the third prong, the court held that Doe was neither excluded from participation/denied the benefits of/or subjected to discrimination under the Plan. Furthermore, the court held that defendant did not intentionally discriminate against Doe because the medications subject to the mail order/specialty pharmacy requirement were neutral on their face — the common link among the drugs on the list was their cost, not the disabled status of the drugs’ users.

Following upon the Sixth Circuit’s decision, HHS issued re-proposed regulations under the antidiscrimination provisions of the ACA which are a significant revision to and departure from the 2016 regulations upon which Doe attempted to rely. The new proposed regulations would not allow claimants to “mix-and-match” the substantive requirements under the civil rights statutes incorporated into the ACA, yet another instance of the Trump Administration seeking to cut back on protection for individuals by replacing Obama Administration regulations.

Judge Sutton, who wrote for the court, is the same judge who wrote the 6th Circuit’s opinion in *Obergefell* rejecting marriage equality, which was subsequently reversed by the Supreme Court.

Doe was represented at argument by Jerry Flanagan, of Consumer Watchdog, Los Angeles, CA. Others on the brief include Edith M. Kallas of Whatley Kallas LLP (NY), Alan M. Mansfield of Whatley Kallas LLP (San Diego, CA), and Seth M. Hyatt of Barrett Johnston Martin & Garrison LLC (Nashville, TN).

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

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**N.Y. Appellate Division Holds that Gay Father Can Seek to Adopt His Son Conceived Through Gestational Surrogacy**

*By Christian Kummer and Brett Figlewski*

Filing and litigating *pro se* in New York’s Appellate Division for the Second Department, Joseph G. brought to the court the question whether the biological father of a child conceived with an anonymous egg donor and born to an unpaid gestational surrogate may adopt the child and thereby terminate any parental rights held by the surrogate. In a June 26 decision issued just days before the historic PRIDE celebration of the 50-year anniversary of the Stonewall uprising, the four-judge panel answered unequivocally and unanimously in the affirmative. *In the Matter of John; Joseph G. (Anonymous), Appellant*, 2019 N.Y. App. Div. LEXIS 5110, 2019 WL 2607522, 2019 NY Slip Op 05132.

Joseph G., a single gay man, sought to have a child through unpaid (“compassionate” or “altruistic”) gestational surrogacy. In 2012, with the help of medical professionals, Joseph had embryos created with his sperm and with ova from an anonymous donor. In 2013, a surrogate gave birth to twins, and the remaining embryos were frozen and saved for possible future use. Not long after the birth of the twins, Joseph successfully adopted them by obtaining an order of adoption from the Queens County Family Court. Several years later, in 2017, Joseph sought to use the remaining embryos to have another child. A friend agreed to be an unpaid surrogate and entered into an agreement whereby Joseph would adopt the resulting child and relieve the surrogate of any legal relationship or responsibility for the child. John, the
subject of this litigation, was born in October 2017, and has been in Joseph’s care ever since.

As he had done previously, Joseph filed a petition in Queens Family Court to adopt the child, and the surrogate executed an extra-judicial and statutorily-mandated consent form to surrender all parental rights in accordance with the Domestic Relations Law. Additionally, the surrogate submitted affidavits describing the circumstances regarding John’s conception and birth and confirmed that she voluntarily agreed to Joseph being the sole parent of the child. An adoptive home study was conducted with extremely positive findings, the social worker having reported that it was “clear the appellant, his twins, and John are a cohesive family unit.”

However, in its March 2018 decision, Family Court Judge John M. Hunt dismissed Joseph’s petition on the grounds (1) that an adoption would validate “a patently illegal surrogacy contract” and (2) that there was no authority for a parent to adopt his or her own biological child. The Family Court suggested that instead Joseph could petition for an order of filiation by means of a proceeding to determine paternity. Joseph appealed, and the Appellate Division (decided by Alan D. Scheinkman, P.J., with Lasalle, Barros, and Iannacci, J.J., concurring in his opinion) reversed.

The Appellate Division ruled that although surrogacy contracts themselves are not enforceable, they do not “foreclose an adoption of the resulting child,” and the proper exercise of judicial authority to permit adoption does not “involve any judicial sanction for the underlying circumstances by which the child was conceived and born.” The court stated that although the legislature declared surrogate parenting contracts to be against public policy and therefore unenforceable, the legislature also understood that individuals might enter into such contracts and that children would be born as a result. In anticipation of this reality, the legislature had provided that the birth mother’s participation in a surrogate parenting contract shall not be held against her, and, as in the current case, where there is no dispute regarding parentage because the genetic and gestational parents are in agreement, children would be in the care and custody of the intended parents.

Moreover, the court noted that uncompensated surrogacy arrangements are not subject to any civil or criminal penalty and that the legislature had drawn a distinction between commercial surrogacy contracts and non-commercial surrogacy contracts like the one Joseph entered into in order to conceive his son. The court acknowledged that a surrogacy contract may be used as “evidence of the parties’ unequivocal intention that the intended parents become the parents of the child” and cited Matter of Frank G. v. Renee P.-F., 142 A.D.3d 928, 930, one of the first cases to be decided after the Court of Appeals’ 2016 decision in Brooke S.B. In short, the court was clear that Joseph’s petition had nothing to do with validating or enforcing a surrogacy arrangement. Instead, the court was asked only to approve an adoption for a child for whom there was no controversy between the birth mother and the intended father.

The court also deemed erroneous the Family Court’s reasoning that a biological parent is unable to adopt his or her own child. The adoption statute clearly defines the categories of persons who are permitted to adopt a child, including an unmarried adult such as Joseph, and, additionally, the statute contemplates that adoption be considered in accordance with the best interests of the child. In fact, as the case law has developed, the application of the adoption statute has placed high priority on the best interests of the child, including in the seminal Court of Appeals case from 1995 authored by the late Chief Judge Judith Kaye, Matter of Jacob, 86 N.Y.2d 651, which permitted second-parent adoption by the same-sex partners of biological parents.

The court found that “there was nothing in the text of the Domestic Relations Law which precludes a parent from adopting his or her own biological child,” and looked to express statutory language providing that a couple together may adopt a child of either of them born in or out of wedlock, as well as to a number of hypothetical situations in which the possibility of such an adoption might be the only way for a child to have a legal parent.

Lastly, the court addressed the problem with the Family Court’s direction that Joseph seek to establish his parentage by means of an order of filiation, which, according to the court, “would leave the surrogate as the legal mother, which was not their intent in creating the child.”

The court thus acknowledged that not all means of establishing parentage – whether by adoption, marital presumption, or pre-conception agreement or estoppel pursuant to Brooke S.B. – are equivalent, or even appropriately tailored to the situation of any given family. As such, the court quite pragmatically provided for the consideration of various legal options, depending on a family’s particular intentions and legal needs. Given the variety of ways in which families, especially LGBT families, are formed today, this decision represents an enormous and timely victory for the recognition of LGBT families, and adds another critical cornerstone in the foundation of legal recognition and protection.
Veterans’ Claims Appeals Court Revives Male Veteran’s Claims Stemming from In-Service Sexual Assaults

By Filip Cukovic

On May 31, the U.S. Court of Appeals for Veterans’ Claims vacated the Board of Veterans’ Appeals’ decision denying Carl W. Beard’s entitlement to service connection for an acquired psychiatric disorder allegedly arising from non-consensual homosexual encounters during his military service. The opinion rejects the notion that because Beard had engaged in consensual gay sex, he could not possibly be the victim of same-sex assaults giving rise to PTSD. Beard v. Wilkie, 2019 WL 2307357, 2019 U.S. App. Vet. Claims LEXIS 905 (U.S. Ct. App. for Vet. Claims, May 31, 2019) (designated for electronic publication only).

Beard served on active duty in the U.S. Army from September 1977 to March 1982. During his service, he engaged in several consensual homosexual encounters. However, during that timeframe Beard also reported that he was sexually assaulted by other military members and officials.

In October 1995, Beard filed his first claim seeking service connection for a psychiatric disorder. A final adverse rating decision on that claim was issued in 1996. Additional rating decisions were issued in 2002, 2005 and 2007. However, in December of 2017, the Board of Veterans’ Appeals concluded that he was not entitled to a service-connection claim. First, the Board considered whether Beard has a current psychiatric disability, such as post-traumatic stress disorder (PTSD), and whether it is related to military sexual trauma (MST). Second, the Board considered whether Beard’s current psychiatric disorder is related to the disability for which he previously sought treatment during active service. The Board determined that Beard was not entitled to service connection under either of these two theories of entitlement and denied his claim.

On appeal, Mr. Beard argued that the Board’s decision was erroneous because the Board relied on inadequate VA medical examinations. Specifically, the Board failed to consider Beard’s lay reports of MST and his symptoms exhibited during and after his service. In the May 31 ruling, Judge Kenneth B. Kramer found Beard’s argument persuasive, vacated the Board’s decision, and remanded the matter for further proceedings.

Under the first theory of entitlement, the Board erroneously concluded that Beard’s current psychiatric disorder could not be attributed to military sexual trauma. In arriving at this conclusion, the Board narrowly relied solely on a 2012 report produced by the VA examiner. In this report, the examiner concluded that although Beard had previously identified certain homosexual encounters that occurred during his military service, those events did not indicate the existence of any sexual trauma. The Board stated that, in May 1981, Mr. Beard reported that he engaged in a consensual homosexual affair with another person, implicitly concluding that only because Mr. Beard engaged in consensual homosexual activity, he could not also have been sexually assaulted by other male Army members.

The Court of Appeals took issue with this reasoning and held that the Board’s approach in determining whether Beard’s current mental disorder is linked to military sexual trauma was unfairly narrow and that the Board failed to consider all relevant evidence. Namely, there is evidence that in 1981, Beard reported being taken advantage of while drunk. Furthermore, in 1984, Beard reported to a senior officer that he was sexually assaulted by a Private First Class, whom he identified by name. Additionally, in an April 2005 statement, Beard alleged that he was assaulted by two individuals while on active duty in Korea. Despite these detailed lay reports of MST, the Board made no findings as to whether these events occurred and instead it only relied on a 2012 report in which a single VA examiner concluded that Beard experienced no sexual trauma whatsoever.

Under the second theory of entitlement, the Board erroneously concluded that Beard’s current psychiatric disorder was unrelated to the disability for which he sought treatment during active service. On appeal, Beard argued that the Board erred in relying solely on a September 2015 VA opinion, which failed to consider reports of Mr. Beard experiencing in-service hallucinations and post-service depression. In a 2015 report, the VA official concluded that Beard’s current psychiatric disorder is a separate and secretive disorder from that treated during his active service. The examiner explained that although Beard experienced depressive symptoms during active service, those depression symptoms have not been an issue for him for many years, implying that Beard’s current struggles with depression are unrelated to those that he experienced during his service. Additionally, the examiner concluded that there was no evidence that Beard experienced any symptoms of hallucinations during his time in the Army.

However, the Court of Appeals found that the record contradicts these findings. For example, Social Security Administration records show that Beard was taking VA-prescribed medication to treat depression symptoms for many years, continuously. Furthermore, Beard also produced evidence documenting that he experienced severe hallucinations on several occasions during active service. The Court of Appeals ruled that the Board erred in failing to address these reports and that their exclusive focus on the 2015 VA report was unfairly narrow. Therefore, the court vacated the Board’s decisions and remanded the matter for further proceedings consistent with this decision.

Judge Kramer is a Senior Judge acting in recall status. The opinion does not indicate whether Beard is represented by counsel or pro se.

Filip Cukovic is a law student at New York Law School (class of 2021).

July 2019 LGBT Law Notes
The Oklahoma Supreme Court ruled 8-1 in Schnedler v. Lee, 2019 WL 2588577, 2019 Okla. LEXIS 49 (June 25, 2019), that “a non-biological same-sex parent stands in parity with a biological parent,” and that once standing requirements are met, “the court shall adjudicate any and all claims of parental rights – including custody and visitation – just a the court would for any other legal parent, consistent with the best interests of the child.” The lone dissenter, Justice Richard Darby, claimed that the court had issued an “advisory opinion” that was beyond its purview, and should have used “judicial restraint” and based its holding on “the narrowest grounds possible.” Instead, the court treated it prior precedent on the issue of same-sex co-parent standing as obsolete and substituted an entirely new analysis. Chief Justice Noma Gurich wrote the court’s opinion.

Lori Schnedler and Heather Lee met each other in the early 2000s, while both were employed by the Bartlesville Police Department, their relationship progressing from co-workers to co-habitants of an apartment. After Lori did overseas military service, they bought a house together and decided to have a child. “A work friend of Heather’s, Kevin Platt, agreed to serve as the sperm donor,” wrote Justice Gurich, but after donating his sperm, was not an active participant in the relationship between the women and their child. Until the break-up of the couple years later and the resulting litigation, Kevin, who was married and had children from his marriage, did not have a relationship with the child. After the break-up and the ensuing litigation, Kevin got involved and began to establish a relationship with the child.

The child was born in July 2007, either years before the Supreme Court decided Obergefell and a 10th Circuit decision, for which cert had been denied, resulted in marriage equality being available in Oklahoma. The women’s relationship ended in April 2015, as the marriage equality issue was coming to a head in the courts. Heather left the home they had shared, taking the child with her. Although she allowed Lori regular visitation for seven months, Heather “suddenly denied Lori any further contact with their daughter,” wrote Gurich. “Since that time, Lori has neither seen nor spoken with J.L.”

Lori filed suit in December 2015, petitioning for an adjudication of the child’s custody, visitation, and child support, relying on the doctrine of in loco parentis, which the Oklahoma courts had recognized to some extend in prior same-sex parent disputes of this nature. Heather objected to the petition “and sought to join Kevin, the biological father and genetic donor, as a necessary party to the proceedings. Additionally, both Heather and Kevin brought cross-claims in the action, requesting the trial court’s determination that Kevin was J.L.’s ‘biological and natural father’ and therefore entitled to full parental rights of custody, visitation, and support,” even though Kevin “was not demonstrably involved in J.L.’s life” before the lawsuit began. Heath and Kevin both challenged Lori’s standing to bring the action, and the trial judge actually agreed, interpreting the state’s existing precedent of Ramey v. Sutton, 2015 OK 79, 362 P.3d 217 (Okla. 2015), as requiring the sperm donor to “consent to, and encourage, the non-biological parent’s parental role” in order to find parental standing for the co-parent. In this case, the sperm donor was a third party custody claimant as well and opposing Lori’s petition. The Court of Civil Appeals affirmed the trial court’s dismissal of Lori’s petition. The Oklahoma Supreme Court granted certiorari “to clarify the standing of non-biological co-parents in same-sex relationships, and to create a meaningful and comprehensive framework for the adjudication of the same.”

First, the court found that the lower courts had misconstrued its earlier holding, which it insisted did not empower the sperm donor to stand as a barrier to the co-parent’s standing in a case like this one. Going further, the court found its prior precedents using the doctrine of in loco parentis to be inadequate for present purposes, particularly in light of the U.S. Supreme Court’s concern, expressed in Obergefell v. Hodges, that children being raised by same-sex parents should not have to suffer their families being considered as “lesser” to traditional heterosexual families.

“In announcing today’s decision,” wrote Justice Gurich, “we are mindful of the need to establish practical guidelines for state courts. We conclude that, to establish standing, a non-biological same-sex co-parent who asserts a claim for parentage must demonstrate – by a preponderance of the evidence – that he or she has engaged in family planning with the intent to parent jointly[,] acted in a parental role for a length of time sufficient to have established a meaningful emotional relationship with the child, and resided with the child for a significant period while holding out the child as his or her own child. As always, a court shall assess these factors with the best interests of the child as its foremost aim. When a continuing relationship with the non-biological parent is in those interests, a court must honor its validity and safeguard the perpetuation of that bond. In such proceedings, parties may continue to invoke equitable doctrines and defenses, e.g., equitable estoppel.”

The court specifically rejected the use of in loco parentis as the deciding doctrine in such cases. Justice Gurich wrote that “in loco parentis – at root, a legal fiction – is ‘by its very nature,
a temporary status.’ Temporary and uncertain parental status only exacerbates the frequency of cases like today’s and creates an inherently more unstable environment for the children of same-sex couples. Their children see them as mom or dad. The law should treat them as such.” The court asserted that its holding was “consonant with the constitutional protections guaranteed in Obergefell.”

In his dissent, Justice Darby argued that the case could be resolve in Lori’s favor by a finding that the requirements of Ramey v. Sutton had been met in this case and that Lori could be accorded in loco parentis standing. However, he argued, the court’s reformulation of the rules for finding standing for co-parents was unnecessary, and this an “advisory opinion,” and “This Court does not issue advisory opinions.”

Lori Schnedler is represented by Christopher U. Brech of McDaniel Acord & Lytle PLLC, Tulsa, and Michael F. Smith of McAfee & Taft, also Tulsa. Heather Lee is represented by Bryan J. Nowling, of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., also of Tulsa. “No appearance for Kevin Platt, Third Party Defendant/Appellee,” states the clerk’s summary.

New Jersey Judge Orders Shut-Down of “Alter Ego” of Former Conversion Therapy Group

By Arthur S. Leonard

Hudson County (NJ) Superior Court Judge Peter F. Bariso, Jr., issued a scathing opinion on June 10, ordering the immediate dissolution of an organization calling itself Jewish Institute for Global Awareness (JIFGA), based on his finding that JIFGA was an “alter ego” of “Jews Offering New Alternatives to Homosexuality” (JONAH), a conversion therapy service that had been convicted of violating the New Jersey Consumer Fraud Act by a jury in Judge Bariso’s court on June 25, 2015. Ferguson v. JONAH Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality, 2019 N.J. Super. Unpub. LEXIS 1336 (N.J. Super. Ct., Hudson Co.).

The jury verdict followed a lengthy trial in which “clients” of JONAH testified about the absurd and extreme treatments to which they were exposed. Many of the clients were young people who were pushed into “therapy” with JONAH by their religiously-observant parents in a desperate attempt to “turn them straight.” The jury verdict concluded that JONAH, its operators and those associated with it were engaged in consumer fraud, misrepresenting their ability to change a person’s sexual orientation.

After the jury verdict, the parties negotiated a settlement agreement, approved by the judge, under which JONAH was supposed to go out of business and pay substantial damages as reparation to the plaintiffs who had been defrauded. Arthur Goldberg and other individual defendants were targeted by a permanent injunction issued by Judge Bariso, being “permanently enjoined from engaging, whether directly or through referrals, in any therapy, counseling, treatment or activity that has the goal of changing, affecting or influencing sexual orientation, “same sex attraction” or “gender wholeness,” or any other equivalent term, whether referred to as “conversion therapy,” “reparative therapy,” “gender affirmation process” or any other equivalent term (“Conversion Therapy”), or advertising or promoting Conversion Therapy-related commerce in or directed at New Jersey or New Jersey residents.”

As part of the settlement agreement, which precluded an appeal by the defendants, the plaintiffs agreed to a lower level of damages than would otherwise be awarded by the court in exchange for defendants’ commitment to pay agreed-upon damages promptly and to put JONAH out of business and comply with the terms of the injunction, which was also binding on the named individual defendants.

But evidence presented by the plaintiffs in support of a March 2018 motion to enforce their rights under the settlement agreement persuaded the court that Goldberg was “blatantly” flouting the settlement agreement and violating the injunction by starting a new organization, JIFGA, to pick up where JONAH left off. Bariso headed the first part of his findings: “There is clear and convincing evidence that defendants repeatedly violated the settlement agreement and the permanent injunction.”

The ink was barely dry on the signatures before Goldberg resumed making referrals to conversion therapy practitioners for people who called for assistance, and the damages agreed upon were not paid in full. Goldberg claimed that he understood that the injunction only pertained to clients and therapists in New Jersey, and that he was receiving calls from out of state and referring the callers to therapists who practiced outside the state. Bariso rejected this crabbed reading of the injunction, finding that there were no geographical “loopholes,” and referred to evidence showing that Goldberg had actually acknowledged in writing the possibility that his referrals were illegal.
Furthermore, the opinion documents Goldberg’s ambitions to take his conversion therapy promotion “global,” as indicated by the name of his new organization. Wrote Bariso, “Goldberg’s use of his New Jersey non-profit organization has extended outside the United States. In the spring of 2018, Goldberg reached out to Alan Alencar, a Brazilian leader of Joel 2:25 (conversion therapy organization modeled on JONAH). In an email, Goldberg wrote, ‘after the demise of JONAH, I created the Jewish Institute for Global Awareness’ and offering to ‘be helpful down there to you.’ When Alencar responded that Joel 2:25 was planning to work on men with SSA [same-sex attraction] and start something similar to JIM [a conversion therapy weekend program], Goldberg jumped on the opportunity to discuss his experience working with the SSA issue and how he could help.” Goldberg put Alencar in touch with three conversion therapy providers in Brazil, and urged the creation of similar programs in Europe after returning from a conference on conversion therapy in Slovakia.

Bariso wrote that various Goldberg communications that surfaced through discovery on this motion “highlight the lies in Goldberg’s statement to this court that JIFGA has not worked to promote commerce in conversion therapy.”

As to the “alter ego” finding, Bariso wrote, “JONAH and JIFGA have the same co-founders and co-directors (Goldberg and [Elaine] Berk), occupy the same office, and are reachable at the same phone number and email addresses. Arguably, they have the same name, as JIFGA is a recycled acronym that JONAH once used to market itself to a wider audience. Through discovery, it was found that JIFGA plainly continues JONAH’s general operations and that JIFGA picked up where JONAH left off.”

Judge Bariso concluded that defendants had committed fraud on the court, “constituting criminal contempt of this court and its orders.” The court found that Goldberg and JIFGA continued to make referrals to conversion therapy practitioners even as the motion was being litigated, and while they were representing to the court that they were complying with the injunction.

Bariso ruled that JIFGA would be made subject to the existing injunction against JONAH, and specified that “all communications channels in JIFGA’s control and use for JIFGA’s operations, including the email accounts and phone numbers from JONAH, must be terminated. Goldberg and Berk are also enjoined from serving as directors or officers of or incorporating any tax-exempt entity incorporated in or having operations in New Jersey.” Since the court found a violation of the settlement agreement, the requirement to pay damages at the full original rate was triggered, “a payment that could have been avoided by simply complying with the permanent injunction and the settlement agreement.” The court also ordered the defendants to pay the plaintiff’s legal expenses of litigating this motion, which involved lots of discovery time.

However, Judge Bariso denied the plaintiffs’ request to hold the individual defendants in criminal contempt. “This court seriously questions the direct falsities outlined in Goldberg’s certifications,” wrote Bariso, “along with his willingness to blatantly disobey the permanent injunction. However, the remedies awarded to plaintiffs will serve the dual purpose of contempt hearings: to deter and to punish. The inability for defendants to incorporate another tax-exempt entity in New Jersey will insure that defendants no longer use a similar platform to again violate the injunction and the New Jersey Consumer Fraud Act. Additionally, the monetary damages awarded to plaintiffs will deter defendants from defying this court’s orders.”

Based on his past conduct, it seems likely that Goldberg will try to devise new ways to defy the court’s orders without getting caught, so Judge Bariso’s concluding paragraph seems unduly optimistic and surprisingly naïve.

The plaintiffs are represented by Bruce D. Greenberg of Lite DePalma Greenberg, LLC; David C. Dinielli, of Southern Poverty Law Center; and Lina Bensman of Cleary Gottlieb Steen & Hamilton LLP (New York). ■

Transgender Woman Battles Former Employer’s Frivolous Defamation Action

By Corey Gibbs


IWS hired Hileman in 2011 as the Operations Manager for three of its stores. In April 2013, Hileman informed George Randall that she was transgender. In August 2013, Hileman was demoted to the store manager of just one store. In 2014, Hileman sued IWS and Randall for discrimination and retaliation. The parties settled in March 2015, and they negotiated a Settlement Agreement which led to Hileman resigning and agreeing to silence regarding the agreement.

In November 2015, a local news program created a report entitled “Transgender Community Facing Discrimination in Workplace”. Hileman participated in this report by allowing Mandy Murphy to interview her about her experience as a transgender person.
in the workplace. Hileman discussed the time she told her boss and clients that she was transgender. She even brought up the discrimination litigation in the interview, but she refrained from disclosing any specific information about the identity of the employer, never mention IWS or Randall by name in the interview.

George Randall’s son, Todd, heard about the news report, and he informed his father about it. Todd believed that the statements made by Hileman regarding her termination were untrue and that they violated the Settlement Agreement. He felt that IWS was identified by the news report because there were coincidentally no transgender executives other than Hileman in the wine and spirit industry in St. Louis.

George Randall opened up discussion with his family and attorneys after the news report. Randall’s attorneys felt that Hileman had breached the Settlement Agreement. Randall claimed that he “paid her a dearly sum of money not to talk about, and she violated that.” Despite admitting that he did not know specifically what she said in her interview, he felt violated. Randall agreed that IWS should file a lawsuit against Hileman, and three months later IWS did.

IWS claimed defamation and breach of the Settlement Agreement. It sought the return of the money which it paid for the settlement, punitive damages, and other appropriate relief. When the lawsuit reached the discovery phase, Hileman sought the disclosure of all the facts on which IWS based its claims. IWS attempted to avoid answering the interrogatories and producing documents, but the court ordered it to answer and to produce documents. The business admitted that it could not prove an damage to its reputation. But George Randall believed, deep down, that IWS’s reputation was damaged.

Hileman moved to dismiss the complaint and moved for sanctions against IWS for not complying with the discovery order. The state court dismissed the defamation counts without prejudice, and it ruled that IWS could not replead the defamation counts until it complied with the discovery order. IWS let go of the defamation counts and pursued only the breach of contract claim. Then, Hileman successfully moved for partial summary judgment on causation and some of the damage claims.

Following Hileman’s successes in court, IWS appealed. The state appellate court affirmed the lower court’s decision. That court concluded that IWS’s theory in the complaint was not supportable based on any of the evidence. While the lawsuit was pending in state court, Hileman filed this case in federal court, which was assigned to Judge Yandle, an appointee of President Barack Obama.

Hileman alleged that IWS and George Randall retaliated against her for engaging in protected activities under Title VII and MHRA by filing the state court action. She claimed that the state court action was based on false statements of law and fact. Hileman moved for partial summary judgment on her MHRA retaliation claims. IWS and Randall moved for summary judgment on the Title VII and MHRA claims.

Judge Yandle denied the defendants’ motion for summary judgment on the Title VII claim. The anti-retaliation provision in Title VII “forbids an employer from discriminating against an employer because the employee opposed any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation.” 42 U.S.C. § 2000e-3(a). The judge acknowledged that even former employees are protected by this provision of Title VII.

Judge Yandle stated that Hileman would need to establish three things in order to survive summary judgment on her retaliation claim. First, she needed to establish that she engaged in a protected activity. Hileman engaged in a protected activity when she filed her initial lawsuit. Second, she needed to establish that she suffered from an adverse employment action. IWS and Randall’s state court action could be construed as an adverse employment action. Third, she needed to establish that there is a causal link between the protected activity and the adverse action. Judge Yandle reasoned that there was, writing that there was “sufficient circumstantial evidence to support a finding that Defendants’ state court lawsuit against [Hileman] was filed with retaliatory intent.” By establishing all three requirements, the judge was able to deny the defendants’ motion for summary judgment as to Hileman’s Title VII retaliation claim.

Judge Yandle denied both the defendants’ motion for summary judgement on the MHRA claims and Hileman’s motion for partial summary judgment on the MHRA claims. “The MHRA makes it unlawful to retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by the MHRA.” § 213.070, RSMo. In order to establish a prima facie case of retaliation under the MHRA, Hileman had to prove that she complained of an MHRA-prohibited activity, that IWS and Randall took an adverse employment action, and that a causal connection exists between the complaint and adverse action. The judge stated that the issue with both parties’ motions was in regard to the causal connection between the protected activity and the alleged retaliatory action.

Hileman claimed that her initial lawsuit contributed to IWS and Randall’s decision to file a state court lawsuit. On the other hand, the Defendants claimed that Randall was only motivated by the good faith belief that Hileman had breached the Settlement Agreement. Judge Yandle believed the issue regarding the causal connection would be more appropriately decided by a jury, because there was a genuine issue of material fact.

Along with the other motions, the Defendants moved for “summary judgment on the issue of Hileman’s request for attorney’s fees related to defending the state court lawsuit.” IWS and Randall claimed that issue preclusion and collateral estoppel
barred Hileman’s claim for attorney’s fees. However, the Defendants failed to plead either issue preclusion or collateral estoppel in their Answer. Thus, Judge Yandle denied their motion, because the Defendants waived the defenses by not pleading them earlier.

*Hileman v. Internet Wines & Spirits Co.* tells a slightly deeper story than one may expect. George Randall based the entirety of his claims on his belief that he had been violated in some way. Despite the continued requests for proof, he was not able to back up his claims with evidence. While his gut feelings may not have won his legal battles, they forced Jaimie Hileman to defend herself in court.

While this was not a physical attack on a transgender individual, it appears to be frivolous litigation. Like all litigation, even the frivolous variety comes with costs. If more individuals like George Randall pursue court actions solely based on their beliefs, the other party is attacked financially without a basis in fact. In *Hileman v. Internet Wines & Spirits Co.*, Judge Yandle denied the Defendants’ motion for summary judgment on the issue of Hileman’s attorney’s fees. However, the motion in this case failed because the Defendants did not raise the issue earlier.

Had the Defendants brought the motion before the court earlier, there may or may not have been a different outcome. The possibility that frivolous litigants can bring actions against a party and then subject the party to the defense costs is alarming. Transgender individuals are marginalized and subjected to attacks from all angles, and frivolous litigation may be another form of aggression of which the community should be aware.


### Federal District Court Orders Restroom Access for Transgender High Schooler in Indiana

**By Corey Gibbs**

On June 7, 2019, Judge William T. Lawrence, of the U.S. District Court for the Southern District of Indiana, ruled that a school had violated Title IX and the Equal Protection Clause of the Fourteenth Amendment by refusing to allow a transgender student, J.A.W., to use the restroom conforming with his gender identity. Judge Lawrence followed Seventh Circuit precedent. Whitaker, and J.A.W.’s claims were successful in the District Court. *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2019 U.S. Dist. LEXIS 96571, 2019 WL 2411342.

J.A.W. is a transgender man. He has identified as male for a long time, despite both his driver’s license and birth certificate stating otherwise. At age eleven, J.A.W. began recognizing himself as transgender. In the sixth grade, he started to feel uncomfortable using the girls’ restroom. In the eighth grade, his school assigned him to a physical education class that required him to use the girls’ locker rooms and made him uncomfortable.

After he met with a social worker, the school stopped requiring J.A.W. to attend the girls’ physical education class. At the beginning of his eighth grade year, J.A.W. began presenting himself outwardly as boy. He also asked that others address him by his chosen masculine name and by masculine pronouns.

Upon entering his freshman year of high school, J.A.W. attended both North High School and Central High School. Upon entering puberty, he suffered discomfort and distrest related to gender dysphoria. The Diagnostic and Statistical Manual of Mental Disorders defines gender dysphoria as “[a] marked incongruence between one’s experienced/expressed gender and assigned gender.” This discomfort and distress made J.A.W. incredibly uncomfortable using the girls’ restroom.

At North High School, the administration required J.A.W. to take a physical education course. J.A.W. and another transgender student began using a boys’ restroom to change, so that they could avoid the discomfort of changing in the girls’ locker room. Eventually, a parent complained to the Evansville Vanderburgh School Corporation administrators. The parent claimed that “two girls” were using the boys’ restroom. After the complaint, EVSC informed J.A.W. that he could no longer use the boys’ restroom. The school told the two transgender students that they could use a girls’ locker room that was not being used at that time. EVSC also informed J.A.W. that he could either use the girls’ restroom or a gender-neutral, single-occupancy restroom that was located in the nurse’s office. The nurse’s office was far from J.A.W.’s classes.

Early in J.A.W.’s sophomore year, he approached the principal of North High School and presented a copy of the “Dear Colleague” letter which was issued on May 13, 2016 by the U.S. Department of Justice and the U.S. Department of Education. The letter stated:

“As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.”

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EVSC reviewed the letter and still denied J.A.W.’s request to use the boys’ restroom.

In November 2016, J.A.W. emailed EVSC’s Chief Diversity Officer, Dr. Blue, to inquire about EVSC’s policy regarding transgender students accessing restrooms and locker rooms. Dr. Blue claimed that there was no policy, but that transgender students could use the nurse’s office. J.A.W. did not respond to Dr. Blue’s email. He did not complain to anyone that the gender-neutral restrooms were either inaccessible or unsatisfactory.

In June 2017, J.A.W.’s counselor wrote that J.A.W. met the criteria for Gender Dysphoria of Adolescence and that he would benefit from hormone therapy. J.A.W. began taking testosterone in the Fall of 2017. He has been taking testosterone injections regularly since he began in 2017.

During the first semester of his junior year, J.A.W. began using the boys’ restrooms without permission. In the second semester of his junior year, his attorney informed EVSC that, pursuant to a Seventh Circuit decision, Whitaker, he believed that J.A.W. was entitled to use the boys’ restrooms at the school. EVSC’s general counsel responded by stating that the Seventh Circuit decision was factually distinguishable and that the decision did not reflect the law across the United States. EVSC still refused to allow J.A.W. to use the boys’ restroom at school.

Once the lawsuit began, EVSC claimed that it had never been made aware that J.A.W. had been diagnosed with gender dysphoria, that he had started hormone therapy, or that he had complaints regarding accessibility to the gender-neutral restroom. EVSC claimed that it first became aware of the hormone therapy and diagnosis through discovery in this lawsuit. At the preliminary injunction hearing, “[J.A.W.] looked and sounded like a teenage boy; he is very unlikely to be mistaken for a girl at this point,” wrote the judge. EVSC’s superintendent testified that if J.A.W. had changed his birth certificate to indicate that his sex was male, then EVSC’s “practice” would have allowed J.A.W. to use the boys’ restrooms.

J.A.W. asserted that EVSC’s refusal to allow him to use the boys’ restroom was a Title IX violation. According to 20 U.S.C. § 1681(a), “[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.” Title IX states that separate toilets and facilities on the basis of sex may be provided, but the facilities must be comparable for both sexes. EVSC claimed that it lacked notice of a claimed violation of Title IX.

According to EVSC, the Seventh Circuit has recognized a threshold requirement to trigger protections for transgender students. “Plaintiff’s right to use the boys’ restrooms – assuming such a right exists – could not have accrued until EVSC received something more than Plaintiff’s announcement that he is a boy and his unilateral demand for access to the boys’ restrooms,” the defendant argued. Judge Lawrence rebutted EVSC’s argument by asserting that the Seventh Circuit has previously recognized that policies which make individuals use restrooms that do not conform with their gender identity punish the individuals for gender nonconformance. “In sum, EVSC’s practice violated Title IX,” wrote the judge, concluding that the question whether J.A.W. was entitled to damages and when the damages began to accrue should be left to a jury to determine.

J.A.W. also asserted an equal protection claim against EVSC. The Seventh Circuit has previously stated that, “The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike.” The circuit court also asserted that sex-based classifications require heightened scrutiny. In the case at hand, EVSC’s “practice” is sex-based. “J.A.W. has pointed to evidence that stands unrefuted that EVSC’s practice could not be stated without referencing sex and that the practice treated transgender students like J.A.W. differently.” Judge Lawrence granted J.A.W.’s motion for partial summary judgment with regard to the equal protection claim.

This case comes at a time when transgender rights are being rolled back by the Trump Administration. As the President continues to strip individuals of their rights at the federal level, citizens’ rights are placed in the hands of judges across the nation. While there are judges like Judge Lawrence, who recognize that statutes are meant to protect all citizens, there are other judges who do not interpret statutes as protective of all citizens.

The “Dear Colleague” letter that J.A.W. presented to the principal of North High School is reflective of the protections that the Obama Administration sought to leave behind. The letter broadened the meaning of “sex.” In February 2017, approximately one month into Trump’s administration, a new “Dear Colleague” letter addressing the Obama era interpretation of “sex” was released. The new letter stated:

“This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.”

This letter builds its argument on one Circuit court and one district court opinion. It also shows the state-centric path down which the Trump Administration has led the nation.

With so much power being left in the hands of federal judges, we must be
mindful of the direction in which cases like J.A.W. v. Evansville Vanderburgh School Corporation are going. Judge Lawrence repeatedly discussed Seventh Circuit precedent, which the District Court for the Southern District of Indiana is bound to follow, throughout his opinion. Judge Lawrence turned to Whitaker v. Kenosha Unified School District No. 1 Board of Education for guidance.

In Whitaker, the facts are quite similar to those in J.A.W. Ash Whitaker wanted to be able to use the boys’ restroom while at school, but the school district refused to permit Whitaker access to the boys’ restroom. The Seventh Circuit affirmed the lower court’s decision to grant Whitaker injunctive relief, and Whitaker was then able to use the boys’ restroom.

The Seventh Circuit relied on the facts provided by amici to conclude that it is imperative to allow transgender students to access the restroom that conforms to their gender identity. “These administrators uniformly agree that the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized. Rather, in their combined experience, all students’ needs are best served when students are treated equally.” Facts show that restroom policies, which prohibit transgender students from using the restroom that conforms to their gender identity, only serve to harm the students.

While cases like J.A.W. v. Evansville Vanderburgh School Corporation impact the geographical jurisdiction of the courts where they take place, one case that could create an impact nationally is Harris Funeral Homes v. EEOC. The issue in Harris Funeral Homes is whether Title VII prohibits discrimination against transgender people based on their status as transgender or sex stereotyping. The Supreme Court of the United States will take on that issue in the coming months.

J.A.W. is represented by Gavin Minor Rose, Jan P. Mensz, Kenneth J. Falk, and the ACLU of Indiana. ■

Indiana Appeals Court Finds Transgender Name-Change Applicants Entitled to Confidentiality

By Arthur S. Leonard

Dealing simultaneously with the refusal by two trial judges to allow transgender name-change applicants to avoid the normal requirement to publish notices of their applications to inform the public of their impending name changes, the Court of Appeals of Indiana found that transgender name-change applicants have a right to keep their name-change proceedings confidential, including waiving the usual requirements of publication, and providing for permanent sealing of the records of their cases. In the Matter of the Name Change of K.H., 2019 WL 2554318, 2019 Ind. App. LEXIS 277 (June 21, 2019); In the Matter of the Name Change of M.E.B., 2019 WL 2554325, 2019 Ind. App. LEXIS 280 (June 21, 2019).

In both cases, the applicants had filed to together with their applications requests to waive any publication requirement and to have the records permanently sealed. Both Orange County Circuit Judge Steven L. Owen (M.E.B. case) and Hamilton County Circuit Judge Paul A. Felix (K.H. case) denied the motions. Indeed, Judge Felix specifically ordered the plaintiff to publish a notice of the hearing on her application to waive publication, obviously defeating the purpose of the motion before even hearing any evidence in support of a waiver. Both judges responded with actual or feigned ignorance of the dangers that transgender individuals who are “outed” through publication of notice about their name-change proceedings could face.

For example, K.H. filed an affidavit stating that publishing a notice and – as ordered by the judge, notifying the Attorney General of her name-change petition – “will cause me to suffer the immediate and irreparable harm that I understand was to be prevented by my request to maintain the confidentiality of my requests to change my name and gender,” since giving notice as required by the court “would be an invitation to the public to come to the Court and offer their opposition to my very existence as a trans woman . . . I understand the Court’s order does not require me to specifically say that I am changing my gender, but that is the reasonable presumption that would be made by someone reading language that I intend to change my name from one commonly associated with males to one commonly associated with females,” which is what the court directed that the notice must state. K.H. said that such publication “puts a huge target on my back for people who dislike and hate transgender people. I do not believe that I can comply with the Court’s notice requirements without being subjected to all forms of transphobic persecution.” The trial court denied the motions in K.H.’s case, specifically because she did not publish notices of the hearing on her confidentiality request and did not notify the Attorney General. Apparently the judge believed that the state should be given an opportunity to appear and object both to confidentiality and to the name change, otherwise why mandate notifying the attorney general of the hearing when there is no statute or regulation requiring such notification?

In the other case, M.E.B. recited specific instances of discrimination she had suffered due to people’s reactions to her as transgender, and noted that a local person who was on Facebook.com had posted statements that they would shoot any transgender people they saw. The Court of Appeals quotes at some length from what the trial court wrote, which is full of prejudicial language and manufactures statutory and regulatory requirements that do not exist.
Clearly, both Judge Owen and Judge Felix were hostile to the idea of granting name changes to transgender applicants, were determined to place barriers in their way, and signaled deliberate ignorance of the dangers to life and limb that transgender people face from being “outed” through publication of their name-change proceedings.

The Court of Appeals was fully sensitive to the situation. Writing for the court in both cases, Judge John Baker tailored his remarks to the specifics of each case, reaching common conclusions that the applicants were entitled to have their motions for waiver of publication, confidentiality of proceedings, and permanent sealing of the records, all granted. Baker noted, in particular, that in the internet age, requiring publication of a notice of a name-change procedure in a newspaper probably meant exposure on the internet, possibly in perpetuity, so anybody curious about a particular individual could discover through this mechanism that they are transgender. And, particularly in M.E.B.’s case, the court noted the extensive documentation submitted to the trial court about violence against transgender people.

Judge Owen's snidely worded order dismissing the motion suggests that he is likely incapable of providing a neutral, unbiased forum for any litigation involving a transgender party. Consider this: “[M.B.] testified that he/she [sic] suffers from ‘gender identity disorder.’ [M.B.] stated his/her [sic] name and gender marker are not correct. [M.B.] ‘perceives’ himself/herself [sic] as a female however he/she [sic] was ‘assigned male hardware’. This has created problems with how he/she [sic] perceives himself/herself [sic]. [M.B.] came to Court wearing women’s clothing and hairstyle. [M.B.] had makeup on and spoke in a feminine voice. He [sic] requested that Court refer her as [M.B.].” The Judge said that it was “readily apparent” that M.B. had failed to prove “by clear and convincing evidence that publication of the notice of the petition in this case would create ‘a significant risk of substantial harm.’”

The Court of Appeals held this was clearly wrong, in light of the extensive documentation that M.B. had offered of violence against transgender people, stating, “The fact that M.B. did not provide evidence that she, herself, or other citizens of Indiana have been a target of violence is of no moment. The goal of Rule 9 [which authorizes exceptions to the publication rule] is proactive; it seeks to prevent harm. To force petitioners to wait until they have already experienced that harm would vitiate the purpose of the rule.” The court dropped a footnote citing to M.B.’s submission, which “did provide evidence of a specific act of violence to a transgender person in Indiana,” as well as a specific act of discrimination she had faced in the state.

“Rather than focus on the evidence that M.B. did not provide,” wrote Judge Baker, “the trial court should have focused on the evidence that she did provide. With respect to the general rates of discrimination, harassment, violence, and homicide experienced by people who are transgender, M.B. provide the following evidence,” wrote the court, then quoting in full several paragraphs of M.B.’s submission that cited to articles, task force reports, and statistical analyses of anti-transgender violence in the U.S. “We find that this evidence readily supports M.B.’s argument that, if she had to publish notice of her name change petition and maintain a publicly open case file, she would be at significant risk of substantial harm.”

The court also lectured the judge about his assertion that publication would not “out” M.B. because the way she looked and dressed already outing her. “This subjective assessment is not an element of an Administrative Rule 9 petition, nor should it be,” wrote Judge Baker. “Appearance is in the eye of the beholder, and regardless of the trial court’s own opinions about how men and women ‘should’ look, M.B. has the right to appear as she desires while maintaining public confidentiality about her gender identity. This was a wholly improper reason to deny M.B.’s petition.”

Indeed, the Indiana Court of Appeals has addressed this issue in the past, in In re A.L., 81 N.E.3d 283 (Ind. Ct. App., 2017), in which the court specifically found that “there is no statutory requirement to publish notice of intent to change one’s gender marker” and that “there is a statutory requirement to publish notice of intent to change one’s name, but that statute is explicitly subject to Administrative Rule 9,” which allows for a waiver of the publication requirement where the applicant shows that publication will “create a risk of substantial harm to the requestor . . . ” In light of frequent media reports about assaults and murders of transgender people, the actions by the two judges in this case reflect willful ignorance and frank indifference to the dangers faced by the applicants.

In both cases, the court of appeals reversed the trial court’s judgment on the confidentiality petitions and remanded the cases back to the trial court “with instructions that this case shall remain sealed and for further proceedings.”

Both applicants were represented on this appeal by Michael R. Limrick, Hoover Hull Turner LLP, of Indianapolis, and Megan Stuart of Indiana Legal Services, Inc., Bloomington.
California Court of Appeals Affirms $12+ Million Damages for Los Angeles Employee Subject to Vicious Hostile Environment Because of Perceived Sexual Orientation

By Arthur S. Leonard

James Pearl, formerly employed as a supervisor in the Wastewater Management Division of the Los Angeles Department of Public Works, collapsed at work on December 26, 2013, after years of hostile environment harassment, much of it allegedly perpetrated by management, suggesting that he was perceived as gay. In addition to name-calling and other forms of harassment, he was discharged on trumped-up charges and ordered reinstated after an appeal fully exonerated him, only to encounter continued harassment upon his return. He was then 52 years old. He was rushed to the hospital and treated for acute stress disorder and perniciously elevated blood pressure that had caused him to lose consciousness. He had no prior history of hypertension. He was placed on medical leave and has not worked since then.

Pearl sued the City of Los Angeles under the California Fair Employment and Housing Act, which forbids discrimination or harassment because of actual or perceived sexual orientation, winning a jury verdict of $17,394,972, of which $10 million was for past noneconomic damages and $5 million for future noneconomic damages, the balance being to compensate for economic injury. The City challenged the verdict after trial, and the trial judge, concluding that the award for past noneconomic damages had been inflated by the jury to punish the City for its abject failure to protect Pearl and for the festival of perjury on the witness stand as City officials blatantly lied about their actions, told Pearl that unless he accepted a reduction of the $10 million to $5 million, the court would grant the City’s motion for a new trial. Pearl accepted the reduced verdict of $12,394,972, and the City appealed, arguing that once the trial judge found that aspects of the jury’s award were punitive, he had no choice but to grant a new trial on the issue of damages. Disagreeing, the 2nd District Court of Appeal affirmed. Pearl v. City of Los Angeles, 2019 Cal. App. LEXIS 557, 2019 WL 2511941 (June 18, 2019).

Writing for the court, Judge Dennis Perluss observed that the jury had rendered a “lengthy special verdict” in which it found that “Pearl was subjected to unlawful harassment in his employment based on perceived sexual orientation; Pearl’s supervisors knew of the harassment, participated in, engaged in, assisted in or encouraged the harassment and conduct and failed to take immediate and appropriate corrective action; and the harassment and his supervisor’s failure to prevent harassment and retaliation were substantial factors causing Pearl’s harm.” The plaintiff presented highly qualified expert medical witnesses who testified, without contradiction, that work-related stress caused Pearl’s injuries.

The trial judge, Los Angeles County Superior Court Judge J. Stephen Dzuleger, said this on the record about the City’s presentation, after finding that the award of past and future economic damages and noneconomic damages was amply supported by the evidence at trial: “However, two things combine to cause the court to believe that the award of $10 million for past noneconomic damages was an effort to punish the Defendant rather than to arrive at a reasonable amount of damages for that which occurred in the past to Plaintiff. The first thing is that numerous city employees and, most importantly, managers perjured themselves repeatedly during trial. Those witnesses were impeached, discredited and their stories were largely nothing but fabrications. They told those stories to protect themselves and their jobs. They had no concern for the sanctity of their oath. This perjury was apparent to me but more importantly to the jury. The court noted during trial that some of the juror’s reactions to that testimony and the court feared at the time what impact it might have on its decision making.” [sic] The judge concluded that punishment was on the jury’s mind and that it had effectively doubled the amount awarded for past noneconomic harm as a way of punishing the City.

The judge also found that plaintiff’s counsel’s closing argument fed into this by asking the jury to send a message to the City about the unacceptability of its conduct in this case.

The Court of Appeal rejected the City’s argument that this required a new trial on damages. “One of the most difficult tasks imposed on a factfinder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering.” wrote Perluss. “The evidence of the medical experts, undisputed at trial, was that severe and unremitting harassment had caused Pearl to suffer a ‘catastrophic emotional and physical breakdown’ that resulted in malignant and chronic hypertension, organ damage, partial hearing and vision loss, and disabling and chronic psychiatric illness. In conditioning the denial of a new trial on Pearl’s acceptance of a reduced sum for past noneconomic damages, the court, stating its reasons in great detail, determined that an award of noneconomic damages (past and future) in the amount of $10 million was fair and reasonable, observing Pearl would suffer ‘for the rest of his life.’ We cannot say that determination, amply supported by the evidence in the record, was an abuse of the trial court’s discretion.”

In addition to affirming the verdict, the court directed that “Pearl is to recover his costs on appeal.”

One suspects that the court’s reluctance to order a new trial on damages reflected not only the detailed explanation by Judge Dzuleger but a concern that the City would benefit from
Gay Rower’s Title IX Claim against Ithaca College Barely Survives Motion to Dismiss

By Arthur S. Leonard

Christopher Andrew Kelley, a gay rower who claims his rights were violated under Title IX by Ithaca College when he was “constructively terminated” from the men’s crew team, barely survived the College’s motion to dismiss in a Report & Recommendation issued on June 18 by U.S. Magistrate Judge David E. Peebles, who recommended allowing the Title IX case to continue despite doubts about whether the complaint was filed within the statute of limitations, while recommending dismissal of other claims on the merits. Kelley v. Ithaca College, 2019 U.S. Dist. LEXIS 102636 (N.D.N.Y.).

Judge Peebles’s Report contains an extended, detailed summary of Kelley’s allegations, which relate a series of incidents spread out over several years, during which Kelley went from being outed as gay to becoming an out and proud gay rights advocate who published articles about his experiences in the college newspaper, the general press, and on the Outsports website, to the apparent consternation of his coach and the University athletic director, who felt that what he wrote did not reflect well on the College.

The College retained an outside investigator to undertake an “internal and external” investigation, but Kelley claims the final results were not “released” to him. He had quit the men’s crew several weeks earlier, feeling he could no longer put up with shunning by other team members and the continuing insensitivity of the coach and the athletic director.

Weeks after Kelley quit the team, the College put out a statement that “it had created a plan to make the college a more inclusive, diverse and welcoming community for all regardless of . . . sexual orientation . . . [and] noted in its announcement that several incidents this fall have served as fresh and painful reminders of a longstanding problem on campus surrounding issues of racism and cultural bias,” as much as a concession of the truth of some of Kelley’s allegations.

On the other hand, some of Kelley’s allegations about the treatment he received from the coach and teammates were undermined by an article he published in Outsports in June 2015, suggesting that after he was outed and started working with Athlete Ally, “the culture on the crew team has shifted. There’s an amazing sense of inclusivity, that everyone from any walk of life is welcome and appreciated. Every day, we come to practice to pull hard, and our sexual identities are checked at the door. After a while, I didn’t feel like an other – I wasn’t ‘that one gay kid.’ I felt comfortable in my spandex.” But evidently he was not so comfortable when he came back to school in the fall and was confronted by the coach about the article, which had talked about a party at which team members allegedly consumed vast quantities of alcohol (many of them being underage), and he was suspended from the team for several matches, leading him to quit.

Kelley eventually filed a triple-barreled complaint in federal court, three years after he quit the team, alleging a Title IX violation against the College, an equal protection (14th amendment) violation against the coach and the athletic director, and an intentional infliction of emotional distress tort claim against the coach. The College moved to dismiss all claims rather than answering the complaint.

Judge Peebles found it easy to recommend dismissal of the constitutional claim, since Ithaca College is a private college so its employees are not state actors as required for such a claim, and on its face the complaint did not allege facts sufficient to meet the high bar for outrageous conduct set by New York Court for the intentional infliction of

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emotional distress tort. (Frequent use of terms such as “faggot” don’t generally strike judges as sufficiently outrageous to ground a claim of intentional infliction of emotional distress. Coach Robinson evidently agrees with that, have characterized them as “micro-aggressions” that he counseled Kelley to ignore.)

Kelley’s factual allegations would clearly support a cause of action under Title IX (provided the court accepts the contention that discrimination because of sexual orientation is covered by Title IX, a conclusion that would flow logically from the 2nd Circuit’s decision under Title VII in Zarda v. Altitude Express), but the College persuasively argued that Kelley had waited much too long to file his Title IX complaint. Title IX does not have an express statute of limitations, so federal courts borrow the relevant state statute of limitations for personal injury cases, which in New York is three years. Kelley’s story of harassment and discrimination begins with Fall Term 2012 when he entered the College as a freshman, and culminated with his decision to quit the team on September 10, 2015. He filed suit on September 10, 2018, exactly three years later. The College argued that in light of the three-year statute of limitations, his entire tale of woe beginning in 2012 is excluded from consideration by the court, as the only action coming within the statute of limitations is the alleged constructive discharge exactly three years earlier. The College also suggested, improperly, that the appropriate statute of limitations was set by Title VII or the New York Human Rights Law, both of which were, of course, irrelevant to this complaint.

On the other hand, Kelley argued that the entire history he recounts is actionable under the “continuing violation” doctrine and, furthermore, that counsel for the College had agreed to waive any statute of limitations defense in communications between the time Kelley quit the crew and the filing of the lawsuit. Judge Peebles decided that Kelley’s allegations amounted to a series of discrete events, not sufficient to constitute a continuing violation, and that the evidence pro and con on waiver was such that “I am unable to conclude at this early stage, and without the benefit of discovery, whether the College agreed to waive its statute of limitations defense.” As a result, he recommended denying the motion to dismiss the Title IX claim so that the parties could engage in “limited discovery regarding the statute of limitations and waiver issues, and that discovery with regard to the merits of plaintiff’s claims be held in abeyance until the statute of limitations issue can be resolved by the court.” But, as noted, he recommended dismissing the constitutional and tort claims, which Kelley expressly did not oppose. The report goes to Senior District Judge Gary L. Sharpe.

Kelley is represented by Kelsey W. Shannon of Lynn Law Firm, LLP, Syracuse.
Second, the panel found that because the BIA need not “address specifically each claim” the Petitioner made, it nonetheless had considered the affidavit, and that the BIA “heard and thought and [did] not merely react” to the evidence.

Finally, the panel found that the denial of allowing video testimony by the expert did not violate law or due process, because it was within the IJ’s discretion to allow the evidence into the record in the form of an affidavit rather than live testimony.

The opinion does not describe the affidavit in detail, beyond mentioning Petitioner’s representation to the BIA that the expert “would have presented an expert opinion on homosexuality in Jamaica and the government’s willingness to protect homosexuals like [him].” The opinion goes on to say that Petitioner “speculates” that the expert “would have provided testimony not covered in the materials that would have addressed specific points on which the IJ express skepticism, such as the Jamaican government’s ability and willingness to protect homosexuals in [his] circumstances,” had she been allowed to testify by videoconference. But, said the court, the Petitioner “never elaborates on what the testimony would have been or distinguishes it from the expert’s written declaration.” Consequently, he was “unable to show that he was substantially prejudiced” by the IJ’s decision to limit the expert’s presentation to her written affidavit.

Rejecting Petitioner’s argument that the IJ’s failure to discuss the substance of the affidavit in her opinion meant that she had “effectively excluded it,” the court pointed out that the IJ accepted it into evidence, listed it among the evidence considered, and “stated that she had considered all the evidence even if she did not specifically discuss it in her decision.” The court insisted that the IJ is not required to “specifically discuss each piece of evidence” in order to satisfy Petitioner’s due process right to introduce relevant evidence and have it considered.

Finding that none of Petitioner’s legal and constitutional arguments were meritorious, the panel denied the Petition for review, leaving Petitioner’s order of removal standing.

Petitioner is represented by Theodore N. Cox of New York. ■

Bryan Xenitelis is an attorney and an adjunct professor at NYLS

Colorado Appeals Court Holds Imposing Lifetime Sex Offender Registration on a Defendant Whose Crimes Were Committed as a Minor Raises 8th Amendment Concerns

By Arthur S. Leonard

In a startling turn of events, a three-judge panel of the Colorado Court of Appeals rejected many years of its own precedents on June 20 when it ruled in People of the State of Colorado, In the Interest of T.B., Juvenile, 2019 WL 2528764, that imposing a lifetime sex offender registration requirement on a young person whose sex-related crimes were committed when he was a minor is a form of punishment, so before imposing it a court must determine whether it violates the minor’s 8th Amendment rights. Writing for the majority of the panel, Judge Craig R. Welling did not specify the offenses for which T.B. was convicted, merely describing them as “unlawful sexual behavior.”

T.B. was adjudicated for “unlawful sexual contact” at age 12 in 2001, and in 2005 he pleaded guilty to a sexual assault charge. He successfully completed the probation to which he was sentenced as well as offense-specific treatment. Although the court does not go into the details of his offenses, the fact that he was not sentenced to confinement suggests that the crimes were not violent. He has no other criminal record apart from the two sex offenses. He filed a pro se petition in 2010 to discontinue the registration requirement, reporting that he had “successfully completed the terms and conditions of my sentence related to that offense” and that “I have not been subsequently convicted or adjudicated a juvenile delinquent for any offense involving unlawful sexual behavior.” The trial judge granted T.B.’s petition as to the 2000 case, but concluded that by statute he could not be relieved of the registration requirement because he was a repeat offender. This was despite the court’s finding that T.B. “has earned the right not to have to register” and “he is not a risk to sexually reoffend.” T.B. eventually obtained counsel, Gail K. Johnson and Katherine C. Steefel of Johnson & Klein, PLLC, Boulder (CO), and filed a second petition, claiming that lifetime registration violated his due process and 8th Amendment rights. The court rejected his constitutional arguments, relying on People in the Interest of J.O., 383 P.3d 69 (Colo. Ct. App., 2015), which held that registration does not impose a punishment, rendering the due process and 8th Amendment arguments irrelevant.

The Colorado Sex Offender Registration Act requires that juveniles who are twice adjudicated for unlawful sexual behavior categorically must register as sex offenders for life. Responding to T.B.’s appeal, a majority of the three-judge Court of Appeals rejected the precedent of Interest of J.O. and earlier similar holdings. Judge Welling pointed out that T.B.’s petition requires a two-step analysis: first, whether registration is a punishment, and second, whether imposing registration is “cruel and unusual.” In this as in past cases raising the issue, the trial court had never gotten to an analysis of evidence as to whether the requirement is cruel and unusual, having been stopped at the first step by the court’s holding that registration is not a punishment, rendering the 8th Amendment irrelevant. The court decided that this question could arise both in terms of whether the statutory provision is facially unconstitutional, or whether it is unconstitutional as applied, and decided that it was appropriate to remand to the trial court to make the initial determination after an appropriate factual inquiry.

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Prior rulings had focused on the civil nature of the requirement, but the court agreed with T.B.’s argument that it was possible that the punitive effect of the requirement could override its civil intent, while noting that the legislative history includes comments by legislators that would support their understanding about the punitive nature of such a requirement. Judge Welling described a seven-factor analysis that had been proposed by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to determine whether a requirement conceived by the legislature as civil should be deemed punitive. The factors are: “(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether the court imposes the sanction only upon a particular finding of scienter; (4) whether its operation will promote the traditional aims of punishment; (5) whether the behavior to which it applies is a crime; (6) whether there is a rational connection to a nonpunitive purpose; and (7) whether it appears excessive in relation to the nonpunitive purpose.”

Applying the *Mendoza-Martinez* factors, the court concluded that several support T.B.’s argument that registration may be punitive in his case. First, the court found, “the effect of requiring a juvenile to register as a sex offender for life is reminiscent of traditional forms of punishment. The dissemination of information that is then used to humiliate and ostracize offenders can resemble forms of punishment that historically have been used to ensure that offenders cannot live a normal life.” The court also noted that because juvenile proceedings are sealed, information about them is generally not available to the public, but the registration requirements makes them available to the public. On this point, the court distinguished U.S. Supreme Court rulings that sex offender registration is not punitive, noting that all those cases involved adult sex offenders, the records of whose convictions “are presumptively public.” This means that, although the Colorado register of juvenile sex offenders is not listed on the internet, the information is available to anybody who is doing a background check on T.B. in connection with a job application, since “any member of the public may request and obtain from his or her local law enforcement agency a list of sex offenders” that would include juvenile offenders. At the hearing on T.B.’s petition, his parole officer (who was supporting his request) testified that “information about T.B.’s status as a sex offender could still show up in a background check and be the basis for T.B. losing an apartment or being fired from a job.

Judge Welling noted the U.S. Supreme Court’s recognition that “juveniles are different from adults for the purposes of the 8th Amendment,” and commented that “this differentiation is particularly acute when considering the consequences that juveniles face when they are required to register as sex offenders.”

Moving to another *Mendoza-Martinez* factor, Welling found that the “lifetime registration requirement promotes the traditional aims of punishment – ‘retribution and deterrence.’” Furthermore, the behavior to which the registration provision applies “is already a crime,” he wrote, continuing, “For juveniles, CSORA’s lifetime registration requirement sweeps in only those who have been adjudicated for committing past crimes – and, once the requirement to register for life is imposed, it does so without regard to whether he or she is likely to reoffend.” This also supports the contention that it is punitive in nature.

“The final two factors – whether there is a rational connection between the sanction and its stated nonpunitive purpose and whether the statute is excessive given that purpose – must be considered together,” wrote Welling. While conceding that there is a connection to public safety, Welling concluded, the question is whether the requirement is excessive “given the important public safety justifications at issue.” and here, he pointed out, “a growing number of states have concluded that lifetime registration requirements similar to CSORA’s are excessive as applied to juveniles considering their nonpunitive purpose.” He cited an quoted from decisions by several other state appellate courts on this point, while conceding that several opinions from other states rejected the contention of excessiveness. On balance, the majority of this panel was more persuaded by the opinions finding excessiveness, concluding that “requiring a juvenile, even one who has been twice adjudicated for offenses involving unlawful sexual behavior, to register as a sex offender for life without regard for whether he or she poses a risk to public safety is an overly inclusive – and therefore excessive – means of protecting public safety. That over inclusiveness is exemplified in this case,” as the juvenile court found that T.B. was unlikely to reoffend. Thus, the rational connection between the requirement and the nonpunitive public purpose was questionable, and the registration requirement, at least in T.B.’s case, arguably functions as a punishment.

But, the court concluded, the question whether imposing the requirement is “cruel and unusual punishment” remains to be determined, since it requires a “fact-intensive inquiry” and is “best addressed by the trial court in the first instance.” Although T.B. submitted some evidence on this point, the state did not offer rebuttal testimony, content to rest on the solid precedent rejecting application of the 8th Amendment to registration requirements. Similarly, because of the Colorado precedent holding registration to be nonpunitive, the trial judge never rendered a conclusion on the merits of the claim that imposing it was “cruel and unusual punishment.” A remand is required for such a determination. On another point, the court noted T.B.’s argument that the statute “creates an impermissible irrebuttable presumption that a previous offender will offend again and, therefore, remains a danger to the community forever,” but asserts that T.B.’s briefing failed to articulate the constitutional basis for that argument, and refrained from addressing it on the merits.
Dissenting Judge John R. Webb rejected the court’s analysis, reiterated the significance of repeated past holdings that the registration requirement is not punitive, and noting that the requirement in this case is authorized by statute, the legislature could amend or repeal it. “Because relatively recent United States Supreme court cases imposing constitutional limitations on juvenile sentencing deal with palpable punishments – the death penalty and life without possibility of parole,” Webb wrote, “those cases provide little guidance in answering the preliminary question whether mandatory registration is punishment at all. So, I discern insufficient reason to disavow our unanimous precedent. Reaching an issue not address by the majority. I further conclude that the requirement does not violate due process, either on its face or as applied to T.B. Both the majority’s heavy reliance on out-of-state authority and T.B.’s contrary policy arguments are better addressed by the General Assembly or our supreme court. Therefore, and with respect, I dissent.”

The immediate question is whether the State will appeal this ruling to the Colorado Supreme Court and, if need be, to the U.S. Supreme Court, as it raises a question of federal constitutional interpretation. Judge Welling’s opinion notes that appellate courts of other states are divided on the question whether mandatory registration is punishment at all. So, I discern insufficient reason to disavow our unanimous precedent. Reaching an issue not address by the majority. I further conclude that the requirement does not violate due process, either on its face or as applied to T.B. Both the majority’s heavy reliance on out-of-state authority and T.B.’s contrary policy arguments are better addressed by the General Assembly or our supreme court. Therefore, and with respect, I dissent.”

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The allegations in the complaint plainly state a claim under the standard of Hudson v. McMillian, 503 U.S. 1, 7-8 (1992); see also, Ricks v. Shover, 891 F.3d 468 (3d Cir. 2018); Smith v. Mensinger, 293 F.3d 641, 649 (3d Cir. 2002). The test, met here, is “whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Judge Joyner sustains Count 1, against Officer Moore, with a good discussion of excessive use of force cases in the Third Circuit.

Antonio Ferrara’s male partner visited him at the Delaware County Jail, following which Ferrara was subjected to the usual post-visit strip search. During the search, Officer G. Moore made homophobic remarks to Ferrara; and, “without provocation, Moore struck him in the face multiple times, causing extensive facial injuries and requiring immediate and future medical attention.” There were several bystander officers, who did not intervene. Ferrara sued the County, the commercial operator of the jail, and various individuals, including the Warden, Officer Moore, and the two bystander officers.

In Ferrara v. Delaware County, 2019 WL 2568117, 2019 U.S. Dist. LEXIS 104207 (E.D. Pa., June 21, 2019), U.S. District Judge J. Curtis Joyner denied a motion to dismiss filed by Moore and the bystander officers. Judge Joyner also denied a motion to strike the demand for punitive damages. He required a “more definite statement” under F.R.C.P. 12(e) of supplemental and conspiracy claims; and he dismissed with prejudice claims against the County, the warden, and the private jail operator, the euphemistically-named “Community Education Centers, Inc.” (which has been acquired by GEO, Inc., as part of its empire of hundreds of correctional facilities).

Count III, against the bystander officers, is also sustained. Ferrara alleged that these officers not only stood idle and did not intervene, but that they also “encouraged” Moore. So long as the bystander officers had a “reasonable opportunity” to intervene, they can be liable for refusing to do so. Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002). There is a good discussion here, too.

Count II of the Complaint bundles several theories of federal and state liability as “Supplemental Claims.” As divided by Judge Joyner, they include: (1) state torts (assault, battery, and intentional infliction of emotional distress); (2) “discrimination” by Moore; and (3) conspiracy by the officers to violate Ferrara’s civil rights and to conceal the events.

Judge Joyner has little trouble sustaining the claims on assault and battery under Pennsylvania law. He also denies dismissal of the claim of intentional infliction of emotional distress. Whether the conduct is “extreme and outrageous” should be decided in the first instance as a preliminary matter by the court, citing Ruder v. Pequea Valley Sch. Dist., 790 F. Supp. 2d 377, 397 (E.D. Pa. 2011) – and medical evidence is not required at the motion to dismiss stage. Kornegey v. City of Phila., 299 F. Supp. 3d 675, 684 (E.D. Pa. 2018). Defendant Moore’s conduct “could be considered so ‘extreme and outrageous’ as to go beyond all possible bounds of decency in a civilized society. The concurrence of an unprovoked assault and making sexual epithets while Plaintiff was subjected to the increased vulnerability of a strip search, clearly encompass conduct that could be considered ‘utterly intolerable in a civilized society.’” Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).
Judge Joyner found Ferrara’s “discrimination” claim to be “puzzling,” and he ordered a more definite statement. This is an opportunity, in this writer’s view, to include in the “statement” a stand-alone Equal Protection claim of discrimination based on sexual orientation. The elements seem to be present. Even under a rational basis test, there is no penological justification for the attack.


On Count IV, Judge Joyner granted a motion to dismiss by Delaware County, the jail’s warden, and the private vendor. He divided the discussion into analysis of municipal liability under Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978); and supervisory liability under 42 U.S.C § 1983.

Under Monell, Ferrara had to plead pattern and practice or policy of the government municipality and its warden. Even under “failure to train” theory, there must be an underlying “pattern” of prior constitutional violations in order to show that the municipality or warden knew of the need for training. Connick v. Thompson, 563 U.S. 51, 61 (2011). Judge Joyner found the pleadings insufficient in this regard. There is no separate discussion of the private vendor here, although its exposure is usually analogized to liability under Monell.

Judge Joyner also grants these executive defendants, including the private vendor, dismissal of all claims under supervisory liability theory. His finding that Ferrara failed to plead that these defendants were the “final policymakers” with respect to the jail seems a bit thin. If not them, who? Perhaps anticipating the weakness of this point, Judge Joyner writes that, even if they are policymakers, there is no showing of supervisory misconduct except for “conclusory” allegations that they should have anticipated that officers would engage in such aberrant conduct and taken steps to prevent it. Judge Joyner finds this argument too close to the forbidden theory of respondeat superior liability, and it fails to account for the need to show a pattern that was ignored, as required by failure-to-train cases.

Judge Joyner does not cite the exhaustive decision of Barkes v. Frist Correctional Medical, Inc., 766 F.3d 307 (3d Cir. 2014) (passim, including a vigorous dissent), which held that the Delaware DOC Commissioner and the Warden would face trial, along with the private vendor, in connection with the suicide of a vulnerable inmate. This writer suspects that discovery, including reports mandated by the Prison Rape Elimination Act, would disclose homophobia and LGBT discrimination in the jail that would be useful in framing a Monell or supervisory claim. Dismissal with prejudice seems hasty.

Judge Joyner also dismisses claims of respondent superior under state law because the state tort causes of action are all intentional torts, for which there is no respondent superior liability under 42 Pa. Cons. Stat.§ 8542. He declines to dismiss punitive damages claims for these torts.


Ferrara is represented by James W. Wells of Gay & Chacker, PC, Philadelphia.

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 Woman Assaulted by Police during Arrest May Pursue Constitutional Claim

By William J. Rold

Transgender plaintiff Paul Anthony Lynch was at home when the San Diego police department came knocking in the course of investigating a neighborhood crime, about which they told Lynch she was a “suspect.” Lynch initially refused to exit her home as requested, but she came outside when officers appeared at the rear door of her home and restated their demand, threatening to “drag your faggot ass out” and to kill her dogs. Lynch appeared, attired in panties, a blouse, and high heels; and she stopped a few feet from the officers with her hands in the air. She was visibly unarmed. Sergeant Boykin, in the police group, suddenly placed a carotid hold on Lynch from behind her, causing her to lose consciousness and fall to the ground, injuring herself. She sued for violation of her civil rights in Lynch v. Burnett, 2019 WL 2537825 (S.D. Calif., June 20, 2019).

Reviewing the pleadings and defendants’ motion to dismiss, U.S. Magistrate Judge Jill L. Burkhardt Issued a Report and Recommendation [R & R] that the case proceed in part and be dismissed without prejudice in part. Although Lynch sued under the Eighth Amendment, the R & R applied Fourth Amendment theory (through the Fourteenth Amendment), because the events were incident to an arrest. An objective reasonableness standard thus applied. Deorle v. Rutherford, 272 F.3d 1272, 1279 (9th Cir. 2001).

Finding that the carotid hold was potentially “deadly” force, the R & R recommended that dismissal be denied because the argument that it was objectively unreasonable under the circumstances stated a claim under the Fourth Amendment. [Extensive
recitation of Ninth Circuit arrest law omitted.

Lynch also sued other officers at the scene who did not intervene to stop the carotid hold. The R & R recommended that these claims be dismissed because everything happened so quickly that there was not adequate time to intervene, citing Jones v. Williams, 297 F.3d 930, 936-7 (9th Cir. 2002) (“Officers may not be held liable merely for being present at the scene of a constitutional violation or for being a member of the same operational unit as a wrongdoer”).

Lynch also claimed that the officers violated her rights by not providing her with prompt medical care for her injuries. She conceded, however, that paramedics were summoned and arrived within minutes. The R & R found that failure to provide medical care incident to an arrest was also governed by a Fourth Amendment objective reasonableness test. Tatum v. City & County of San Francisco, 441 F.3d 1090, 1098-9 (9th Cir. 2006). In this case, there was no cognizable claim of unreasonableness, since officers promptly summoned medical aid. [Ninth Circuit survey also omitted here.]

Judge Burkhardt allowed a chance to amend. Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986).

Federal Judges in Georgia Grant Qualified Immunity to Defendants in Transgender Prisoner Case, then Dismiss Injunctive Claims

By William J. Rold

U.S. District Judge Tilman E. Self, III, begins his opinion dismissing a pro se transgender prisoner’s three-year effort to obtain gender dysphoria treatment with this bloviation: “Law is hard. Of course, it is even more difficult without a formal legal education. More than that, however, when a pro se party is proceeding without a legal education while in prison, understanding the complexities and intricacies involving the ever-changing – and very challenging – area of constitutional law can, without doubt, make one frustrated, disheartened, and at times indignant.” Bayse v. Dozier, 2019 WL 2550321 (M.D. Ga., June 20, 2019). Ironically, in light of this prefatory observation, Judge Self has repeatedly denied Bayse’s requests for appointment of counsel!

Law Notes has been reporting (and criticizing) the jurisprudence in this pro se case since its initial filing in the Northern District of Georgia. See Bayse v. Holt, 2017 WL 3911244, 2017 U.S. Dist. LEXIS 217112 (N.D. Ga., September 7, 2017), reported in Law Notes (October 2017 at pages 422-3). When Bayse found herself in the Middle District of Georgia and finally saw an endocrinologist, she failed in her attempt to obtain a preliminary injunction requiring Georgia DOC officials to follow the specialist’s recommendations. Bayse v. Dozier, 2018 WL 6601085 (M.D. Ga., December 17, 2018), reported in Law Notes (January 2019 at page 30). Now, in a brief opinion adopting (and “So Ordering”) the Report and Recommendation [R & R] of U.S. Magistrate Judge Charles H. Weigle, Judge Self dismisses all claims. Because of the brevity of the opinion, it is necessary to refer to the 28-page R & R in PACER for this report.

Judge Weigle’s R & R recommends granting summary judgment on qualified immunity grounds, based on Georgia DOC officials’ affidavits swearing that plaintiff Robbin Amanda Bayse (a/k/a Robert Bayse) did not suffer any violation of constitutional rights. This is problematic, because qualified immunity applies only to damages claims. Pearson v. Callahan, 555 U.S. 223, 231 (2009). Qualified immunity does not apply to claims for injunctive relief, such as medical treatment in the future, as Bayse primarily seeks here in pleading for management of her care by qualified specialists and an evaluation for confirmation surgery.

Having gotten off on the wrong foot, the R & R compounds the problem by its qualified immunity application and analysis. Qualified immunity applies if: (1) no constitutional right has been violated; or (2) a right may have been violated but it was not clearly established at the time of the violation. Pearson, id. at 232. It could be conceded that option 2 is satisfied because there is no clearly established right to transgender confirmation surgery in the Eleventh Circuit, so Bayse’s claim for damages will not prevail. Whether Bayse’s rights have been violated to justify injunctive relief, however, is a different question. The R & R conflates injunctive and damages precedents. It also fails to distinguish between this case, in which there is to be no trial, and decisions following full hearings, upon which the R & R relies, such as Kosilek v. Spencer, 774 F. 3d 63 (1st Cir. 2014) (passim).

The R & R says that any disputes about following the advice of a specialist or the specifics of a treatment plan are legally immaterial for summary judgment purposes, because they are merely disagreements between provider
and patient, which are not actionable under the Eighth Amendment. Simpson v. Holder, 200 F. App’x 836, 839 (11th Cir. 2006), citing Estelle v. Gamble, 429 U.S. 97, 104–7 (1976). So – for example, since: (1) all of the state’s providers agree and none of them recommended a modification of the treatment plan approved by the Georgia DOC or gender confirmation surgery; and (2) Bayse has presented nothing more than her disagreement with them – there is no impediment to summary judgment. The R & R also accepted the officials’ statements that they had made “no recommendation” for the requested treatment and then treated it as evidence of the obverse: that they had made a “recommendation” against it.

With no attorney and no money, Bayse had no opportunity to cross-examine Georgia’s “experts” or to present her own. Bayse tried to present “admissions” allegedly made to her by medical staff that they did not consider themselves “qualified” to treat her, and by a DOC physician who said that she would “recommend surgery if her supervisor would allow her.” It is farcical for the R & R to pretend that it merely had a difference of opinion before it. This writer predicted in both earlier reports on this litigation that Bayse would never obtain injunctive relief without counsel and expert testimony.

That Bayse has a serious condition under the Eighth Amendment is conceded. This is not a case about some fanciful contrived constitutional right, like access to cable television. Qualified immunity is meant to weed out those cases where the law clearly precludes liability for damages. It is not designed to cabin the development of the law or to preclude requiring state officials to conform their conduct in the future to the requirements of the Constitution – a rule over a century old. See Ex Parte Young, 209 U.S. 123, 168 (1908) (requiring Minnesota Attorney General to stop interfering with federal regulation of railroads).

When the R & R got to Judge Self, he abandoned all pretext of applying the nuances of qualified immunity and wrote: “What needs to be understood, first and foremost, is that in the Eleventh Circuit, clearly-established rights are those set by precedent of the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the law from the highest court of the state where the alleged constitutional violation took place.” He thus improperly used qualified immunity to freeze development of the law for injunctive cases in the future.

Judge Self criticized Bayse for not developing a better record, comparing the Florida transgender case of Keohane v. Jones, 328 F. Supp. 3d. 1288, 1294 (N.D. Fla. 2018). In Keohane (where the inmate had counsel), she tried her case, put World Professional Standards for Transgender Health into the record, called experts, and won an injunction.

The district court characterized Florida’s position in Keohane as one beginning with “ignorance and bigotry.” 328 F. Supp. 3d at 1305. Some of this kind of thinking appears in the R & R here. Judge Weigle quotes Judge Posner’s 1997 opinion for the Seventh Circuit in Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1991), regarding confirmation surgery: “Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.” Maggert denied all treatment to transgender inmates, saying such an inmate is entitled only to protection against “prisoners who want to use him as a sexual plaything . . . if known.” Id. at 672. The Seventh Circuit criticized its own decision twenty years later in Fields v. Smith, 653 F.3d 550, 555 (7th Cir. 2011), saying that its prior language was “dicta” based on “assumptions” that were not “put to the test” – and it affirmed an injunction issued by a district court notwithstanding the Maggert precedent.

Arkansas Federal Judge Dismisses Transgender Inmate’s Request for Hormones for Diagnosed Gender Dysphoria as Failing to State a Claim

By William J. Rold

Pro se transgender inmate Stansel Alexander Prowse filed a federal lawsuit claiming that, although she was diagnosed with gender dysphoria by a psychiatrist under contract with the Arkansas DOC, she has been denied all treatment by direction of the Arkansas DOC Gender Dysphoria Committee, which stated that “hormone therapy was not clinically indicated nor recommended.” U.S. Magistrate Judge Jerome T. Kearney recommended dismissal of her amended complaint in Prowse v. Kelley, 2019 WL 2608896 (E.D. Ark., June 10, 2019), for failure to state a claim upon which relief could be granted.

Defendants moved to dismiss, claiming that they were being sued only in their supervisory capacities over transgender care, that they have no direct responsibility for Prowse’s care, and that no one has recommended that she receive hormones or feminine items. They further argue that Prowse is not entitled to hormones or feminine items under the Eighth Amendment by the Eighth Circuit’s ruling in Reid v. Griffin, 808 F.3d 1191, 1193 (8th Cir. 2015). In Reid, the Court of Appeals, over a dissent, ruled that the inmate plaintiff was not entitled to gender dysphoria treatment because no one had diagnosed her with gender dysphoria. Here, there is an alleged diagnosis, which must be accepted as true for purposes of the motion; but the Committee said there is no need for hormones or feminizing items.
In recommending dismissal, Judge Kearney wrote: “[A]lthough Defendants were involved in the decision not to approve the hormone therapy, Plaintiff admits their decision was based on the lack of such recommendation by his mental-health professional.” Judge Kearney also addressed the merits and recommended a finding that Prowse “was not entitled, under the law, to estrogen-replacement therapy” under Reid, relying primarily on 8th Circuit decisions from the last century. Judge Kearney also relied upon other district court decisions applying Reid: Butterfield v. Young, 2018 WL 1640594 (D.S.D., April 5, 2018); Derx v. Kelley, 2017 WL 2874627 (E.D. Ark., June 19, 2017), report and recommendation adopted, 2017 WL 2874314 (E.D. Ark. July 5, 2017). [Note: A later decision in Butterfield v. Young, also dismissing her plaintiff’s case and reported at 2019 WL 2304665 (D.S., May 30, 2019) – see Law Notes (June 2019 at pages 41-2) – is on appeal to the Eighth Circuit, No. 19-2371.]

Prowse objected to Judge Kearney’s recommendations, saying that Arkansas has a “blanket policy” of not providing hormones and feminizing items to transgender inmates. Reviewing the recommendations “de novo,” U.S. District Judge James M. Moody, Jr., adopted Judge Kearney’s recommendations “in their entirety.” 2019 U.S. Dist. LEXIS 105883, 2019 WL 2606890 (E.D. Ark., June 25, 2019). Judge Moody found that the directive (AR 14-19) Prowse attached to her objections, did not support her argument that Arkansas has a “blanket policy.” In fact, it might; at the least, it is ambiguous.

AR 14-19, states that it is the policy of the Arkansas DOC to provide “appropriate treatment” to inmates with gender dysphoria, without elaborating on what that is. Later, the directive states, in a part not quoted by Judge Kearney, that the Committee “is responsible for determining the appropriate treatment” for transgender inmates. This section undermines Judge Kearney’s argument that the Committee was only “involved” in the hormone decision; it squarely makes it responsible. It is not clear if Judge Kearney had this directive at the time of his recommendation. This writer could not find in her handwritten papers the admission by Prowse (mentioned by Judge Kearney) that her mental health provider had not recommended hormones. It is also inconsistent with everything else she wrote.

Another section, under the heading “Treatment,” states: “The initiation of sexual reassignment is impractical in a correctional setting.” A critical section, dealing with “Treatment” and hormones, is incomplete: “Inmates entering the Department with prior surgical alteration of genitals and/or prescribed hormonal therapy procedures will continue to receive maintenance hormone replacements until their individual case is reviewed and assessed. Treatment with hormonal medications for the purpose of” – [page 2 of 3 of the Directive stops there; page 3 of 3 is not in the record. The two pages (of three) of Arkansas Directive AR 14-19, entitled “Gender Dysphoria and Intersex Inmates,” filed as an exhibit to Prowse’s objections, has an “Law Library” rubber stamp from the prison of Prowse’s confinement; but docket item 27, ending at page 17 of 17, also fails to include the third page of the directive.]

This directive appears to state what is known among advocates as a prison “freeze frame” policy – see Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014) – in which the transgender inmate is “frozen” in whatever status of transition she occupied prior to incarceration. This kind of policy was enjoined in Missouri in Hicklin v. Precynthe, 2018 U.S. Dist. LEXIS 21516 (E.D. Mo., February 9, 2018), reported in Law Notes, “Federal Judge Issues Preliminary Injunction for Hormones, Hair Pattern Treatment, and Feminizing Canteen Items to Missouri Transgender Inmate; Rejects ‘Freeze Frame’ Policy,” (March 2018 at pages 108-9). Missouri has since settled this case.

Judge Moody found here that the Arkansas DOC directive “does not support” Prowse’s arguments and that the Committee had made an individual decision. In fact, the record as it is “does not support” Judge Moody’s findings. It is outrageous that the Arkansas Attorney General did not file the full directive – and even worse that the court did not insist upon it before ruling.

Judge Moody assessed a “strike” against Prowse under the Prison Litigation Reform Act, and he certified that an appeal “would not be taken in good faith.” One can hope counsel will be obtained and take an appeal anyway. Recent developments for transgender inmates seeking help with transition has made the Eighth Circuit the backwater of the nation. Receipt of hormones, while not routine, is no longer the cutting edge of transgender prisoner litigation anywhere else in the country.
sidewalk, threatening her with arrest if she did not move. Mauler declined to move, proclaiming her right to protest where she was. Batten walked away and a few minutes later two police officers showed up and told Mauler she was under arrest for trespass. When Mauler responded that she would obey a lawful order to move, Batten, who was observing, told the officers that he wanted her arrested and they complied, while Batten, Czach and several other Board employees watched. Charges against Mauler for trespass on private property were subsequently dismissed and she filed this lawsuit against George Arlotto, the Board Superintendent, Batten and Czach. Arlotto was not personally involved and was quickly dismissed from the case. The district court also dismissed claims against Czach, since there was no allegation that she had anything to do with the arrest. However, the court reversed the dismissal as to Batten. In its per curiam opinion, the 4th Circuit panel stated that “the district court did not find that Mauler’s protest was not constitutionally protected activity, which is lawful business for purposes of [the trespass statute]. Nor did the district court find that, assuming the truth of the facts alleged in the complaint, a reasonable person would conclude that Mauler was disrupting the conduct of normal business at the Board’s office. We therefore conclude that the complaint sufficiently pled that Batten caused the officers to arrest Mauler without probable cause and that the district court erred by dismissing Mauler’s First and Fourth Amendment claims against Batten.” Mauler is represented by Robin R. Cockey and Ashley A. Bosche, of Cockey, Brennan & Maloney, P.C., Salisbury MD.

U.S. COURT OF APPEALS, 11TH CIRCUIT – There is a fantasyland quality to reading per curiam opinions emanating from the 11th Circuit Court of Appeals in cases where LGBT people from Central America are seeking asylum, withholding of removal or protection under the Convention against Torture. The opinions sometimes provide considerable detail from the petitioner’s appeal and the record made before the Immigration Judge – detail that would persuade any reasonably empathetic and fair-minded person that the petitioner left his or her home country for good reasons of personal safety – but then the court says that conditions were not sufficiently “extreme” to constitute persecution, and that there was no proof the government would refuse to protect people – this, of course, in countries that do not outlaw anti-LGBT discrimination and where there is no affirmative evidence that the police are able or willing to deal with hate crimes against LGBT people. A prime example of this is Recinos-Coronado v. U.S. Attorney General, 2019 WL 2524397, 2019 U.S. App. LEXIS 18337 (June 19, 2019). Mr. Recinos-Coronado relates a horrific story of sexual abuse, taunting, and physical beating, but these are discounted based on various rationalizations advanced by the IJ or the Board of Immigration Appeals, including casting doubt on the story for failure to disclose abuse to family members or the police under circumstances where the individual could fear the hostile response of family members and the indifference or hostility of police. (Can one blame a man for not disclosing a relative’s sexual abuse of him to his father, when his father stated to him that “if he ever had a gay son, he would prefer to have him dead than in the family”?) The petitioner is from Guatemala, and he offered into evidence “an affidavit from an expert in Latin American studies, numerous human rights reports and country reports on the treatment of LGBT individuals in Guatemala, news reports of attacks on LGBT individuals, police and medical reports from a July 2013 beating he endured in Guatemala,
and letters of support from friends living in the United States.” But to no avail. Even though he was represented by counsel on this appeal – Shirley Cristina Zambrano of Kuck Baxter Immigration, LLC, Atlanta – which usually increases the odds of success in these cases, the petitioner struck out. For an example, he credibly testified that when he was a child his uncle forced him to perform oral sex on the uncle until he threw up; the ALJ reasoned that there was no evidence the uncle sexually assaulted the petitioner because of the petitioner’s sexual orientation, but rather because he was young and vulnerable. Or, without stating doubt about the petitioner’s report that he was beaten up by three men because he was gay, the court accepts the agency’s conclusion that this is not a basis for reasonable fear of persecution if he is returned to Guatemala, because the police were still investigating the incident and there was no affirmative evidence that the men knew who he was or would seek him out to beat again if he returned to Guatemala, or that the police would refuse to follow up on his report of the incident. What can one do but throw up one’s hands in despair? (All of this is compounded by news reports about Guatemala, or that the police would throw him out to beat again if he returned to Guatemala, because the police were investigating the incident and there was no affirmative evidence that the men knew who he was or would seek him out to beat again if he returned to Guatemala, or that the police would refuse to follow up on his report of the incident.)

ALABAMA – Jeremie Leif Bone, a transgender civil engineer who was laid off by Northrop Grumman Systems Corporation (NGSC) from a position that would require overseas deployment, ostensibly because of a supervisor’s concern that “something might happen to [him]” if deployed overseas, has filed suit in the U.S. District Court for the Northern District of Alabama, asserting claims under Title VII and the Americans With Disabilities Act (ADA). Bone v. Northrop Grumman Systems Corporation, 5:19-cv-00991-HNJ (N.D. Ala., filed June 25, 2019). From the docket number appearing in the complaint, it appears that the case has been assigned to Magistrate Judge Herman N. Johnson, Jr., to deal with the inevitable motion to dismiss that will be filed by Northrop Grumman. Bone began his gender transition while serving with the U.S. Army, having been diagnosed “in our around” 2014, and beginning his transition in March 16. He was hired by NGSC in November 2017, and began working in the beginning of 2018. Everything was fine at work under his original supervisor, but a new supervisor “took a much more intransigent approach than did his predecessor,” denying Bone the opportunity to deploy overseas, which led to his layoff by NGSC. The 11th Circuit does not, at present, recognize Title VII claims for gender identity discrimination as such, although the Circuit’s constitutional decision to treat public employee gender identity discrimination claims as sex discrimination claims for purposes of the 14th Amendment (Glenn v. Brumby, 663 F.3d 1312 (2011)) may be persuasive on interpretation of Title VII’s ban on discrimination because of sex. The 11th Circuit has recognized gender non-conformity claims under Title VII, which might prove useful as well. The ADA claim, according to the complaint, is that Bone was subjected to discriminatory treatment “based solely on NGSC’s perception that his underlying gender dysphoria and his ongoing transgender transition were disabilities that would keep him from performing an essential function of his job – deploying overseas.” The plaintiff is represented by Eric J. Artrop of Mastando & Artrop, LLC, Huntsville.

ALABAMA – George D. Baker, an out gay man (whose employer claimed it did not know he was gay), worked for Defense subcontractor L3 Technologies, Inc., at Fort Rucker in Daleville, Alabama. He claims to have been subjected to a hostile environment, involving a considerable amount of name-calling, at the hand of co-workers. He also claims to have reported this to supervision, which the company stoutly denies. Additional facts of interest: Baker was accused of being loud and aggressive with co-workers, and of repeatedly sitting in toilet stalls watching pornography on his cellphone while jerking off and making loud grunting noises. “Baker also admits he commonly made loud ‘grunting’ noises due to hemorrhoids when using the restroom, which ‘could be interpreted as masturbating,” wrote the magistrate judge, who indicated that the company sent somebody out from HQ to “investigate” these reports. His supervisor passed information about this situation to the main office in New York, and it was passed along to the HR office. Eventually, the military barred him from the base and he quit his job to forestall being discharged. He filed discrimination claims with the EEOC under Title VII and the Office of Federal Contract Compliance Programs under a federal anti-discrimination executive order, receiving right to sue notices from both agencies, but then waited too long to file his lawsuit, and the employer moved to dismiss on statute of limitations grounds. The motion was granted by U.S. Magistrate Judge John H. England, finding that “the undisputable evidence establishes that Baker did not file this action within ninety days of receiving the EEOC Right to Sue Letter on February 7, 2017,” as he waited to file his action for five months. His counsel, unsuccessfully defending against the employer’s motion, is Garrett Parker Dennis, Alexander Shunnarah Injury Lawyers, Birmingham, AL.
ALABAMA—In Hatcher v. Birmingham Jefferson Cty. Transit Authority, 2019 WL 2409081, 2019 U.S. Dist. LEXIS 96445 (N.D. Alabama, June 7, 2019), a gay man who drives busses for the Transit Authority claimed that he was denied overtime and desirable assignments because he was gay, and that his repeated written complaints to supervisors about this did not improve the situation. His complaint does not mention filing a charge with the EEOC and getting a right to sue letter before filing suit under Title VII in federal court. The opinion by District Judge R. David Proctor lists W. Eugene Rutledge of The Rutledge Law Firm, LLC, Birmingham, as Baron K. Hatcher’s counsel, which raises interesting questions. Granting the defendant’s motion to dismiss Hatcher’s discrimination and retaliation claims under Title VII, Judge Proctor observed that 11th Circuit case law bars sexual orientation discrimination claims under Title VII, and a retaliation claim would similarly be barred since complaining about sexual orientation is not a protected activity under Title VII in the 11th Circuit as of now. (Of course, that might change when the Supreme Court rules on the appeal in the Bostock case next term, but as of now, that’s the law in the 11th Circuit.) Proctor noted the possibility of gay plaintiffs asserting sex-stereotyping claims, but found no allegations in Hatcher’s complaint that would lend themselves to such a claim, noting that “the Amended Complaint is completely devoid of any allegations suggesting that Plaintiff’s failure to conform with male gender stereotypes motivated any materially adverse action.” Alternatively, the court noted that plaintiff’s failure to plead exhaustion of administrative remedies was another reason to dismiss the complaint. The City of Birmingham passed an ordinance prohibiting sexual orientation discrimination, but it was not in effect at the time of events recounted in this opinion, and news reports suggest that delays by the City in establishing the Commission authorized to enforce the measure precluded seeking relief under local law until relatively recently. Perhaps it is not totally surprising that Hatcher’s counsel decided to seek relief under federal law, but rudimentary research would have led to the 11th Circuit decisions rejecting sexual orientation claims, most recently Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017), and Bostock v. Clayton Cty. Bd. Of Commissioners, 723 F. App’x 964 (11th Cir. 2018), cert. granted, 139 S. Ct. 1599 (2019), hearing scheduled for October 8, 2019. Perhaps this complaint was filed in hope that the Supreme Court would rule in favor of sexual orientation claims under Title VII while this dismissal is on appeal to the 11th Circuit.

ARIZONA – U.S. Magistrate Judge Leslie A. Bowman issued a Report and Recommendation concerning the state government’s motion to dismiss Russell B. Toomey’s suit alleging violations of Title VII and the Equal Protection Clause by categorically excluding coverage for “gender reassignment surgery” from the health plan provided to faculty members of the University of Arizona. Toomey v. State of Arizona, 2019 U.S. Dist. LEXIS 106056 (D. Ariz., June 24, 2019). Judge Bowman recommended dismissing the Title VII claim. However, Judge Bowman accepted Toomey’s argument that heightened scrutiny applies to a government policy that discriminates because of gender identity, concluding, “The defendants do not argue that, as a matter of law, the Plan exclusion would survive a heightened level of scrutiny. Accordingly, the defendants have not shown that Toomey fails to state a proper claim under the Equal Protection Clause.” The judge also rejected a sovereign immunity defense by named individual defendants who were sued in their official capacity, observing that Toomey was seeking prospective injunctive relief, not damages. Toomey is represented by Heather Ann Macre, James Burr Shields, II, and Natalie Brooke Virden, of Aiken Schenk Hawkins & Ricciardi PC, Phoenix AZ; Joshua A. Block and Leslie Cooper of the ACLU LGBT Rights Project, New York; Kathleen E. Brody of the ACLU of Arizona, Phoenix, and Tempe attorney Molly Patricia Brizgys. Objections to the Magistrate’s R&R were filed quickly.

CALIFORNIA—An African-American man living with HIV who was denied service in October 2017 by a barbershop was granted a default judgment by U.S. District Judge Andre Birotte, Jr. (C.D.Cal.) on April 23. Nikko Briteramos, represented by Lambda Legal, alleged violations of the Americans with Disabilities Act and
California’s Unruh Civil Rights Act, which forbids discrimination in public accommodations because of, inter alia, race, disability and sexual orientation. Briteramos v. King’s of Cuts, Case No. 2:18-cv-06400-AB. Defendants were served with the complaint, but never answered or responded to any filings or communications by the plaintiffs. The court awarded actual and punitive damages from defendants of $75,000, attorney’s fees of $4,600, and granted plaintiff’s application for litigation costs of $574.60, subject to submission of a bill of costs. The court had previously issued an order on March 18, setting forth the factual allegations and reasoning for finding a default judgment appropriate, in which the court noted that the plaintiff is a person with a disability within the meaning of the statutes, which clearly applied to the barbershop as a place of public accommodation. An expensive lesson for defendants about their obligations under public accommodations law.

CALIFORNIA – Amazingly, years after the point has been established and driven home that an HIV Confidentiality Statute must be strictly complied with by courts when faced with a request to order HIV testing of a criminal defendant, some trial judges continue to order HIV testing without making the necessary findings or establishing that the limited situations in which testing is authorized apply to the case. Once again, in People v. Gonzalez, 2019 Cal. App. Unpub. LEXIS 4197, 2019 WL 2558195 (Cal. App., 5th Dist., June 21, 2019), the court explains that unless the defendant is charged with a crime on the list of those presumed to involve the possibility of HIV transmission through contact exposure, testing may not be ordered. In this case, the defendant failed to register as a sex offender after his release from prison, was arrested three months later for failure to register, and pled no contest. At sentencing, the trial court ordered HIV testing, presumably because the crime for which he had been previously incarcerated was sexually related (one assumes, given the sex offender registration requirement he was charged with violating). But, of course, the crime for which he was before the judge was not that underlying crime, but rather the crime of failing to register. Failing to register is not an act on the list of those for which HIV testing is authorized, and failing to register, as such, does not expose anybody to the risk of HIV transmission. Voila! Gonzalez was represented by appointed counsel: Kendall Dawson Wasley.

CALIFORNIA – The 5th District Court of Appeal affirmed a decision by Kern Superior Judge Raymonda B. Marquez to deny a father’s motion to place his 15-year-old bisexual son with the father. In re D.C., a Person Coming Under the Juvenile Court Law, 2019 Cal. App. Unpub. LEXIS 3879, 2019 WL 2369908 (June 5, 2019). The minor, called D.C. in the court’s opinion, told Human Services workers that he was regularly beaten by his mother, who disapproved of his sexual orientation. The minor was placed with his grandmother in Fresno while Human Services workers tried to locate the father. The opinion does not say whether the parents were married. When the workers located the father, it was only to learn that the father had a criminal record in both California and Nevada, including serious violent offenses. After the social worker made contact with the father, the father said he did not want the minor placed with him at that time, and would only be interested if the minor became “trapped in the system or staying in foster care.” The juvenile court subsequently declared the minor a dependent of the court. The father indicated he was interested in “visits” but not in having the minor placed with him. The minor had run away from his grandmother’s home. After police located him, he was placed in a group home, which he disliked at first, but ultimately adjusted to. The minor indicated he had received threatening text messages from his father, and told social workers that his father “had forced the minor and his friend to smoke marijuana to ‘get the gay out of them.’” The agency recommended against placing the minor with his father, due to the father’s “violent behaviors.” However, after the father had completed probation, the minor was placed with the father in December 2017. However, but the placement didn’t “stick,” as the minor quickly left that home. The agency concluded that the father’s parenting skills were lacking. The juvenile court decided that the minor, who would shortly be turning 16, should be involved in deciding how to deal with his housing issues, and denied the father’s request for placement, finding “there is clear and convincing evidence that such placement would be detrimental to [D.C.’s] safety, protection, or physical or emotional well-being.” The court of appeal affirmed this ruling. “Here, the father had a lengthy criminal record that included multiple convictions for violent offenses,” wrote the court. “When father had the minor in his custody in December 2017, after being released from prison, the minor ran away from home that same month because, according to father, ‘the minor felt ‘uncomfortable’ in the home. Father’s response was to ‘not pay any more attention’ to the minor because the minor ‘made a choice.’” Under the circumstances, one wonders why the father appealed the juvenile court’s ruling against him as being the custodial parent. The court of appeal concluded, “The juvenile court had broad discretion to evaluate not only the child’s physical safety but also his emotional well-being. A placement that would impair the emotional security of the child, as would the placement with father, is all that is required for finding detriment.”
CIVIL LITIGATION notes

CALIFORNIA – In Murphy v. Twitter, Inc., 2019 Cal. Super. LEXIS 129 (San Francisco Super. Ct., June 12, 2019), Judge Ethan P. Schulman ruled that Meghan Murphy, who was bounced off Twitter for her transphobic tweets, could not maintain a civil action against Twitter. He applied Section 230 of the federal Communications Decency Act, which essentially insulates social media companies from liability and allows them to include in their terms of service and/or contracts with users exculpatory language that makes it possible for them to avoid contractual liability. Judge Schulman’s opinion quotes the various tweets that got Murphy into trouble with Twitter, which determined that she had repeatedly violated its terms of service — specifically, the “Hateful Conduct Policy” — by posting sarcastic comments about particular transsexuals and commentary generally disrespectful of transsexual people. Murphy argued that Twitter should be bound by statements in its “Terms of Services, Rules, and Enforcement Guidelines,” which she construed as giving Twitter users free reign to say pretty much whatever they pleased, and also argued that Twitter violated California’s Unfair Competition Law by including in its contract its right to suspend or ban accounts “at any time for any reason.” Murphy styled her lawsuit a class action on behalf of Twitter users, seeking declaratory and injunctive relief against Twitter censoring their speech and suspending their accounts if the company doesn’t like what they post. Twitter demurred to her causes of action, arguing that the suit was barred by Section 230. Judge Schulman agreed with Twitter. “As its plain language and legislative history make clear,” he wrote, “Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred.” Murphy particularly objected to communications she received from Twitter demanding her to remove certain tweets. “That this case involves Twitter’s decision to take down content rather than to post it is immaterial,” wrote Schulman, quoting a California Supreme Court decision that stated: “No logical distinction can be drawn between a defendant who actively selects information for publication and one who screens submitted material, removing offensive content. “The scope of immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.” Schulman found that both California and federal courts had taken a consistent approach in interpreting and applying Section 230. “In particular,” he wrote, “federal courts have specifically ruled that a service provider’s decisions to provide, deny, suspend or delete user accounts are immunized by Section 230.” Section 230 occupies the field, and excludes breach of contract claims of the type asserted by Murphy. “All of her claims challenge Twitter’s interpretation and application of its Terms of Service and Hateful Conduct Policy to require Murphy to remove certain content she had posted in her Twitter account, to suspend that account, and ultimately to ban her from posting from Twitter due to her repeated violations of the Terms of Service and Policy,” wrote the judge. “All of those actions reflect paradigmatic editorial decisions not to publish particular content, and therefore are barred by Section 230.” The opinion does not mention whether Murphy is represented by counsel.

DISTRICT OF COLUMBIA – U.S. District Judge Amit P. Mehta ruled on June 12 that the National LGBT Bar Association does not have standing to assert an Establishment Clause claim against the U.S. Department of Health and Human Services (HHS) and the U.S. Conference of Catholic Bishops (USCCB) based on the refusal of Catholic social service agencies participating in programs to find foster and adoptive parents for unaccompanied minor refugees to include same-sex couples in the programs. Marouf v. Azar, 2019 U.S. Dist. LEXIS 98528, 2019 WL 2452315 (D.D.C.). Fatma Marouf and Bryn Esplin, a married same-sex couple, approached Catholic Charities of Fort Worth, Texas (CCFW), the only agency under the program located in their residential area, seeking to become foster or adoptive parents for such a child. They were advised that “prospective foster parents must ‘mirror the holy family’” and that same-sex couples were not qualified to foster a child. They were also told that none of the children served by CCFW “is a member of the LGBT community,” as if that were relevant. Marouf and Esplin complained to the Office of Refugee Resettlement, under whose auspices grant money is funneled to agencies like CCFW as a sub-grantee of the U.S. Conference of Catholic Bishops, which contracts with HHS to obtain the money appropriated by Congress to HHS as part of its operating budget. ORR took no action on their complaint, after thanking them for notifying it about the issue. USCCB is the largest single contractor with HHS to provide such services through the myriad Catholic social service agencies around the country. In its grant applications, USCCB is upfront that it will provide services consistent with Catholic doctrine. “At the time it submitted these grant applications,” wrote Judge Mehta, “USCCB’s position on same-sex marriage was unequivocal and a matter of public record. For instance, USCCB’s Fact Sheets concerning adoption and foster services state that ‘when placing children with couples, Catholic Charities ensures that those children enjoy the advantage of having a mother and a father who
are married.’’ In a publication titled “Frequently Asked Questions About the Defense of Marriage,” USCCB states that “placing a child in the care of two men or two women may be well-intentioned, but ultimately deprives the child of that which best serves his or her interests – a mother and a father.” Despite knowing this, HHS grants the money to USCCB, oblivious of its obligations under the Establishment Clause and the 5th Amendment. The complaint was originally filed on behalf of Marouf and Esplin, later amended to add the National LGBT Bar Association as a co-plaintiff, alleging violations of the Establishment Clause, Equal Protection, and Due Process. The case would seem open and shut, but HHS and USCCB moved to dismiss, arguing that all plaintiffs lack standing. Judge Mehta found that Marouf and Esplin have individual standing to maintain the actions, but the NLGBT Bar does not. He found that the only basis asserted by NLGBT Bar for standing related to the Establishment Clause count, and that under the standing doctrine for Establishment Clause cases, NLGBT Bar does not qualify, because the only basis NLGBT Bar argued was taxpayer standing, and that doctrine has been narrowly construed by the Supreme Court. The programs in question were not directly established by Congress, which left it to HHS to devise programs and administer grants for the general purpose of assisting unaccompanied refugee minors. Thus, Mehta reasoned, the plaintiffs “are actually contesting a discretionary executive action – not a legislative directive – as to which taxpayer standing . . . is not available.”

However, the court found that Marouf and Esplin, as individuals otherwise-qualified to be foster parents who were turned away on religious grounds, have individual standing to invoke the Establishment Clause and the 5th Amendment (Equal Protection and Due Process) in a suit against HHS and USCCB (which is theoretically bound by constitutional constraints when spending federal money). So the case continues, but National LGBT Bar is relegated to an amicus role. Counsel for plaintiffs listed on the opinion include Ann Stanton of Hogan Lovells US LLP, Denver; James Anthony Huang, Jennifer A. Fleur, Kenneth Y. Choe, and Jessica Lynn Ellsworth of Hogan Lovells LLP, Washington, D.C.; Camilla b. Taylor and Jamie Avra Gliksberg, Lambda Legal, Chicago; and Ken Upton for Americans United for Separation of Church and State, Legal Department, Washington.

INDIANA – Sexual stereotyping theory came into play in Stedman v. City of Terre Haute, 2019 WL 2436995, 2019 U.S. Dist. LEXIS 97309 (S.D. Ind., June 11, 2019), in which District Judge James R. Sweeney, II, mainly rejected the municipal employer’s summary judgment motion on sexual harassment claims by Stephen Stedman, who finally quit his job rather than stick it out in a workplace where he was subjected to unpleasant name-calling and insinuations that he had a romantic relationship with another male employee. Stedman alleged a hostile work environment on the basis of sex. His harassers were male coworkers. He also claimed constructive discharge, but Judge Sweeney found the facts alleged were not sufficiently severe to support that claim. However, the hostile environment claim stuck. “Significantly,” wrote Sweeney, “the evidence is that Stedman was nicknamed ‘Tits’ and ‘Titty Boy,’ which could indicate sexual stereotyping . . . A reasonable jury could find that these nicknames were given to Stedman because his harassers did not consider him to be sufficiently masculine looking, that is, based on sex stereotyping. Then again, it could just be that the harassers were needling Stedman for being flabby or overweight or a ‘mama’s boy.’ The use of the nicknames was not an incidental part of the alleged harassment; it was consistently directed at Stedman. The comments about Stedman’s breasts and the juggling and fondling of them could be understood as reflecting the harassers’ sex stereotype. In addition, the harassment involved physical touching, including the rubbing of Stedman’s knee without his consent, which could be viewed as sexual in nature. Furthermore, the comments suggesting that Stedman and Stillman had a romantic or sexual relationship and the playing of songs to that effect could suggest that the harassment was based, at least in part, on animus because of Stedman’s failure to meet sex stereotypes. To be sure, a reasonable jury could find that the motivation was based on animus toward Stillman’’ indeed one would have expected the complained of conduct to have survived Stillman’s departure if they were aimed at Stedman’s sexual orientation. Still, a reasonable jury would not be required to find that the harassment of Stedman was based on his sex but, based on all the circumstances and context in which he was teased, a jury could reasonably find that the harassment was based on Stedman’s sex.” The court also found that the conduct was sufficiently severe or pervasive to affect terms and conditions of Stedman’s employment, and observed that the City had not yet developed sufficiently its position regarding imputing liability to the employer, effectively waiving the argument that it could not be held liable for the hostile environment. The court also found that a negligent supervision claim should survive summary judgment, largely because of its interrelationship with the harassment claim, and also allowed an ADA retaliation claim to continue based on other facts not relevant to this report. Stedman is represented by Paul Jungers of Wagner, Crawford, Gambill & Jungers, Terre Haute.

KANSAS – Lambda Legal and Kansas state officials entered into a consent
judgment settling Lambda’s suit on behalf of transgender Kansans who were challenging the state’s categorical refusal to issue new birth certificates consistent with the plaintiffs’ gender identity. Foster v. Andersen, Civ. Action No. 18-02552-DDC-KGG (D. Kans., Judgment signed by Judge Daniel Crabtree on June 21, 2019). The consent judgment referred to decisions by other federal district courts holding that states had violated the 14th Amendment by refusing to make such revised birth certificates available. The parties agreed to entry of an order that states that Kansas’ existing ban violates the Due Process and Equal Protection Clauses of the 14th Amendment, enjoins state officials from enforcing the existing policy, and orders that they “shall provide certified copies of birth certificates to transgender individuals that accurately reflect their sex, consistent with their gender identity, without the inclusion of information that would, directly or indirectly, disclose an individual’s transgender status on the face of the birth certificate.” The procedure for getting such a certificate, as agreed in the Consent Judgement, is that the individual submit “a sworn statement requesting such change and accompanied by: (1) a passport that reflects the person’s true sex; or (2) a driver’s license that reflects the person’s sex; or (3) a certification issued by a healthcare professional or mental health professional with whom the person has a doctor-patient relationship stating that based on his or her professional opinion the true gender identity of the applicant and that it is expected that this will continue to be the gender with which the applicant will identify in the future.” The Consent Judgment specifically provides that state officials will issue certificates to the named plaintiffs in the case, and all parties bear their own costs of the litigation, including attorney’s fees. The case was handled for the plaintiffs by Lambda Legal attorneys Omar Gonzalez-Pagan and Kara Ingelhart, with pro bono co-counsel Jim Lawrence, Katherine Keating, and Sarah Holdmeyer of Bryan Cave Leighton Paisner LLP.

MAIN – In recognition of the fact that many smaller communities in rural Maine lack the population numbers and resources to have their own public schools, the state has a program under which it will pay the tuition of students from such communities “at the public school or the approved private school of the parent’s choice at which the student is accepted.” However, to be an “approved private school,” a school must agree to abide by state anti-discrimination law, which includes a ban on discrimination because of sexual orientation and gender identity. In Carson v. Makin, 2019 U.S. Dist. LEXIS 106656, 2019 WL 2619521 (D. Maine, June 26, 2019), U.S. District Judge D. Brock Hornby rejected a contention by some parents who live in such a community that the limitation of “approved private schools” to those who comply with the state’s antidiscrimination law violates their rights under the Free Exercise Clause to pick a religious private school for their children at the expense of being disqualified for the tuition program. At first glance, the state would seem hopelessly, because the 1st Circuit rejected such a challenge to the Maine tuition scheme as long ago as 2004, in Eulitt v. Maine Department of Education, 386 F.3d 344. Plaintiffs argue, however, that the reasoning of Trinity Lutheran, it similarly violates the Free Exercise Clause to deny parents the option to send their children to religious schools with state tuition subsidies. Judge Hornby found that it was arguable but not clear that the Trinity Lutheran decision might cause the 1st Circuit to rethink Eulitt, but he decided that as a district court judge he was bound by Eulitt until such time as the 1st Circuit decides to overrule that case, so he granted judgement on the record to the state, signaling his awareness of what comes next: “My decision not to decide the ultimate question the parties and amici pose – whether Trinity Lutheran has changed the outcome in Eulitt – is no great loss for either the parties or the amici. It has always been apparent that, whatever my decision, this case is destined to go to the First Circuit on appeal, maybe even the Supreme Court. In the First Circuit, the parties can argue their positions about how Trinity Lutheran affects Eulitt. I congratulate them on their written and oral arguments in this court. I hope that the reheasal has given them good preparation for their argument in the First Circuit (and maybe even higher). My prompt decision allows them to proceed to the next level expeditiously.” Amici are, of course, organizations who want to gain state subsidies for religious schools with the schools having to comply with state anti-discrimination laws.

MARYLAND – U.S. District Judge Deborah K. Chasanow rejected an attempt by Daniel Hawkins, a gay discrimination plaintiff asserting claims under Maryland’s Fair Employment Practices Act (FEPA), to get the case remanded to state court after it was removed by defendant PNC Bank on diversity grounds. Hawkins v. PNC Bank, 2019 WL 2579001, 2019 U.S. Dist. LEXIS 105613 (D. Md., June 24, 2019). Hawkins asserted two claims. In Count One, he alleged discrimination based on
sexual orientation, sexual harassment, and hostile work environment, seeking compensatory damages, back pay, punitive damages, and attorneys’ fees in the amount of $75,000. In Count Two, he alleged constructive discharge, and reasserted his claim for compensatory damages, back pay, punitive damages, and attorneys’ fees in the amount of $75,000. His counsel, Joseph Thomas Mallon, Jr., and Marshall N. Perkins, of Mallon and McCool LLC, Baltimore, MD, presumably thought that by capping their claims at $75,000 per count, they were insulating the case from removal under the “one harm one recovery” rule. Opposing the motion to remand, PNC successfully argued that the two counts addressed different harms, and could theoretically result in an award of more than $75,000 in damages when cumulated. As diversity jurisdiction extends to suits in which more than $75,000 is sought, and the harms described in the two counts only partially overlap, Judge Chasanow concluded that the requirements of the diversity jurisdiction statute have been met and denied the motion. PNC Bank’s persuasive counsel is Eric J. Janson, of Seyfarth Shaw LLP, Washington, DC. Judge Chasanow, a Senior District Judge and formerly Chief Judge of the district, was appointed by Bill Clinton.

MINNESOTA – The Court of Appeals of Minnesota upheld a decision by the Department of Employment and Economic Development to deny unemployment benefits to a gay man living with HIV who had quit his job with Fairview Health Services but received severance pay and was not charged with any misconduct. Rankila v. Fairview Health Services, 2019 Minn. App. Unpub. LEXIS 521, 2019 WL 2416012 (June 10, 2019). Under Minnesota’s unemployment insurance law, a person who is discharged for reasons other than misconduct providing cause for the discharge is entitled to unemployment benefits, but somebody who quits may qualify for benefits “when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity.” The employee had been “on and off performance improvement plans” and met with two Human Resources staff members to discuss a complaint another co-worker had made against him. They told him that he could either resign or “he would receive a corrective action and be placed on a final warning.” He was not told he was being discharged, but warned that he might be discharged in the future if “he continued to have performance issues.” He replied, “I don’t [want] to work where I’m not wanted. So I’ll choose to leave.” He was told, pursuant to the employer’s policy, to take a few days to think about his decision before making it final, but ultimately he left work, was paid several weeks of severance pay, and then applied for unemployment benefits. On the question whether his quitting was justified, he testified that “he quit his employment with Fairview for reasons that he did not bring up” at his initial unemployment hearing, “namely, that he has a learning disability. The ULJ (Unemployment Law Judge) also understood him to claim that he was subjected to unpleasant comments and jokes about his sexuality during his employment, set aside an initial determination against his claim and scheduled a second hearing. At this hearing, he testified that other employees made “off the wall comments” or “jokes about being gay,” but testified to no details about this. He also testified that he believed he was not given the “option to stay at Fairview” during the meeting with HR. He also states that he has “lived with HIV since 1995, and he would not leave a job with great insurance” unless he thought he had to. But this did not convince the ULJ, who denied the benefits claim, and was affirmed by the court, which reviewed the hearing record and found no reason to set aside the ULJ’s conclusions that the employee was neither discharged nor compelled to resign. The court rejected his claim that he was eligible under the statute’s “good-cause” exception, which would apply if he had a “good reason to quit.” Even taking account of his testimony about comments by co-workers that he found upsetting, the court found that the record supported the ULJ’s conclusion that he quit because he feared he would “eventually” be fired by Fairview and, under the statute, this is not a good reason to quit. The employee is represented by Japser Berg of IAJ Law, LLC, Edina, MN.

NEW YORK – An attempt by New York to prohibit enforcement of mandatory arbitration clauses in employment agreements when the subject matter of the case is sexual harassment ran aground on the shoals of the Federal Arbitration Act (FAA) in a case of first impression decided by U.S. District Judge Denise Cote on June 26, Latif v. Morgan Stanley & Co., LLC, 2019 WL 2610985, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y.). Mahmoud Latif was hired in June 2017 by Morgan Stanley. As part of his on-boarding process he signed an Offer Letter that incorporated by reference Morgan Stanley’s form arbitration agreement (a copy of which was attached), by which he agreed to submit any claim arising out of his employment to final and binding arbitration, waiving any right to sue in court. He alleges that beginning in the fall of 2018, “he became the target of inappropriate comments regarding his sexual orientation, inappropriate touching, sexual advances, and offensive comments about his religion. He also alleges that around February 2018, a female supervisor sexually assaulted him.” According to Latif, he reported these incidents to the Human Resources Department at Morgan, which led to months of email exchanges
that, – William Nesbitt sued and meetings between Latif and the HR Department, culminating in his termination around August 1, 2018, just over a year after he was hired. He filed discrimination charges, and ultimately filed suit in the Southern District of New York, alleging a hostile work environment and retaliation in violation of Title VII, with supplementary claims under the New York State and City Human Rights Laws, as well as claims for assault and battery, aggravated sexual abuse, violation of the city’s Gender Motivated Violence Protection Act, and intentional and negligent infliction of emotional distress. Morgan Stanley moved for arbitration, and Latif conceded that all but one of his claims were subject to arbitration. However, he contended that his hostile environment sexual harassment claim was not subject to arbitration because of a New York law that took effect on July 11, 2018, less than a month before he was fired. The law, which specifically addressed sexual harassment claims as a legislative reaction to the #MeToo movement, includes Section 7515, titled “Mandatory arbitration clauses; prohibited.” This section defines as a “prohibited clause” any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discrimination practice of sexual harassment.” Further, Section 7515 provides that no written contract “except where inconsistent with federal law” may contain a “prohibited clause,” but states an exception: “Nothing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon.” It also states that “except where inconsistent with federal law,” the provisions of a “prohibited clause” included in a contract shall be “null and void.” Judge Cote mentioned that Justice Ruth Bader Ginsburg referred to Section 7515 in a dissenting opinion in a recent case, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019), as an example of a state’s attempt “to safeguard employees’ opportunities to bring sexual harassment suits in court” and “ameliorate some of the harm occasioned” by recent Supreme Court opinions. But, of course, that was in a dissent, and Judge Cote concluded, not surprisingly, that the “except where inconsistent with federal law” provision provides the key to this case, because the Federal Arbitration Act has been construed by the Supreme Court to make arbitration agreements similar to that contained in the Morgan Stanley Arbitration Agreement generally enforceable and not subject to subject-matter exceptions created by state law. The FAA does have a savings clause going to general state law principles that could support an argument that an arbitration agreement is unenforceable. She observed, however, that because Section 7515 singles out arbitration of sexual harassment claims as unenforceable, but specifically allows mandatory arbitration clauses about other subjects, it does not provide a general principle of state law that would make an arbitration provision unenforceable. Thus, it is unavailing against a motion under the FAA seeking an order compelling arbitration of a sexual harassment claim in New York. Mr. Latif is represented by counsel – Abraham Zev Wolf Melamed of Derek Smith Law Group PLLC in Manhattan – who might think it worthwhile to appeal this ruling to the 2nd Circuit. The New York State legislature’s desire to allow sexual harassment complainants access to the courts is clearly expressed, and the question whether this provision is preempted by the Federal Arbitration Act deserves to be considered at an appellate level. However, as a practical matter, since all the other claims asserted by Mr. Latif must be arbitrated, it probably makes little sense in terms of economy and expedition to arbitrate the other claims without addressing the sexual harassment issue, to which they are closely tied. This undermines a primary motivation for the N.Y. law: to bring sexual harassment claims out of the cloistered realm of private arbitration, where they will evade public scrutiny because of the inevitable confidentiality agreements that surround settlement of such claims, thus sinking without a trace and leaving the public without information about which employers are tolerating sexual harassment of their workers.

NEW YORK – William Nesbitt sued Advanced Service Solutions for damages for personal injuries “sustained as a result of an accident caused by a snow and ice condition,” according to the Decision and Order by the N.Y. Appellate Division, 2nd Department, in Nesbitt v. Advanced Service Solutions, 2019 N.Y. App. Div. LEXIS 4977, 2019 N.Y. Slip Op 04961 (June 19, 2019). He was served with a discovery demand that he authorize the release of medical records, including “an authorization for records from Walgreens Pharmacy relating to ‘Alcohol/Drug Treatment/ Mental Health Information/HIV-Related Information.” The attorney who drafted the discovery demand obviously was oblivious to New York’s HIV Confidentiality Law. Nesbitt refused to supply the requested authorizations, arguing that the information sought was irrelevant to the issues in the case. Supreme Court granted defendant’s motion to compel and Nesbitt appealed. The Appellate Division cited and quoted from the HIV Confidentiality Law and opined that Supreme Court should have denied “that branch of the defendants’ motion which was to compel the plaintiff to provide an authorization for a Walgreens Pharmacy to provide ‘Alcohol/Drug Treatment/ Mental Health Treatment/HIV-Related
Information.” But the rest of the Supreme Court’s ruling as to other medical disclosures was upheld, since Nesbitt “placed his medical condition in issue, and has specifically alleged that the subject accident exacerbated preexisting injuries.” Nesbitt is represented by Matthew R. Kreinces of Tantleff & Kreinces, LLP, Mineola. The defendant is represented by A.G. Chancellor III and Michael C. Tromello, Melville.

NEW YORK – Somehow the word has to get out to the general LGBT community that if you believe you have suffered employment discrimination because of your sexual orientation in New York City, your first move should be to file a charge against your employer with the New York City Human Rights Commission, which enforces a statute that prohibits employers from discriminating against employees because of their sexual orientation, and which will investigate your claim and seek to resolve the problem. An alternative would be to file an action against your employer directly in the New York State Supreme Court under the State Human Rights Law. But rushing into federal court with a pro se claim directed specifically and solely against your supervisor or other co-workers, without getting any kind of legal advice (there is a free legal clinic at the LGBT Community Center on Tuesday nights, for example) is not a smart move, as Case D. Thomas learned on June 10 when U.S. District Judge Ronnie Abrams granted a motion by Jeff Thurston to dismiss Thomas’s pro se suit against Thurston. Thomas v. Thurston, 2019 U.S. Dist. LEXIS 96979, 2019 WL 240056 (S.D.N.Y.). Thomas’s home-made complaint accused Thurston (along with a second defendant) of engaging in a “conspiracy that aimed to violate [Thomas’s] civil rights, human rights, and pursuit of happiness,” through, among other things, harassing him, discriminating against him, and wrongfully terminating him.” Thomas amended his complaint to remove the second defendant, leaving Thurston the sole remaining defendant, alleging that Thurston “discriminated against him based on his sex and sexual orientation, specifically through his involvement in terminating Thomas’s employment.” Continued Judge Abrams, “He brings claims against Thurston ‘under any and all laws, writs, standards, statutes, and clauses that may apply,’ including the Equal Protection Clause of the United States Constitution.” Thomas asserted his claims exclusively under federal law. Abrams suggested that Thomas meant to assert claims under Title VII and 42 USC Section 1983 (neither mentioned in the complaint), and observed that Title VII claims may not be filed against individuals, only against companies. (Indeed, only companies with at least 15 employees.) Furthermore, there is no allegation that Thomas was discharged from a government job or that Thurston was an agent for the government, so Thurston was not a state actor. Thus, the complaint must be dismissed. But Judge Abrams had compassion on the pro se litigant, dismissing without prejudice and suggesting that Thomas contact the New York Legal Assistance Group (NYLAG) Legal Clinic for Pro Se Litigants in the Southern District of New York, for help in framing a new complaint, directing that he had one month from June 10 to do so. She appended to the decision a flyer from NYLAG with a phone number to call and the location and times when the free clinic is open.

NEW YORK – A lesbian former property owner in the Village of Westhampton Dunes on Long Island may maintain her action against certain Village officials for violation of her First Amendment Rights and abuse of process arising from a disputes generated from her project to build a “new single-family summer house” on land she purchased in the Village. Sausa v. Village of West Hampton [sic] Dunes, 2019 U.W. Dist. LEXIS 98079 (E.D.N.Y.). District Judge Sandra J. Feuerstein referred to Magistrate Judge Anny Y. Shields the task of producing a Report and Recommendations on a motion by defendants to dismiss all of Marla Sausa’s claims. To briefly summarize the lengthy story spelled out in Judge Shields’ report, it seems that Sausa submitted an application for a building permit, which was granted, but she became concerned, given the location of the property, that what was being constructed by her contractor might not be in compliance with all safety requirements, particularly with respect to withstandng storm damage. She sought help from Village officials, only to learn that they seemed to take a very laissez-faire approach, trusting contractors to do what was required. Dissatisfied, Sausa contacted state officials, leading to what can best be described as intense hostility against her by the local officials when state officials suggested that the Village folks were applying the wrong standards to her project, causing Village officials to alert all residents about possible Code violations in the location of propane tanks on their property, which undoubtedly generated consternation and public relations difficulties for the local officials. The local officials then issued Sausa two “desk appearance tickets” for violation of Village and State codes, advising that if she failed to appear as directed a warrant for her arrest would be issued. She fought the prosecution of the appearance tickets, which were dismissed by the Village Justice Court, but the Village filed a non-meritorious appeal that was dismissed by Appellate Term, imposing significant litigation causes on Sausa. Ultimately, Sausa gave up on her project and sold the property unfinished and without relevant permits in place for it to be finished. She sued on June 29, 2018, in federal court under 42 USC
Sexual orientation discrimination claims are cognizable under Title VII. Harris v. Blue Ridge Health Services, Inc., 2019 WL 2570491, 2019 U.S. Dist. LEXIS 104565 (M.D.N.C., June 21, 2019). The plaintiffs did win substantial damage awards for their claims asserted under the False Claims Act, the North Carolina Medical Assistance Provider False Claims Act, the Fair Labor Standards Act, and the North Carolina Retaliatory Employment Discrimination Act. The women were essentially acting as whistle-blowers in attempting to have rectified Blue Ridge’s submission of reimbursement claims to Medicaid while out of compliance with Medicaid regulations, and had also raised issues about unlawfully being denied overtime pay to which they were entitled. The company’s attitude was dismissive and threatening. When one of the women went over her supervisor’s head to report the Medicaid noncompliance to the company that owned Blue Ridge, her supervisor told her “that she would not forgive you for telling Reece about their noncompliance issues and that the best thing Octavia could do would be to find another job.” The supervisor’s response to the overtime claims was “that she needed to get on board or find another job” and that any employee who did not like the company’s pay policy “could ‘kick rocks.’” Sounds like a sure set-up for the award of liquidated damages under the wage and hours law for willful violations, and so Judge Schroeder found, although he disagreed with the plaintiffs about how they should be calculated. It seems that after losing their jobs with Blue Ridge, they eventually found alternative employment. There was a dispute about whether and how the amount they earned “in mitigation” should be charged against their damage award, and particularly how it would affected the calculation of their liquidated damages for willful violation. Ultimately, the court awarded Octavia $93,762.75, plus pre- and post-judgment interest; similarly, the award to Octavia was $76,951.59, plus pre- and post-judgment interest. Both plaintiffs have to submit a bill of costs (to which they are entitled as prevailing parties) and file a motion for attorneys’ fees. “Given Blue Ridge’s default,” wrote the judge, “counsel is excused from the Local Rule’s requirement that the parties attempt to reach an agreement on the proper fee award,” but they are required to submit the usual affidavits and accountings to substantiate their fee awards. The plaintiffs are represented by Wilson F. Fong, of Hensel Law, PLLC, Greensboro, NC.

Pennsylvania – U.S. District Judge Mark R. Hornak’s opinion in In re Subpoenas to Dr. Agnes Gereben Schaefer, 2019 U.S. Dist. LEXIS 92190, 2019 WL 2336698 (W.D. Pa., June 3, 2019), presents an interesting sidelight to the ongoing litigation over President Trump’s ban on military service by transgender people. The government issued four subpoenas to Dr. Schaefer, one for each of the lawsuits challenging the policy, seeking her testimony in her capacity as the lead author of the RAND Corporation Report that was commissioned by the Defense Department in 2015 and that provided a basis for the determination by then-Secretary of Defense Ashton Carter to lift the ban on continuing service by transgender individuals as of July 1, 2016, and prospectively to lift the enlistment ban by July 1, 2017. An important part of the government’s case defending President Trump’s decision in July 2017 to reinstate the ban and the subsequent adoption of a policy recommended in February 2018 by then-Secretary of Defense James Mattis, is to support the President’s assertion that Carter’s decision did not have a valid basis, which could require discrediting the RAND report. The four district court judges who issued preliminary injunctions against the ban all mentioned the RAND report in finding that plaintiffs were likely to
preval in their challenge to the anti-transgender policies. Dr. Schaefer filed this action in the U.S. District Court in Western Pennsylvania, where she resides, seeking to quash the four subpoenas, essentially arguing that she and RAND are not parties to the case, and that the testimony the government is seeking to compel is in effect expert testimony, not ordinary fact witness testimony. Dr. Schaefer asserts that RAND is a non-partisan non-profit research organization that refrains from public advocacy; rather, it produces objective studies commissioned by the Defense Department to provide a factual basis for policy decisions. She notes that she has not been retained as an expert by any parties in these cases, and has not testified on behalf of any parties. Wrote Judge Hornak, “She and RAND oppose testifying on behalf of any party in the litigations or otherwise being inserted into the cases. Dr. Schaefer voiced concerns that if she were deposed, it could fairly be viewed by some that she had ‘taken sides’ in the underlying disputes. According to Dr. Schaefer, any appearance of ‘taking sides’ risks harm to her professional reputation, because the quality and value of her research depends on her reputation for objectivity and independence,” concerns that are also germane to RAND’s reputation. She also objected to the burdens imposed on her in having to prepare for depositions about events that took place several years ago, and the possible harm to her professional reputation. Dr. Schaefer and RAND have not offered testimony in any of these cases, and stated that they would not do so unless compelled by the court. Judge Hornak, after an extensive analysis of the rules that govern compelled testimony of experts, concluded that the subpoenas should be quashed. He concluded, based on the list of proposed questions from the government, that Schaefer “is primarily being sought in order to give opinion testimony rather than to provide testimony about her knowledge of facts relevant to the cases,” and ultimately that the RAND Report, which is publicly available on the organization’s website, speaks for itself, and Schaefer clearly had no role in the ensuing policy decisions by the Defense Department after the report was delivered to them. While conceding the potential relevance of her testimony, the judge found that most of the factors required to analyze the issue cut against the government. “In short,” he concluded, “the Government’s asserted necessity for Dr. Schaefer’s deposition relies in significant measure on multi-layered uncertainty and speculation. While it is possible that further developments in the underlying cases may necessitate that this Court revisit this issue, for now, the Court concludes that the burden of having to comply with the subpoenas at this juncture because the professional and reputational burdens that she would incur would disproportionately outweigh the relevance of, and the Government’s asserted need for, her deposition testimony.”

TEXAS – Senior U.S. District Judge Gray H. Miller entered a Title VII default judgment in favor of Eric Senegal, a gay man who was hired in 2016 to work at a Kentucky Fried Chicken franchise restaurant but was never given a shift and never began working. Senegal asserted that “other employees” informed him that “the manager had referred to him as a fa – ot and said he needed to change his voice.”

Senegal v. TAS Foods, LLC, 2019 WL 2568630, 2019 U.S. Dist. LEXIS 104065 (S.D. Tex., Houston Div., June 21, 2019). Senegal’s original complaint alleged sexual orientation discrimination in violation of Title VII, contending that the KFC manager “did not want Senegal, a gay male, to work at the restaurant because of Senegal’s sexual orientation and/or because of expectations for Senegal to act as a stereotypical male.” Judge Miller granted a motion to dismiss the original complaint for failure to state a claim, following well-established 5th Circuit precedent that sexual orientation discrimination claims are not actionable under Title VII, but the ruling was without prejudice and Senegal was allowed to file an amended complaint asserting sex discrimination under a gender-stereotyping theory. TAS Foods never responded to the amended complaint, service of which was proven, and Senegal moved for a default judgment. In order to grant the judgment, Judge Miller had to determine whether the plaintiff’s factual allegations, presumed to be true since not controverted by the defendant, pleaded facts sufficient to state a Title VII claim. Judge Miller found that the amended complaint satisfies this standard, writing, “A plaintiff’s ‘perceived failure to conform to traditional gender stereotypes may be attributable to a plaintiff’s appearance or behavior or both,” quoting from the Supreme Court’s opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). ‘Senegal alleges that Defendants’ manager said he ‘needed to change his voice,’ which could imply that Senegal’s voice did not conform with the manager’s stereotype of how a male voice should sound. This evidence indicates that Senegal was not put on the schedule because of the employer’s perception that Senegal failed to act as a stereotypical male. Accordingly, the Court agrees that Senegal’s complaint sufficiently pleads facts that constitute gender-stereotype discrimination under Title VII.” The court awarded back-pay as demanded in the complaint, but rejected the claims for compensatory and punitive damages. As to the former, the court found that Senegal had not alleged facts suggesting he had suffered non-economic harm “as
WASHINGTON – In In the Matter of the Domestic Partnership of Walsh v. Reynolds, 2019 WL 2597785, 2019 Wash. App. LEXIS 1660 (June 25, 2019), the Court of Appeals of Washington revisited the relationship dissolution case of Jean Walsh and Kathryn Reynolds, which it had previously addressed in Walsh v. Reynolds, 335 P.3d 984 (Wash. Ct. App. 2014), finding that on remand, Pierce County Superior Court Judge Stephanie A. Arend failed to follow the “law of the case” established by the earlier decision, and had brought incorrect opinions about constitutional due process and common law concepts into play in rendering an incorrect decision concerning the nature of the parties’ relationship and how their property should be distributed. The opinion for the appeals court was written by Judge Rebecca Glasgow. The story is long and complicated – too long and complicated for a detailed recounting here. Suffice to say that the two women had a relationship, including cohabiting, for more than two decades, that during the course of the relationship, which began in California and eventually moved to Washington, property was acquired, three children were born (and second-parent adoptions undertaken), various monetary arrangements were made, and domestic partnership registration occurred both in Washington and California, as the law governing same-sex relationships was evolving in both states. When the final break-up happened the children were all teenagers. Walsh and Reynolds had registered as domestic partners in Washington in August 2009, having previously registered in California while living there in 2000. The parties separated on March 14, 2010, and Walsh petitioned for dissolution and a property distribution on March 11, 2011. The key question in the case was how the history of the relationship would play out in terms of property distribution, when it appears that most of the money to acquire property came from Walsh, a surgeon, who brought substantially larger resources into the relationship than Reynolds, an educator. The house they were occupying at the time of the break-up had been purchased with Walsh’s funds, but both women’s names were on the deed. Ownership of various cars was also in issue. The women had maintained separate financial accounts, although some purchases over time were jointly made. There were periods during the relationship when Walsh was compensating Reynolds, who was not employed outside the house for some periods of time, for housekeeping and taking care of the children, so that Walsh could pursue her surgical career. Things were complicated. In the earlier decision, the Court of Appeals had found that the women were in a committed intimate relationship, a term of art in Washington common law to which community property principles applied, and said that this relationship dated back at least to 2005, when developments in California law expanded the legal effect of their 2000 domestic partnership registration to include inheritance and community property rights. On remand, however, the trial court, despite clear indication otherwise by the court of appeals’ earlier decision, concluded that the relationship could not fit into the “committed intimate relationship” category prior to that date, asserting that otherwise Walsh’s due process rights in her property would be violated, and furthermore disputing the earlier conclusion that this was a committed intimate relationship, noting the separate financial accounts maintained by the parties and the testimony about the end of their physical relationship at a date well before their break-up. The trial court ended up treating as separate property things that Reynolds argued should be treated as community property. On this appeal, the court agreed with Reynolds that the trial court had failed to faithfully apply the first case to its deliberations, spelled out the relevant legal principles in detail, and remanded
CRIMINAL LITIGATION notes

By Arthur S. Leonard

MICHIGAN – The Court of Appeals of Michigan affirmed the criminal conviction of Joseph Peter Sturza, a former admissions director at Austin Catholic High School, for giving masturbation lessons to a gay sophomore (age 15) at the school, but vacated the trial court’s sentence of one year in prison and 5 years on probation, responding affirmatively to the prosecution’s argument that the downward departure from sentencing guidelines eviscerated the relevance of Sturza’s use of the internet in his dealings with the student. People v. Sturza, 2019 Mich. App. LEXIS 3347, 2019 WL 2605758 (June 25, 2019) (per curiam). The victim transferred to Austin Catholic in January of his freshman year to escape bullying at his prior school. During his sophomore year, his father, who was an occasional volunteer at the school, noticed “defendant ‘hovering’ over the victim, playing closer attention to the victim than other students, and giving the victim hugs that lasted longer than an innocent hug.” The victim’s parents also noticed excessive time on the victim’s electronic devices, and his father discovered electronic communications between Sturza and the victim, which he share with school officials, that were “sexual in nature and many discussed masturbation.” At trial, the victim testified that he had revealed to Sturza that he was gay, and that Sturza eventually came out to him as well, invited him to his office with the door closed (which agitated the victim), and discussed sexual topics, including masturbation and specific “techniques,” some of which the victim found “disgusting.” Sturza did not initiate any sexual activity with the victim, but did engage in graphic masturbation discussions, “demonstrations in the air” and suggestions, and the two even engaged in simultaneous masturbation while on the phone with each other, with Sturza providing commentary and asking questions. After all this came out at trial, the jury convicted Sturza of “child sexually abusive activity” and using a computer to communicate with a person for the purpose of committing child sexually abusive activity, but acquitted Sturza on the charges of “accosting a minor for immoral purposes” and using a computer to communicate with a person for the purpose of committing that crime. Taking together the two offenses for which Sturza was convicted brought into play a sentencing range starting with 30 months, but the judge agonized on the record about whether it was appropriate to go beyond the 12 months that would be the minimum for the first offense, reasoning that he saw no basis for saying the crime was worse when the computer came into play than when Sturza was talking masturbation with the victim in his office, so the judge went with 12 months in prison and 5 years probation. Cross appeals ensued. Sturza argued that he was just providing help to a gay teen, not seeking sexual gratification for himself, and that it was not illegal for the teen to masturbate in private, so he contested the idea that what he did fit into the statutory crimes. The Court of Appeals rejected these arguments, likening Sturza’s activity to an older man “grooming” a younger one to become a sexual partner. While upholding the conviction, the court found the sentence too short, and remanded the case for resentencing, counteracting the trial judge’s statements by noting that using the computer gave the range of Sturza’s activity greater scope. The Court of Appeals’ opinion does not identify Sturza’s counsel.

NEW YORK – Does a convicted sex offender in New York who is subject to the reporting requirements of Correction Law Section 168-f(4) have to inform the Division of Criminal Justice Services that he has an account with Facebook.com? Perhaps surprisingly, the answer to that question is “No,” according to a unanimous decision by the New York Court of Appeals in People v. Ellis, 2019 N.Y. LEXIS 2007, 2019 NY Slip Op 05183, decided on June 27. The statute requires that sex offenders register with the Division “no later than ten calendar days after any change of address, internet accounts with internet access providers belonging to such offender, [or] internet identifiers that such offender uses . . . ” The defendant in this case, Arthur W. Ellis, Jr., is subject to this reporting requirement. In 2015, he completed his annual “verification form,” which required him to disclose to the Division certain “Internet Information,” including his “service provider,” “screen names,” and “email addresses.” He completed each of these preprinted sections on the form, including his email address. “Although he disclosed the identifier he used to log into Facebook, and the name by which he went on Facebook (his real name),” wrote Judge Eugene Fahey, “he did not disclose the fact that he had a Facebook account.” He was later charged with failing to register in violation of Section 168-f(4), because he failed to disclose this account as an “internet identifier.” He moved to dismiss the indictment, the county court denied the motion, and he pled guilty, preserving his right
to appeal. The Appellate Division reversed the judgment and dismissed the indictment, construing the statute to require disclosure of email addresses and screen names, as well as disclosure of which internet service provider the individual uses to connect to the internet, but that it does not require disclosure of the services on which the sex offender has accounts, which are not “internet identifiers” within the meaning of the statute. The Court of Appeals agreed with the Appellate Division. It seems that the Division was looking for shortcuts not specifically authorized by the statute in its attempt to assist social media companies in identifying and excluding sex offenders from their services. The statute authorizes the Division to release to “authorized internet entities” the “internet identifiers” used by sex offenders “in order to enable those authorized internet entities to ‘prescreen or remove sex offenders from [their] services’ and to ‘advise law enforcement and/or other governmental entities of potential violations of law and/or threats to public safety.’” In order to do that, the social media company, such as, for example, Facebook, having received the list of the email addresses and “internet identifiers” of all of New York’s registered sex offenders, would have to take the next step of determining whether any particular sex offender’s email address or screen name had been used on its service. This step (which can probably be done relatively quickly by a computer program if the lists are provided in electronic form) would be simplified if the Division could present Facebook with a list of all the sex offenders who had reported that they had Facebook accounts, but that’s not how the statute is written. As the Appellate Division found, Mr. Ellis did not violate the statute when he did not report that he has a Facebook account, so long as he correctly reported his email address and any screen name that he uses on the internet, which he did. Ellis is represented by Noreen McCarthy.

**CALIFORNIA** — Gay inmate Joseph Anthony Stafford filed a complaint of sexual harassment against an officer under the Prison Rape Elimination Act [PREA]. Alleging that he was subjected to further harassment after filing the PREA complaint, Stafford filed a pro se civil rights suit alleging violation of his rights under the Eighth Amendment (prohibition of cruel and unusual punishment) and First Amendment (prohibition against retaliation for exercising right to petition the government). Screening the complaint, U.S. Magistrate Judge Dennis M. Cota allowed most of the claims to proceed in Stafford v. Doss, 2019 U.S. Dist. LEXIS 100297, 2019 WL 2491321 (E.D. Calif., June 14, 2019). Stafford pleaded that a supervising defendant (Lopez) said that he authorized “push back” after a PREA complaint was made against his staff. Lopez did not move to dismiss, but three officers named as carrying Stafford's complaint. Judge Cota found that Stafford won a grievance against the officer (Betty Evans), who had allegedly violated London's “privacy,” and, later, threatened London. A lieutenant (Justin Atherholt) also told London: “You gotta remember that your kind is hated here.” Evans wrote a disciplinary ticket against London for “sexual misconduct” for hugging and kissing her visiting biological brother. The opinion does not say what happened as a result of the ticket, except to mention that London received a hearing. This lawsuit ensued. Judge Noreika begins by dismissing all claims against supervisors, for lack of personal involvement, and all claims about verbal threats alone, as not actionable under Dunbar v. Barone, 487

**DELAWARE** — Pro se transgender inmate Kamilla Denise London filed a complaint against several prison officials for violations of her civil rights. In London v. Evans, 2019 U.S. Dist. LEXIS 107827, 2019 WL 2648011 (D. Del., June 27, 2019), U.S. District Judge Maryellen Noreika dismissed all but one of the claims. Initially, London complained about an officer (Betty Evans), who had allegedly violated London's “privacy,” and, later, threatened London. A lieutenant (Justin Atherholt) also told London: “You gotta remember that your kind is hated here."Evans wrote a disciplinary ticket against London for “sexual misconduct” for hugging and kissing her visiting biological brother. The opinion does not say what happened as a result of the ticket, except to mention that London received a hearing. This lawsuit ensued. Judge Noreika begins by dismissing all claims against supervisors, for lack of personal involvement, and all claims about verbal threats alone, as not actionable under Dunbar v. Barone, 487
F. App’x 721, 723 (3d Cir. 2012). Evans’ filing of a disciplinary report against London, even if false, is not actionable as a violation of due process, so long as London is given a hearing, under Crosby v. Piazza, 465 F. App’x 168, 172 (3rd Cir. 2012, citing Smith v. Mensinger, 293 F.3d 641, 653-54 (3rd Cir. 2002). A lone claim against Evans survives, however: filing of false charges in retaliation for exercising London exercising her constitutional rights, which can violate the First Amendment. Crawford-El v. Britton, 523 U.S. 574, 592 (1998). The elements are: (1) protected activity; (2) adverse actions by a state actor; and (3) protected activity as a substantial motivating factor in the state actor’s decision to take adverse action. Carter v. McGrady, 292 F.3d 152, 158 (3rd Cir. 2002); accord: White v. Napoleon, 897 F.2d 103, 111-12 (3rd Cir. 1990); and Milhouse v. Carlson, 652 F.2d 371, 373-74 (3rd Cir. 1981).

IDAHO – Sometimes, a 2x4 is needed. The litigation regarding transgender Idaho inmate Andree Edmo has been the subject of several articles and brief notes in Law Notes over the past year. In short, Chief U.S. District Judge B. Lynn Winmill has made it very clear that he was granting extraordinary injunctive relief to transgender inmate Adree Edmo in directing that he be afforded prompt access to gender confirmation surgery. The judge’s exhaustive decision is now officially reported at Edmo v. Idaho Dep’t of Correction, 358 F. Supp.3d 1103, 1118-20, 1129 (D. Idaho 2018). Defendant DOC officials have sought stays, filed objections under the Prison Litigation Reform Act, attempted to re-characterize the case, and even argued (unsuccessfully) that they would be irreparably injured if Edmo were permitted to keep a pre-surgical appointment prior to her surgery. The Ninth Circuit granted a stay of Judge Winmill’s injunction, but it ordered the appeal expedited. The history is in the May 2019 issue of Law Notes (at pages 39-40). Now, having heard oral argument, the Ninth Circuit, per Order by panel Circuit Judges M. Margaret McKeown and Ronald M. Gould and Senior U.S. District Judge Robert S. Lasnik (W.D. Wash, by designation) (all appointees of President Clinton), ordered a “limited” remand to Judge Winmill to “clarify” three issues: (1) whether his denial of a stay was meant to “renew” the injunction; (2) whether he was granting permanent relief in his order; and (3) whether Edmo “actually succeeded” on her motion for permanent relief. The Circuit issued its order on May 30, 2019; Judge Winmill responded on the next day, answering “yes” to all three questions. In Edmo v. Idaho Department of Correction, 2019 WL 2319527 (D. Idaho, May 31, 2009), Judge Winmill stated that his denial of a stay was meant to keep the injunction in place. To clarify, however, he reassured the injunction with this decision. [Note: The Defendants had argued to the Circuit that, under the Prison Litigation Reform Act [PLRA], a preliminary injunction dissolves after 90 days unless reissued, so their own appeal was moot. This very weak argument was not adopted by the Circuit, except insofar as it inquired of Judge Winmill whether he intended permanent relief. He did.] On the second and third questions, Judge Winmill found that the procedural posture of the case, the sweep of evidence, and the full opportunity for everyone to be heard, justified a permanent injunction and that Edmo was entitled to one. He noted that he had already made the findings needed under the PLRA for injunctive relief, but (“in an abundance of caution”) he makes then again in a footnote. Judge Winmill concludes his terse opinion by referring to rarely cited F.R.C.P 1, which says in pertinent part: “These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” In remanding, the Circuit had requested a quick turn-around, with any further proceedings going to the same circuit panel without further notice of appeal, briefing, or argument. Stay tuned for reporting (hopefully) of a final decision on the merits. Edmo is steadfastly represented by the National Center for Lesbian Rights, San Francisco; with local counsel Ferguson Durham, PLLC, Boise; and cooperating attorneys from Hadsell Stormer & Renick, LLP, Pasadena.

ILLINOIS – Ruling on a motion to seal certain personal information in a putative class action involving transgender medical care for prisoners in Illinois, U.S. District Judge Nancy J. Rosenstengel grants the motion in part and denies it in part in Monroe v. Baldwin, 2019 WL 2409572 (S.D. Ill., June 2, 2019). In relation to underlying motions to certify a class and to grant a preliminary injunction, plaintiffs sought to seal two types of exhibits: (1) a list of all transgender prisoners known to be incarcerated in Illinois on a certain date, along with such personal information as their names, inmate ID numbers, places of incarceration, dates of birth, dates of diagnoses, dates of commencement of hormone therapy (if applicable), and prison housing arrangements; and (2) particulars about the named plaintiffs, including summaries of medical history, incidents of self-harm, psychological background, and course of treatment. Judge Rosenstengel noted that court records are presumptively public, citing, Nixon v. Warner Comm., Inc., 435 U.S. 598, 597 (1978); Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) – although there are exceptions for “compelling reasons of personal privacy.” Goesel v. Boley Intern. (H.K.) Ltd., 738 F.3d 831, 833 (7th Cir. 2013). Applying this framework, Judge Rosenstengel finds that public disclosure of the list of unnamed class members with the
identifying and personal information was a breach of privacy and unnecessary to litigation of the pending motions. As to the named plaintiffs, however, they had waived their privacy by bringing the case and reciting virtually the same history and background about themselves in the complaint. The details about them would not be sealed. The putative class is represented by the Roger Baldwin Foundation of ACLU, Inc./ACLU of Illinois, and by Kirkland & Ellis (Chicago); and by the Law Offices of Thomas E. Kennedy, III, L.C. (St. Louis).

NEW YORK – In an exhaustive decision (over 15,000 words), U.S. District Judge Mae A. D’Agostino dismisses most of pro se inmate Derrick M. Hamilton’s amended civil rights complaint for failure to state a claim in Hamilton v. NY State DOCCS, 22019 U.S. Dist. LEXIS 92793, 2019 WL 2352981 (N.D.N.Y., June 4, 2019). Hamilton, a Rastafarian, whose beliefs Judge D’Agostino finds are sincerely held for purposes of this screening – even if unorthodox, irrational, or even demonstrably false – objects to numerous conditions of his incarceration. Only a small cluster of issues raises points germane to Law Notes readers. Hamilton states that, beginning in 2012, New York corrections officials intitated a program to “rewrite” Rastafarian “sanctity” by permitting “cultural vultures” and “undesirables” such as “gang members, homosexuals and mentally challenged” to enter the “sacred order” and serve as clerks and food handlers. Hamilton argues that this was part of the state’s “pro-homosexual agenda,” and it violated both the Free Exercise and Establishment Clauses of the First Amendment. Hamilton pleads that he was on a prescribed medical diet, which he was “denied” because he was forced to refuse it after it was handled by “open homosexuals,” in violation of the Eighth Amendment. He also pleads that he suffered retaliation for exercising his free speech. On the “food handler” issue, Hamilton had complained to the food services administrator, receiving the response that all food handlers were “properly trained in the safe and hygiene [sic] handling of foods and serving areas.” Hamilton responded that he would not “buy into the state-mandated perception of homosexuality as normal,” after which the food services administrator wrote Hamilton a disciplinary ticket for refusing specially ordered medical meals. Judge D’Agostino found that Hamilton had stated potential First Amendment Free Exercise issues, requiring a response, even if the claims could be dismissed on a proper motion. “Courts have generally found that to deny prison inmates the provision of food that satisfies the dictates of their faith does unconstitutionally burden their free exercise rights.” McEachin v. McGuinnis, 357 F.3d 204-05 (2d Cir. 2004). Since the food was offered and refused, there was no Eighth Amendment claim (or it collapsed into the First Amendment Free Exercise claim). The food services administrator also had to respond to a claim of retaliation, although other defendants did not, since Judge D’Agostino found the pleadings insufficient to allege that Hamilton had been chilled in exercise of his First Amendment speech rights. Judge D’Agostino also required a response to the allegation that the employment of gays as clerks and food handlers violated the Establishment Clause, under the three-factor framework of Lemon v. Kurtzman, 403 U.S. 602, 612-13, reh’g denied, 404 U.S. 876 (1971) (secular purpose; neither advances nor inhibits religion; and avoids excessive entanglement). In this writer’s view, this is an odd fit. Granting equal employment to LGBT inmates has a secular purpose unrelated to religion, and it is Hamilton who seeks to impose the entanglement. That he may try to seek a religious accommodation Free Exercise claim is different from the state’s establishing a religion by denying one – but this is the mischief created by the Supreme Court in Burwell v. Hobby Lobby Stores, Inc., 573 U. S. 682, 725-726 (2014) (substantial burden under Religious Freedom Restoration Act to require employers to facilitate contraception insurance coverage contrary to their religious beliefs); and its dodge in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm., 138 S.Ct. 718 (2018) (remanding because of evidence of bias in commission members; declining to rule on conflict between LGBT civil rights protection and First Amendment religion issues). These issues continue to churn Establishment Clause arguments, as indicated in the dissents to a recent stay by the Supreme Court in a death penalty case where an inmate was denied the presence of a Buddhist chaplain at execution. See Murphy v. Collier, No. 18-A-985 (May 13, 2019) (dissenting opinion by Justice Alito, urging application of balancing of Turner v. Safley, 482 U. S. 78, 90 (1987), to deny Establishment Clause claims where state allowed only approved chaplains at execution). Judge D’Agostino ruled here not only that Hamilton stated a claim under Lemon, but also that Turner balancing should apply to support Hamilton’s argument that LGBT prison employment rules were “establishing” a religion. She cites scant authority: only Pugh v. Goord, 571 F. Supp. 2d 477, 494 (S.D.N.Y. 2008). Pugh, however, was a decision on remand of a case in which New York corrections officials preferred Sunni over Shi’ite sects of Islam – a distinction that has caused “entanglement” (and wars) in large parts of the world. The Second Circuit, in sending the case back, specifically did not approve the district court’s analysis or use of Turner balancing. Pugh v. Goord, 345 F.3d 121, 126-8 (2nd Cir. 2003). Until the Supreme Court stops this line of argument, tolerance for the intolerant will continue to masquerade as freedom of religion.
NEW YORK – The petitioner in this case, identified only as “Thomas P,” is a convicted felon who has served his sentence and is currently confined as a sex offender under New York’s “Megan’s Law.” He seeks supervised release to the community after twenty-five years. Oneida County (N.Y.) Supreme Court Justice Gerard J. Neri (a trial judge under New York’s Unified Court System) denied Thomas P’s application in Matter of Thomas P v. State of New York, 2019 N.Y. Misc. LEXIS 3195, 2019 NY Slip Op 50992(U) (June 18, 2019). Under New York Mental Hygiene Law § 10.03, the State has the burden in such a proceeding to show “by clear and convincing evidence” that Thomas P: (1) has a mental abnormality; and (2) is a “dangerous sex offender requiring confinement.” Justice Neri heard from two experts (Dr. Burgoyne – for the State; and Dr. Lazarro – for Thomas P), as well as from Thomas P on his own behalf. The doctors agreed on basic diagnoses: that Thomas P is a pedophile attracted to pubescent and pre-pubescent boys, which Thomas P admitted. The doctors disagreed on whether Thomas P posed a present danger to society if released from confinement, even under strict circumstances. Thomas P admitted to continuing “to get triggered by children.” Not surprisingly, Justice Neri found that the State had met its burden to continue to confine Thomas P – but Justice Neri did not stop there. He recognized Thomas P’s right to his own prior cases and those of another New York trial judge in Oneida County. There is no appellate authority for this point – or for any other point in the entire opinion. In fact, there is no consensus among experts that PPGs or chemical castration are reliable or effective. A recent Illinois appellate decision exhaustively questioned whether such evidence was even admissible under the almost century-old test of Frye v. United States, 293 F. 1013 (D.C.Cir.1923). Commitment of Sandry, 857 N.E.2d 295, 306 (Ill App. 2006). More recently, conditions such as use of the PPG imposed by Justice Neri were disapproved in the Second Circuit for release of federal child pornography felons because of their intrusion on liberty interests under the Constitution. United States v. McLaurin, 731 F.3d 258 (2nd Cir. 2013) (passim). Release of offenders like Thomas P presents extremely difficult issues. The search for solutions is not aided by sweeping pronouncements or judicially imposed “treatment.” Thomas P is represented by Mental Hygiene Legal Services, Fourth Judicial Department.

NEW YORK – Pro se HIV-positive inmate Sean McTerrell has serious medical and mental health problems. Attempting to redress them in a federal civil rights case, McTerrell filed fourteen different pleadings and more than 360 pages of documents, covering multiple defendants at four prisons since 2017. U.S. District Judge Elizabeth A. Wolford valiantly tries to screen the claims in a long opinion in McTerrell v. Koenigsmann, 2019 WL 2511426 (W.D.N.Y., June 18, 2019). Judge Wolford dismisses most of McTerrell’s allegations as not stating constitutional claims, while allowing nine claims to proceed. This report summarizes the claims that will go forward. Overall, McTerrell alleges that defendants’ deliberate indifference has “destroyed” his immune system “beyond repair.” Dismissing McTerrell’s allegations of improper HIV care as disagreement between doctor and patient, Judge Wolford allows McTerrell to proceed on claims he was denied HIV medication that was ordered at two prisons. He can also proceed against specific doctors who refused to initiate treatment for his hepatitis-C, although the allegations are insufficient to go forward on a policy claim of not treating any inmate hepatitis-C patients alleged against the governor and the corrections commissioner, citing Iacobangelo v. Corr. Med. Care, Inc., 624 F. App’x 10, 14 (2d Cir. 2015). McTerrell may likewise proceed on a claim that he was denied any treatment for alleged kidney failure for over four months. McTerrell alleges that officers forced him to enter a cell when “the devil was in that cell” – events which occurred in the “immediate aftermath” of a suicide attempt. Claims against the officers for deliberate indifference to McTerrell’s suicidal status may proceed, citing Young v. Choiniski, 15 F. Supp. 3d 194, 202 (D. Conn. 2014). McTerrell alleged that two nurses violated his privacy by disclosing confidential medical information, “causing other guards and inmates to threaten to sexually assault, beat, and kill him.” This claim may proceed under the authority of Whalen v. Roe, 429 U.S. 589, 599 (1977); Powell v. Schriver, 175...
McTerrell may also proceed on two claims of excessive force. In the first instance, related to the “devil in the cell” incident, officers allegedly forcibly removed a rope McTerrell had looped around his neck, “knocked him to the floor, punched him in the ribs four times, forced a knee on the back of [his] head, kicked him in the groin . . . [and] then slammed [him] onto a gurney where he had a seizure.” These allegations satisfy the gratuitous use of force requirements of Hudson v. McMillian, 503 U.S. 1, 7-8 (1992); Whitley v. Alters, 475 U.S. 312, 321 (1986); and Wright v. Goord, 554 F.3d 255, 268 (2nd Cir. 2009) [other annotated string citations to Second Circuit decisions omitted].

The second incident, which Judge Wolford also characterizes as “excessive force,” involved officers who urinated in McTerrell’s coffee. See Hogan v. Fischer, 738 F.3d 509, 516 (2nd Cir. 2013) (holding that spraying an inmate with vinegar, excrement, and machine oil is more than a de minimis use of force). Judge Wolford allows McTerrell to proceed against a physician for not taking steps to provide McTerrell with his ordered HIV medication: “If Plaintiff’s allegations are true, then Dr. Galite had knowledge that Plaintiff was not receiving his HIV medication, and it can be inferred that he could have reasonably taken action to make sure that Plaintiff was getting his medication. Therefore, the failure to protect claim as to Dr. Galite may proceed to service.” Judge Wolford does not explain why this claim sounds as a failure to protect, as opposed to deliberate indifference to serious medical needs — nor does she cite any authority for this characterization. The next two claims going forward both relate to feces. A nurse refused to provide McTerrell with diapers, although he cannot control his bowels. This is actionable under Trammell v. Keane, 338 F.3d 155, 165 (2d Cir. 2003); and Gaston v. Coughlin, 249 F.3d 156, 166 (2nd Cir. 2001). McTerrell was also forced by officers to occupy a cell “with feces on the walls, sink, floor and no cleaning supplies.” This states a claim under Gaston and Wright v. McMann, 387 F.2d 519, 522, 526 (2nd Cir. 1967).

Finally, McTerrell may proceed on a claim of First Amendment retaliation against a nurse who allegedly admitted that she filed false misbehavior reports against McTerrell because he kept filing complaints about his health care and her colleagues. [Lengthy Second Circuit annotation omitted.] Judge Wolford directed the New York Attorney General (after service) to assist McTerrell in identifying the “John Does” in the pleadings.

NEW YORK – Pro se plaintiff, inmate Tonyé-D’Mitira Vickers-Pearson, sued the City of New York and the NYC Health & Hospitals Corporation alleging failure to treat his tuberculosis, which tested reactive while he was in NYC custody but of which he says he was unaware until he arrived in New York State custody some six months later. Because he is also HIV-positive, he alleges that he not only suffered from untreated tuberculosis and breathing problems, accompanied by sweats, fatigue, and the like — but his HIV condition worsened from the lack of tuberculosis treatment. In Vickers-Pearson v. City of New York, 2019 WL 2568726, 2019 U.S. Dist. LEXIS 104460 (S.D.N.Y., June 21, 2019), U.S. District Judge Edgardo Ramos dismissed the case on the pleadings without leave to amend. Procedurally, however, Judge Ramos went beyond the pleadings. Defendants moved to dismiss for failure to state a claim. Some months later, Vickers-Pearson wrote to the court that he had been in solitary confinement and transferred to Attica and was concerned about whether he was receiving his mail. Judge Ramos ordered the motion papers resent to plaintiff at Attica and set a briefing schedule for opposition to dismissal by plaintiff and for reply by defendants. Vickers-Pearson opposed dismissal and attached a copy of the positive tuberculosis lab test to his opposition. In reply, defendants attached other documents from Vickers-Pearson’s medical record. These documents purported to indicate that plaintiff received follow-up visits for his reactive tuberculosis test, including a chest x-ray (which was normal) and that, upon examination and further testing, he had no symptoms of active tuberculosis. They further purported to show that Vickers-Pearson was offered INH (tuberculosis prophylactic treatment) but that he signed a refusal against medical advice. Judge Ramos accepted the documents dehors the pleadings because Vickers-Pearson had attached a medical record document to his opposition and the defendants’ documents were “integral” to the Complaint. Judge Ramos wrote, “The court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs’ possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken” citing Silsby v. Icahn, 17 F. Supp. 3d 348, 354 (S.D.N.Y. 2014). He also cited Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (district court may consider a document as “integral” if it is “clear on the record that no dispute exists regarding the authenticity or accuracy of the document”; and it is “clear that there exist no material disputed issues of fact regarding the relevance of the document.”) [Internal quotations and citations omitted]. None of these cases are quite on point, in light of plaintiff’s adamant denials in the complaint. Judge Ramos also cites Sankara v. City of New York, 2018 WL 14033236, *at 7 (S.D.N.Y. Feb. 22, 2018) (when a “plaintiff refers to and relies upon his medical records from Correctional Health Services, but does not attach the records to his
Sometimes outrages come in small packages. Proceeding pro se, HIV-positive inmate Jonas Xavier Caballero sued numerous defendants and a private hospital alleging constitutional deprivations—ranging from serious (denial of proper HIV care; and continuous, unnecessary shackling to his hospital bed); to trivial (television that only received three channels)—while in the custody of the Brooklyn House of Detention. Caballero settled with the City of New York for an undisclosed amount. Claims remained against the private hospital, Brooklyn Medical Center [BMC], where he was hospitalized for ten days before transfer to Bellevue Hospital, a New York City public hospital. BMC moved to dismiss on the ground that it was not a state actor that could be sued under 42 U.S.C. § 1983. U.S. District Judge Pamela K. Chen granted BMC’s motion, dismissing the remaining claims on the complaint, for insufficient allegation of state action, in Caballero v. Shayna, 2019 WL 2491717, 2019 U.S. Dist. LEXIS 100110 (E.D.N.Y., June 14, 2019). In West v. Atkins, 487 U.S. 42, 54 (1988), the Supreme Court held that a private physician who contracts with the state to provide medical care to inmates is a state actor. BMC’s supporting papers are sealed in PACER, but (according to Judge Chen) an affidavit submitted by a BMC official testified that BMC has no contract with the City of New York. Judge Chen denied Caballero’s request for counsel, without prejudice to renew, just weeks before ruling on the motion to dismiss. PACER does not indicate that Caballero was given notice that the motion to dismiss was being converted to a summary judgment motion. Caballero was entitled to such notice under F.R.C.P. 12(d). Moreover, since Judge Chen relied on an affidavit outside the pleadings, dismissal was improper without compliance with Rule 56. Of course, a pro se plaintiff could not be expected to know of such protection; and Judge Chen, in denying counsel, assured Caballero that she would rely only on the allegations in the complaint. Judge Chen’s cited authority to avoid West would have been easily distinguishable by counsel. Kavazanjian v. Rice, 2008 WL 5340988, at *12 (E.D.N.Y. Dec. 22, 2008) (“Providing isolated emergency treatment to a prisoner on equal terms with the general public . . . does not constitute state action”). Caballero was admitted for ten days. Next, Judge Chen writes, “A private hospital is not transformed into a state actor when it provides emergency treatment services to inmates . . . . See, e.g., Thompson v. Booth, 2018 WL 4760663 *10 (S.D.N.Y. Sept. 28, 2018) (collecting cases).” In Thompson, the plaintiff inmate was seen in the emergency room for a few hours. The cases “collected” also involved “isolated” or “single” treatment or observation. One can only wonder without any answer on file whether BMC will bill New York City for ten days’ hospitalization. Under what theory? Contract? Was Caballero the only inmate from the Brooklyn House of Detention ever hospitalized at BMC? In this writer’s view, the state action analysis here is questionable. Fuller (and rule-compliant) analysis might have yielded the same outcome, but the shortcuts taken in this case were jurisprudentially wrong.

NEW YORK – Sometimes outrages come in small packages. Proceeding pro se, HIV-positive inmate Jonas Xavier Caballero sued numerous defendants and a private hospital alleging constitutional deprivations—ranging from serious (denial of proper HIV care; and continuous, unnecessary shackling to his hospital bed); to trivial (television that only received three channels)—while in the custody of the Brooklyn House of Detention. Caballero settled with the City of New York for an undisclosed amount. Claims remained against the private hospital, Brooklyn Medical Center [BMC], where he was hospitalized for ten days before transfer to Bellevue Hospital, a New York City public hospital. BMC moved to dismiss on the ground that it was not a state actor that could be sued under 42 U.S.C. § 1983. U.S. District Judge Pamela K. Chen granted BMC’s motion, dismissing the remaining claims on the complaint, for insufficient allegation of state action, in Caballero v. Shayna, 2019 WL 2491717, 2019 U.S. Dist. LEXIS 100110 (E.D.N.Y., June 14, 2019). In West v. Atkins, 487 U.S. 42, 54 (1988), the Supreme Court held that a private physician who contracts with the state to provide medical care to inmates is a state actor. BMC’s supporting papers are sealed in PACER, but (according to Judge Chen) an affidavit submitted by a BMC official testified that BMC has no contract with the City of New York. Judge Chen denied Caballero’s request for counsel, without prejudice to renew, just weeks before ruling on the motion to dismiss. PACER does not indicate that Caballero was given notice that the motion to dismiss was being converted to a summary judgment motion. Caballero was entitled to such notice under F.R.C.P. 12(d). Moreover, since Judge Chen relied on an affidavit outside the pleadings, dismissal was improper without compliance with Rule 56. Of course, a pro se plaintiff could not be expected to know of such protection; and Judge Chen, in denying counsel, assured Caballero that she would rely only on the allegations in the complaint. Judge Chen’s cited authority to avoid West would have been easily distinguishable by counsel. Kavazanjian v. Rice, 2008 WL 5340988, at *12 (E.D.N.Y. Dec. 22, 2008) (“Providing isolated emergency treatment to a prisoner on equal terms with the general public . . . does not constitute state action”). Caballero was admitted for ten days. Next, Judge Chen writes, “A private hospital is not transformed into a state actor when it provides emergency treatment services to inmates . . . . See, e.g., Thompson v. Booth, 2018 WL 4760663 *10 (S.D.N.Y. Sept. 28, 2018) (collecting cases).” In Thompson, the plaintiff inmate was seen in the emergency room for a few hours. The cases “collected” also involved “isolated” or “single” treatment or observation. One can only wonder without any answer on file whether BMC will bill New York City for ten days’ hospitalization. Under what theory? Contract? Was Caballero the only inmate from the Brooklyn House of Detention ever hospitalized at BMC? In this writer’s view, the state action analysis here is questionable. Fuller (and rule-compliant) analysis might have yielded the same outcome, but the shortcuts taken in this case were jurisprudentially wrong.

NORTH CAROLINA – Plaintiff Scott Michael Cox, pro se, is a gay HIV-positive man who was in the custody of the Mecklenburg County Jail for approximately three months. He brought a civil rights case alleging that defendants were deliberately indifferent to his serious health care needs by denying his HIV medication, resulting in his developing resistance to certain essential drugs. In addition to suing the Mecklenburg County Jail, Cox sued two nurses, two nurse practitioners, and an internal affairs investigator (whom his husband called to complain about the denial of medications). In Cox v. Mecklenburg County Jail, 2019 U.S. Dist. LEXIS 100727 (W.D. N.C., June 17, 2019), Chief U.S. District Judge Frank D. Whitney dismissed all claims with leave to replead. The key flaw in the pleading, as explained by Judge Whitney, was Cox’s failure to identify the specific medicines he was denied and the defendants who were individually responsible. A claim could be stated against those with authority to prescribe if there were no medical basis for the refusal, but the pleading does not distinguish nurses from nurse practitioners or an outright refusal to provide known necessary care from a mere difference of opinion as to medicine type and dosage. Judge Whitney takes time to explain what Cox needs to do to cure the complaint. As to the internal affairs defendant whom Cox’s husband called, the complaint fails to allege how this defendant contributed to the denial of...
the medicine or to indicate whether this defendant is being sued as a supervisor or a line employee. Knowledge alone by a defendant outside the medical department is not enough. Finally, Judge Whitney dismisses the claims against the Mecklenburg County Jail because it is not a “person.” This is a bit facile. Of course, a building is not a person; but the gravamen of the claim is one against Mecklenburg County, not its jail. This is easily cured for caption purposes, and there is a theory of liability against the county under Monell v. Dept. of Soc. Svs., 436 U.S. 658, 694 (1978). See Waller v. Butkovich, 584 F.Supp.909, 925 (M.D.N.C. 1984) (treating claim against “police department” as claim against City of Greensboro under Monell). Judge Whitley does not mention that deficiencies in pattern, practice, training, or supervision in the delivery of HIV care can establish Monell liability.

**OHIO** – Compliance with a settlement agreement in a federal case that is dismissed with prejudice as part of the settlement cannot be enforced in federal court unless either: (1) the court retains jurisdiction; or (2) the terms of the settlement are incorporated into a court order. Thus writes U.S. District Judge Algenon L. Marbley in Lee v. Eller, 2019 WL 2341544 (S.D. Ohio, June 3, 2019). The pro se transgender plaintiff, Antoine S. Lee, a transgender prisoner, settled her 2013 federal case in 2015. She filed a pro se Order to Show Cause to enforce the settlement in 2018, arguing that the state was not complying with their agreement (as to hormones and feminine personal items) and was retaliating against her for having “won” her lawsuit. Citing Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 378 (1994), Judge Marbley rules that enforcement of the settlement “requires its own basis for jurisdiction” and that a claimed breach of the settlement agreement “is for state courts, unless there is some independent basis for federal jurisdiction.” Kokkonen, 511 U.S. at 382. Pro se plaintiffs who settle their civil rights cases may be unaware of this nuance of federal civil procedure, and state attorneys general (who made promises to entice the settlement) are not likely to flag the issue. The dismissal is without prejudice to Lee’s bringing an enforcement action as a contract claim in state court or to her filing a new lawsuit seeking relief for retaliation under the First Amendment.

**Pennsylvania** – This case is notable for the “dog that didn’t bark,” as Sir Arthur Conan Doyle wrote. Gay plaintiff Devon Frye was brutally raped by his cellmate, Brian White, for which White was convicted in state court. U.S. Magistrate Judge Martin C. Carlson addressed two issues in the current ruling on summary judgment: (1) Frye’s exhaustion of administrative remedies; and (2) disputed facts as to the liability of Sergeant Nathaniel Wilt, who put the inmates in the same cell and allegedly ignored White’s protests and pleas for protection. There is a striking lack of supporting documentation for defendant’s position, given that the underlying circumstances should have generated much paperwork. The unsupported denials of Frye’s allegations are not enough for Judge Carlson, in Frye v. Wilt, 2019 U.S. Dist. LEXIS 105256 (M.D. Pa., June 24, 2019). Multiple defendants tried to win summary judgment arguing lack of exhaustion of administrative remedies about 18 months ago in Frye v. Wilt, 2017 U.S. Dist. LEXIS 206389 (M.D. Pa., December 15, 2017), reported in Law Notes (January 2018 at page 44). Judge Carlson characterized the evidence as presenting “stark, irreconcilable factual disputes.” Frye presented evidence that his risk was obvious – see Farmer v. Brennan, 511 U.S. 825, 842 (1994) (subjective knowledge of risk can be inferred from its obviousness) – to wit: an openly gay victim who is “very effeminate,” and an assailant who is a convicted sex offender with prior incidents of assaulting cellmates. Moreover, Wilt offered only an “I didn’t know” explanation of how the men came to be housed in the same cell in this toxic combination, a decision he admitted that he made. PREA requires documentation of more. See 28 C.F.R. § 115.41 (screening of all inmates for risk of victimization and abusiveness); and § 115.42 (using screening information to separate victims from abusers). The dog did not bark when it should have. Furthermore, defendant Wilt had a last chance to remove Frye from danger after Frye sought protection, but he allegedly did nothing. Simply put, Carlson concluded that a jury could believe Frye and could disbelieve Wilt. Frye is represented by Martin Stanshine of Stanshine & Signal, PC, Philadelphia.

**Wisconsin** – Pro se HIV-positive inmate plaintiff Willie Simpson is under sanction by the U.S. Court of Appeals for the Seventh Circuit because he filed seventh, eighth, and ninth collateral
attacks against his conviction – all three of which the court deemed frivolous. Until Simpson pays a fine of $1,000, the district courts of the Seventh Circuit are directed not to accept any civil filings from him. Apparently undeterred, Simpson filed suit in Wisconsin state court, joining several matters, including allegations about his HIV treatment. The state sought to remove the case to federal court, where it faced problems in the Western District of Wisconsin with Seventh Circuit rules about joining unrelated claims in a single action. Never minding that Simpson started the single lawsuit, U.S. District Judge James D. Peterson in Simpson v. Litscher, 2019 WL 2603092, 2019 U.S. Dist. LEXIS 105838 (W.D. Wisc., June 25, 2019), separated the claims into three lawsuits (his parole, his mail, and his HIV treatment). He directed the state to select which one it was removing or pay two additional $400 fees to remove them all. (The state elected to remove all of them.) Meanwhile, Simpson could reply to motions by the state, but he could not file motions of his own without paying the $1000 fine imposed by the Circuit for abuse of habeas actions. The Western District of Wisconsin actually has a rule for this situation: When a defendant “removes a state-court civil action filed by a plaintiff under a federal-court filing bar, this court has interpreted the sanction order to generally limit the plaintiff’s ability to file documents proactively – that is, file motions on his own behalf – but it has allowed the plaintiff to file responses to motions filed by the defendant or to court directives,” citing Balele v. Olmanson, 2017 WL 90387, at *1 (W.D. Wisc., Jan. 10, 2017). Simpson filed “several motions” anyway, but they were all barred by the sanction. Except for one: “Simpson says that prison officials have retaliated against him for bringing these lawsuits by forcing him to drink his nutritional-supplement beverage out of a bag, which he says ‘prevent[s] [him] from consuming’ it . . . . I will not apply Simpson’s filing bar to allegations that prison staff is endangering his health by interfering with prescribed medical treatment. I will direct the state to respond to this allegation.” To be a fly on the wall for this one . . . .

**LEGISLATIVE & ADMINISTRATIVE NOTES**

**By Arthur S. Leonard**

**UNITED STATES DEPARTMENT OF DEFENSE** – Although the Defense Department announced it would be implementing the so-called “Mattis Policy” governing transgender military service effective April 12, there was little reporting in the media about any sort of massive dismissal of transgender personnel. A *Gay City News* report published in June told the tale with its headline: “Trans Ban Rollout Marked by Secrecy, Chaos; Some branches refuse to reveal discharges, others admit not keeping track of them.” An attempt by journalists to find out what was happening ran into a “stone wall” at DoD, including some responses taking the administration line that the new policy did not authorize discharges of people solely because of transgender status and that there had been no discharges for that reason, others that there was no active tally of discharges or none had been recorded. It seemed possible that because the President’s original July 2017 tweet announcing the ban caught DoD by surprise, and the idea of changing the policy did not have any strong proponents at the level of policy implementation within the Department, the “implementation” was mainly a political show that might have minimal impact on individual service members, although it did erect a solid wall against enlistment for persons who have been diagnosed with gender dysphoria and/or who had transitioned. More to come, certainly, as litigation continues in four federal district courts . . .

**UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES** – On June 29, the Trump Administration announced that its proposed rule under which health care providers with conscientious objections to providing services, usually religiously-based, were privileged to do so without violating federal law, would not go into effect on July 22, as previously announced, but was instead was being delayed at least until November 22 as litigation challenging its lawfulness proceeds. Lawsuits, including one filed by Lambda Legal, are pending, and a motion for a preliminary injunction had been filed, but ruling on that is being held in abeyance as long as the Administration is not putting the rule into effect.

**UNITED STATES CONGRESS** – Rep. John Lewis (D-GA) has reintroduced the Every Child Deserve a Family Act, which would prohibit federally-funded child welfare service providers from discriminating against children, families, and individuals based on religion, sex, sexual orientation, gender identity or marital status. It will go nowhere because the Republican majority in the Senate will not even consider it if it passes the House, and the president would veto it if it passed both Houses, since the Trump Administration believes that child welfare service providers have a right to refuse to provide services if to do so offends their religious sensibilities, and has actually granted exemptions to legal anti-discrimination requirements on such grounds.

**FLORIDA** – The St. Petersburg City Council voted to recognize majority LGBTQ-owned businesses and include them in the city’s Small Business Enterprise program, which will ensure that such entities, like other minority-owned businesses, are competitive in procuring city contracts. The June 6 ordinance was to have immediate effect.
**ILLINOIS** – On June 30, the date of Chicago’s LGBT Pride March, Illinois Gov. J.B. Pritzker signed an executive order aimed at protecting transgender students. The order directs the appointment of a 25-member panel to study problems faced by transgender students and to make policy recommendations. It also directs the State’s Board of Education to publish a resource guide on the legal rights of transgender and gender-nonconforming students.

**KENTUCKY** – The Henderson City Commission voted 3-2 in favor of a new LGBTQ Fairness Ordinance, becoming the eleventh city in Kentucky to have such a measure in place. Kentucky has no state law banning sexual orientation or gender identity discrimination, although such measures have been regularly introduced in the legislature and have recently achieved co-sponsorship by about a quarter of the legislators, but the measure has never come to a floor vote. The Henderson Commission had been the third local government in the state to pass such a measure, in 1999, following the lead of Louisville and Lexington, but the measure proved extremely controversial and adversely affected the next round of local elections, resulting in a majority vote to repeal the ordinance in 2001. According to Kentucky’s Fairness Campaign, the local jurisdictions (comprising about a quarter of the state’s population) which had adopted Fairness Ordinances include: Louisville (1999), Lexington (1999), Covington (2003), Vicco (2013), Frankfort (2013), Morehead (2013), Danville (2014), Midway (2015), Paducah (2018), and Maysville (2018).

**ILLINOIS** – On June 14, New York Governor Andrew Cuomo signed into law a measure that would sharply limit the use of the so-called **GAY PANIC OR TRANS PANIC DEFENSES** in murder cases. Although the defense that a person committed homicide due to a psychological response to discovering an individual was gay or being solicited for sex by a person of the same sex has been in sharp decline as a result of public condemnation, New York’s enactment of the measure, following the lead of half a dozen other states in recent years, was symbolically important, and was opposed by various criminal defense legal organizations, who stated opposition in principle to the categorical exclusion of any particular affirmative defense. Although in the past there were some cases where a gay or trans panic defense was successfully used to avert a guilty verdict, its more usual use was to obtain reduced sentencing by persuading jurors and/or judges that the defendant’s culpability was lessened by psychological factors. * * * Cuomo also indicated that he would sign a new **EQUAL PAY LAW** that expands on the

**NEW MEXICO** – Effective June 14, New Mexico’s statutory ban on employment discrimination because of an individual’s sexual orientation or gender identity were expanded to apply to all employers. Prior to that date, these grounds of discrimination were prohibited only for employers with 15 or more employees.

**NEW YORK** – On June 30, prior to joining the World Pride Stonewall 50 March, New York Governor Andrew Cuomo signed into law a measure that would sharply limit the use of the so-called **GAY PANIC OR TRANS PANIC DEFENSES** in murder cases. Although the defense that a person committed homicide due to a psychological response to discovering an individual was gay or being solicited for sex by a person of the same sex has been in sharp decline as a result of public condemnation, New York’s enactment of the measure, following the lead of half a dozen other states in recent years, was symbolically important, and was opposed by various criminal defense legal organizations, who stated opposition in principle to the categorical exclusion of any particular affirmative defense. Although in the past there were some cases where a gay or trans panic defense was successfully used to avert a guilty verdict, its more usual use was to obtain reduced sentencing by persuading jurors and/or judges that the defendant’s culpability was lessened by psychological factors. * * * Cuomo also indicated that he would sign a new **EQUAL PAY LAW** that expands on the

**MISSOURI** – When out lesbian candidate Jolie Justus came in first in a large field of candidates for the mayoralty of Kansas City, Missouri, in a non-partisan primary, national media attention focused on the run-off election on June 18 and the possibility that Justus would become the first out LGBT person to be elected mayor of that major Midwestern city. However, in the face-off with Quinton Lucas, it seemed that more of those who had voted for other candidates had gravitated into Lucas’s camp, as he won with 59% of the vote.
existing law and will, inter alia, provide a basis for LGBTQ people who can prove they are being undercompensated compared to others doing equal work to have a cause of action, apart from that available under the Human Rights Law. *** The legislature also enacted a bill to amend the state’s Human Rights Law to make it easier for plaintiffs to prevail in HARASSMENT CASES, departing from the federal standard under Title VII – which requires a showing that harassment was “severe or pervasive” enough to affect terms and conditions of employment. The measure extends to all employers in the state, extends the statute of limitations for harassment claims to three years, and sets up an affirmative defense that delimits the scope of protection: “It shall be an affirmative defense to liability under this subdivision that the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.” *** The New York City Education Department has modified its GUIDELINES FOR TREATMENT OF LGBTQ STUDENTS IN PUBLIC SCHOOLS, among other things making it easier for students to change their name and gender designation, and expanding access to sports teams for transgender students. Students will be able to change their names and gender on school records without having to provide legal documentation. The Department will also end the practice of sex-segregated health classes, and will require that puberty lessons be “inclusive and affirming to all genders, gender identities, sexual orientations, and use gender-inclusive language.” The Department planned to provide training for teachers and administrators about the new guidelines before classes resume in the fall. Schools Chancellor Richard Carranza released a statement to introduce the guidelines: “Schools are safe havens for students to develop their passions and discover their true identities, and these new guidelines celebrate and affirm all students.” Chalkbeat.org (June 28). *** The New York City Landmark Commission approved the DESIGNATION AS CITY LANDMARKS of half a dozen places of LGBT historical interest during Stonewall 50 Pride Month: Caffe Cino; the LGBTQ Community Services Center; the Gay Activists Alliance Firehouse; James Baldwin’s residence, Audre Lorde’s residence, and the Women’s Liberation Center. *** As a result of settlement of a lawsuit against the city by the Legal Aid Society, the New York City Police Department has revised its patrol guide to provide that “gender, gender identity, clothing and location” are factors that “are not sufficient alone or together to establish probable cause” that an individual is violating the LOITERING LAWS. The lawsuit had contended that transgender women – especially transgender women of color – were being improperly targeted by the police for arrest based on these factors. Whether this will make a difference regarding enforcement practices is yet to be seen.

VERMONT – The Department of Vermont Health Access announced at the end of May some proposed changes to Medicaid coverage for gender-affirming surgery that will make it more widely available. Among other things, they plan to end the requirement that people be age 21 or older in order to get the procedures covered by Medicaid. The new role would eliminate any firm age minimum, and would allow transgender youth under age 18 to get surgeries with informed consent from a parent or guardian. According to the Department, nearly a quarter of Vermont residents and about half of all Vermonters under 18 rely on Medicaid for their health insurance. The elimination of the age barrier was seen as important in helping trans teens make their transitions in time to be able to obtain gender-appropriate documentation for such things as high school diplomas, driver’s licenses and other state-issued identification, and college admissions. The public comment period for the proposed rules, available on the Department’s website, end July 17. Burlington Free Press, June 14.

OREGON – According to the blog JDSupra.com, “Effective May 6, 2019, Oregon’s disability discrimination law contains amendments that clarify that sexual orientation is not considered a physical or mental impairment, remove transvestism from the conditions not considered a physical or mental impairment, and remove the provision that states ‘an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to an individual with a disability arising out of transsexualism.’

TEXAS – On June 11, Governor Greg Abbott signed into law Senate Bill 1978, popularly called the “Save Chick-Fil-A” Bill. It prohibits government entities in the state from retaliating against anyone based on their affiliation or support of a religious organization, and authorizes the attorney general to bring legal actions against violators. The bill was passed in response to the San Antonio City Council’s action to block Chick-Fil-A from being a vendor in the municipal airport because it contributes part of its profits to organizations with anti-LGBT histories, such as the Salvation Army and the Fellowship of Christian Athletes, according to one on-line news report we saw. More significant is the allegation that Chick-Fil-A regularly donates to organizations that more actively oppose LGBT rights and marriage equality, and that its owners have spoken out against LGBT rights in the past, leading to various boycott efforts and actions by a variety of entities to exclude Chick-Fil-A from their premises.
VIRGINIA – The Arlington County School Board as brief toward the end of June on a transgender policy that the school administration plans to implement this summer. According to a report in the Washington Post (June 24), Arlington will be the first school district in northern Virginia to have explicit regulations governing rights and protections for transgender students. School employees will be required to update class records with the student’s chosen name, dress codes will not be gender-specific, and gender-neutral facilities will be provided to any student who seeks privacy, but otherwise students will be allowed to use facilities consistent with their gender identity. However, the move has aroused opposition from a group styling itself the Arlington Parent Coalition, which claimed that the rules would give transgender students “preferences and privileges that deny other students their rights,” specifically “privacy” rights. There were reports that schools in Arlington had been quietly accommodating transgender students on an informal basis.

The New York Post reported on June 28 that an agreement had been reached between ONLINE BUDDIES, INC., operator of the gay hookup and dating app called “JACK'D,” and the New York State Attorney General’s Office to pay a fine of $240,000 to the state for failing to take prompt action to protect the privacy of users when Jack’d learned that explicit photo date loaded on the site by users was being sent without authorization to a server that was not adequately protected without user authorization. The Attorney General’s office charged that this security problem was made known to Jack’d in February 2018, but it took a year to fix the problem without notifying users about the danger that their “sensitive information and private photos” could be accessed without their approval. The company’s new CEO issued an apology for the flaw, asserted that it had been corrected, and that “Jack’d users can continue to rely on the security of their personal data.” But the situation points up an important caution to all users of sexually-oriented apps: Don’t assume that promises of confidentiality for your uploaded information will or can be kept by the app.

In a fiercely-contested primary for the Democratic nomination for District Attorney in the borough of Queens, out lesbian criminal defense attorney TIFFANY CABAN achieved a slim majority of votes cast on election day, but the Board of Elections was not expected to finish counting several thousand absentee ballots until early in July, so the outcome remained uncertain at the end of June. There were half a dozen candidates, but Borough President Melinda Katz had the support of the local Democratic establishment and came a close second in the same-day tabulation.

STONEWALL 50 PRIDE MONTH was a time for apologies. NEW YORK CITY POLICE COMMISSIONER JAMES P. O’NEILL issued a formal apology on June 6 for the conduct of NYC police officers at the Stonewall Inn on June 28, 1969. “The actions taken by the N.Y.P.D. were wrong – plain and simple,” stated O’Neill during an event at Police headquarters announcing security arrangements for the upcoming Pride events in the city, reported the New York Times. “I think it would be irresponsible to go through World Pride Month, not to speak of the events at the Stonewall Inn in June of 1969, the Commissioner said, continuing, “I do know what happened should not have happened. The actions and the laws were discriminatory and oppressive, and for that, I apologize.” It was significant that the Commissioner apologized for the “actions” – for which the NYPD was responsible – and not just for the “laws,” for which the state and local governments were responsible. * * * The AMERICAN PSYCHOANALYTIC ASSOCIATION issued an apology on June 21 for having treated homosexuality as a “mental illness” in the past: “It is long past time to recognize and apologize for our role in the discrimination and trauma caused by our profession,” said Lee Jaffe in a formal written statement. “We all know that hearing the words ‘we are sorry’ is important to healing past trauma.” It was also a time for celebrations, including the massively long Heritage of Pride sponsored march, which Mayor Bill de Blasio claimed to have drawn 5 million participants or spectators. While that number seemed the wildest of guesses, it was true that this was the longest such march in duration ever experienced in New York City, with the first units setting out on Fifth Avenue around noon.

LAW & SOCIETY NOTES
By Arthur S. Leonard

THE LGBTQ VICTORY FUND, the largest LGBT political action fund in the United States, has in the past refrained from endorsing candidates during the Democratic presidential primaries as multiple candidates were contending for the nomination with significant pro-LGBT records and policy proposals. But this is the first time the Victory Fund has confronted a campaign by an out gay man, who had raised enough money and achieved sufficient national polling support to appear to be a viable candidate, so the Victory Fund announced during Gay Pride Weekend that it had decided to endorse Pete Buttigieg, Mayor of South Bend, Indiana. Fund President Annise Parker stated: “Every day that Pete is in the race, from the standpoint of an LGBT activist, he transforms American politics.”
LGBT rights groups tried mightily but unsuccessfully to convince Republican Senators to refuse to confirm Trump’s appointment of MATTHEW KACSMARYK to the U.S. District Court for the Northern District of Texas (headquartered in Dallas), based on his long record of outspoken scorn and disdain for LGBT people. Kacsmaryk was deputy general counsel for the First Liberty Institute, a name that pops up in connection with opposition to LGBT rights. He is on record in believing that individual’s religious beliefs should privilege them to be able to discriminate against LGBT people. Although N.D. Texas is not exactly a hotbed of LGBT rights litigation, one suspects there will be occasions in the future for LGBT litigants to seek Kacsmaryk’s recusal from cases in which they are involved.

INDIANAPOLIS ARCHDIOCESE OF THE ROMAN CATHOLIC CHURCH encountered defiance by Brebeuf Jesuit Preparatory School, which resisted Archbishop Charles Thompson’s demand that the school dismiss a popular teacher who was in a same-sex marriage. The school administration indicated willingness to sever ties with the Archdiocese over this issue while, ironically, the teacher’s same-sex spouse, who also taught at a Catholic school, suffered discharge as a result of the Archdiocese’s demands. The Archdiocese announced that it would no longer recognize Brebeuf as a Catholic school.

BELGIUM – The Red Cross in June 14 to “criminalize homophobia” by a vote of 8-3, according to news reports. The Supreme Federal Court “classified homophobia as a crime similar to racism,” until such time as Congress “passes a law specifically addressing such discrimination,” reported the Bangkok Post (June 14), an unlikely but frequent on-line source of news reporting on LGBT issues in Central and South America. The dissenters criticized the court for taking on a legislative function, and some legislators reportedly felt “stripped of their powers” as a result. The current legislative majority is conservative and strongly influenced by evangelical churches, according to the news report, so the court’s ruling may stand without legislative amplification for some time.

ECUADOR – Two 5-4 rulings by the Constitutional Court on June 12 that Ecuador is bound by the Inter-American Human Rights Court’s ruling that same-sex couples are entitled to marry had yet to be published in the Official Register by the end of June, so were not yet in effect. One side-effect of this was that an attempt by opponents of the ruling to submit petitions to overturn it was rejected as premature. The President of the Constitutional Court had stated several weeks earlier that the rulings would be published in the Official Register “in a few days,” but no explanation was provided for the hold-up. Other Latin-American countries that have marriage equality are Argentina, Brazil, and Colombia. The Court directed that a marriage license be issued to the plaintiff couples.

BHUTAN – The lower house of Parliament voted on June 7 to repeal Sections 213 and 214 of the penal code – which criminalize “unnatural sex” – with only one dissenting vote. Openlynews.com.

BRAZIL – The Supreme Court voted June 14 to “criminalize homophobia”
INTERNATIONAL notes

gay activist in striking down or revising seven criminal offenses that were found to have a discriminatory effect on gay men. The Hong Kong courts have been following a more liberal bent than the government on gay rights issues, but have yet to declare expressly a right for same-sex couples to marry in the semi-autonomous city. The Court of Final Appeal ruled unanimously, according to a June 6 report by the South China Morning Post, releasing an English-language summary of its decision: “The court rejected the prevailing views of the community on marriage as a relevant consideration since reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental human rights.” The court said there was no rational connection between protecting the institution of marriage, as advocated by the government, and denying Leung and his partner employment and tax benefits. “It is difficult to see how any person will be encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouses is denied those benefits,” the court wrote, criticizing the government of engaging in “circular logic.” They also noted that since Leung has a marriage certificate (from a ceremony performed in New Zealand), recognizing his relationship with his spouse would not present any “administrative difficulty.”

JAPAN – Ibaraki Prefecture near Tokyo announced on June 24 that it would start issuing partnership certificates for lesbian, gay, bisexual and transgender couples beginning July 1. Several smaller municipalities have begun issuing the certificates, but Ibaraki would be the first among Japan’s 47 prefectures to take this step, reported Kyodo News. Ibaraki Governor Kazuhiko Oigawa stated at a news conference: “This is a matter of human rights, and we must work swiftly in order to eliminate discrimination and prejudices.” Applicants must be at least 20 years old and reside in the prefecture in order to obtain certificates. The certificates are not “legally binding,” but they will allow certain rights and privileges within the prefecture, such as the ability to jointly rent prefecture-run single family housing or to give consent for surgeries at the prefecture’s public hospital.

MEXICO – It seems that there are now votes in the legislative bodies of Mexican states almost every month on the question of marriage equality. In a summary posted on his blog on June 27, journalist Rex Wockner summarized the current situation as follows: “Eighteen of Mexico’s 31 states and the federal capital Mexico City have marriage equality and same-sex couples can marry in the other 13 states if they go to a federal judge and get a personalized injunction (amparo), a process that is time-consuming and requires paying a lawyer for help. The judge cannot refuse the amparo. The requirement on judges resulted from a 2015 ruling by the Supreme Court of Justice of the Nationa (SCJN) that declared all bans on marriage equality unconstitutional. The supreme court, however, has no power to end all states’ bans simultaneously, and can only force individual states’ bans out of existence in specific situations.” A setback was recorded in the state of Sinaloa, where a marriage equality bill was voted down in the state Congress by the heartbreaking margin of 20-18 on June 20, but during June the state congress in Baja California Sur passed marriage equality by a vote of 14-5 with 1 abstention. For an extended discussion and a list of Mexican states where marriage equality has been achieved either through administrative, legislative, or Supreme Court rulings, consult Rex Wockner’s blog. * * * The Civil Registry in Mexico City, where the City Council passed marriage equality legislation in 2010, announced on June 28 that 11,775 same-sex couples had married in Mexico City as of that date. There have also been 4,518 legal gender changes, 27 adoptions of children by same-sex couples, and 84 registrations where a same-sex couple registered their child’s birth as the child’s parents. Two-thirds of the gender changes were male-to-female. Almost two-thirds of the adoptions were by male couples, while the overwhelming proportion of same-sex couples registering a birth in the name of both parents were female couples. There were also 772 divorces registered for same-sex couples.

ISRAEL – Meretz, the small civil rights party in Israel, has elevated Nitzan Horowitz, an out gay man, to be chairman of the party on June 27. 1,043 members of the party’s governing committee elected Horowitz with 81% of the members participating. The election happened amidst talk of a possible merger of Meretz with the Labor Party. Labor used to be one of the largest parties, exercising control of the Knesset for much of the country’s earlier history, but has faded in importance as conservative coalitions took control in recent years. Horowitz stated that he would “make the struggle against religious coercion and the fight for social justice the focal points of the party’s agenda,” reported Haaretz, an Israeli daily newspaper.

SAN MARINO – Citizens of San Marino, one of the smallest countries in Europe, approved a referendum question on banning sexual orientation discrimination through a constitutional provision, by a vote 71.46% yes. San Marino, a municipality on the East Coast of Italy, that traces its existence as an independent entity back to 301 AD (CE), has a population of
approximately 33,500, and is now the 11th country in the world to include LGBT rights in some form in a constitution or other fundamental law (not ordinary legislation). The others are the United Kingdom, Sweden, Portugal, Malta, Bolivia, Ecuador, New Zealand, Mexico, South Africa, and the Fiji Islands. The referendum adds “without any discrimination on the basis of sexual orientation” to Article 4 of the San Marino Constitution. The country had repealed criminal laws against homosexual acts in 2004, and established legal civil unions for same-sex couples in 2018.

SINGAPORE – Ruling on an appeal by a gay HIV-positive man who was convicted of failing to disclose his HIV status to a sexual partner (who subsequently tested positive for HIV, although there has been no confirmation that the transmission occurred during their sexual activity), Justice See Kee Oon dismissed the appeal late in June, and “also set a new sentencing framework to deal with such first-time offenders who may face jail terms up to 10 years if their victims get infected,” reported *Straits Times* (July 2). Announcing the grounds of judgement, the judge wrote: “Disclosing one’s HIV status may not in fact convey the risk of transmission in some circumstances; some victims may be ignorant, poorly informed or misinformed. In this regard, it would be undesirable for the HIV-positive person to assume or take for granted his or her sexual partner’s appreciation or knowledge of the risks involved.” In this case, the newspaper reported, “the 28-year-old Singaporean had penetrative and oral sex with the victim more than once without declaring his condition or alerting him to the risk of infection and obtaining his consent to accept the risk as required by law.” The lawyers for the young defendant were not contesting his failure to warn, but were urging that as a first offender he should not receive the maximum prison term. In response, the court established a “three-band sentence range for first-time offenders” who go to trial rather than plead guilty. “At its lowest, conviction could lead to a fine, and at its highest, an accused could be sentenced to a 10-year jail term. Based on the parameters of harm and culpability, a fine or sentence of up to two years may be meted out in a case where there is low risk of transmission and low culpability, with adjustments made for aggravating or mitigating factors. Similarly, higher risks and greater culpability could lead to jail terms ranging between two and six years. The third band of sentences ranging between six and 10 years would be applied where actual harm occurs and HIV is transmitted,” said the judge.

PROFESSIONAL NOTES
By Arthur S. Leonard

ALPHONSO DAVID is leaving his position as Counsel to New York Governor Andrew Cuomo to become the president of Human Rights Campaign, the national LGBTQ+ lobbying and advocacy organization. David, a member of the New York bar, worked for many years as a staff attorney at Lambda Legal before joining the New York State government in a variety of roles, culminating in his position as chief in-house attorney for the governor. He played a key role in organizing the support necessary to win marriage equality legislatively in New York, several years before the Supreme Court’s decision in Obergefell v. Hodges (2015) made it available nationwide as a matter of constitutional law. David will be the first lawyer and first person of color to head Human Rights Campaign.

A program and reception in the Thurgood Marshall U.S. Courthouse (S.D.N.Y.) on June 25 celebrated the 25th anniversary of Congress’s confirmation of the appointment of the Honorable DEBORAH BATTS as the nation’s first out federal district judge. Judge Batts, appointed to the court by President Bill Clinton in 1994, took senior status in 2012.

On June 25, the NYC Bar Association held a ceremony to bestow its 30th Annual Legal Services Awards. One of this year’s recipients was BRETT FIGLEWSKI. Legal Director of the LGBT Bar Association of Greater New York (LeGaL). Figlewski established a legal services function for LeGaL and has led the organization in providing pro bono representation to LGBT people with a particular emphasis on LGBT family law issues.
PUBLICATIONS NOTED

1. Alexander, Klint W., The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom, 71 Okla. L. Rev. 1069 (Summer 2019).
10. Cohen, David S., Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights, 53 U. Rich. L. Rev. 1085 (May 2019) (bemoans the failure of liberal Supreme Court justices to write concurring opinions in Justice Kennedy’s key cases, in order to address the many doctrinal issues that he failed to develop in his opinions).
17. Kahn, Michele, We’ve Come a Long Way – But We Still Have a Long Way to Go, 91-JUL N.Y. St. B.J. 44 (June/July 2019).
40. Springett, Lauren, Why the Intent Test Falls Short: Examining the Ways in Which the Legal System Devalues Gestation to Promote Nuclear Families, 52 Colum. J.L. & Soc. Probs. 391 (Spring 2019) (argues that the law should recognize some rights in gestational surrogates to seek information about and contact with the children to whom they gave birth under surrogacy agreements).


42. Strasser, Mark, Masterpiece of Misdirection?, 76 Wash. & Lee L. Rev. 963 (Spring 2019).


47. Williams, Brendan, President Trump’s Crusade Against the Transgender Community, 27 Am. U. J. Gender Soc. Pol’y & L. 525 (2019).


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**SPECIALY NOTED**

Elkbris Publishing announced the publication of “Boys’ Secrets and Men’s Loves: A Memoir,” by Professor David A.J. Richards of New York University Law School. Richards is a trailblazer in sexuality and law, having published important articles and books well before the topic had begun to achieve respectability in the academy at a time when he was one of the few out gay men in legal academia. According to the publisher’s press release, “A gay man born into an Italian-American family in New Jersey, David A. J. Richards has written over 20 books on the basic rights of American constitutionalism, including his prominent defense of gay rights and a feminism, which joins men and women in resisting patriarchy. His work on gay rights was prominently cited by the Supreme Court of India’s decision recently recognizing gay rights as human rights.” Writes Richards: “In this book, I examine through autobiographical reflections – as well as the insights of writers and filmmakers – my own struggles as well as those of other men against pressures to sacrifice what we love for the sake of proving our devotion to a patriarchal order. In doing so, I also explore the secret self that resists such sacrifice and surfaces in ways that call for our attention, especially in this time when men’s resistance to patriarchy may be essential for the survival of our democracy.” The publication of Richards’ memoir is a significant event in the history of LGBT rights.