TRUMP SETS IN MOTION A BAN ON OPEN TRANSGENDER MILITARY SERVICE

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On July 26, to the surprise of Defense Department officials and members of the White House staff, Donald Trump transmitted a series of three tweets beginning at 8:55 a.m. announcing a new policy concerning military service by transgender individuals. “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . . . . Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.” This appeared to be a complete reversal of a policy decision made a year earlier by the Defense Department. After a period of prolonged study that included a report commissioned from the RAND Corporation (a “think-tank” that specializes in producing studies on defense-related issues by contract with the DoD) and widespread consultations within the military and with military allies that allow transgender individuals to serve, DoD rescinded an existing regulation that established a ban on service by transgendered individuals on purported medical grounds. As a result of the policy newly announced during June 2016, hundreds of transgender service members “came out” to their superior officers, and some service members who had been concealing their gender identity for years began the process of transition with the assurance that the costs would be covered under military health policies. Estimates of the number of transgender service members ranged from a few thousand to as high as 15,000, most of whom have not yet made their presence known to their commanding officers. This unknown group likely includes many officers as well as enlisted personnel.

Attempts to discern details of the new policy were at first unsuccessful because neither the usual sources in the White House nor the Pentagon had received any advance notice or details. Admiral Paul F. Zukunft, Commandant of the Coast Guard, immediately announced that the Coast Guard would not “abandon” its several openly-transgender members, and that he and his staff had reached out to reassure them. The other military service heads and the Chairman of the Joint Chiefs of Staff quickly announced that there would be no change of policy until some formal directive came from the Office of the President. A spontaneous presidential tweet was not deemed by the Pentagon to be an order to abandon an existing published policy. The White House finally issued a document titled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security” on August 25.

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After a paragraph summarizing what had been done the previous summer and noting that the Secretaries of Defense and Homeland Security had extended a July 1, 2017 date for allowing transgender people to join the military to January 1, 2018, the President stated his reasoning: “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupting unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that
of an individual who has already begun a course of treatment to reassign his or her sex.” Interestingly, this directive mentions only “sex reassignment surgical procedures” but not any of the other costs associated with gender transition, including hormone treatment, which may reflect either ignorance by the White House staffers who drafted the Memorandum or a deliberate intention to make the exclusion as narrow as possible, focusing only on the political “flashpoint” of surgery. The Memorandum states that this second directive about surgical expenses will take effect on March 23, 2018. In other words, transgender individuals currently serving will continue to be covered for sex reassignment surgical procedures at least until March 23, 2018, and continuing beyond then if cutting off coverage on that date interferes with completing surgical procedures already under way. Or at least, that’s what it appears to say.

Third, in the section titled “effective dates and implementation,” the Memorandum gives the Secretary of Defense until February 21, 2018, to submit to the president a “plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.” The Memorandum also has a severability provision, the usual disclaimers accompanying presidential directives about not creating new rights or changing the authority of any government departments or agencies, and permission to the Secretary to publish the Memorandum in the Federal Register. (It was made immediately available on the White House website.)

On a plain reading, the “effective dates and implementation” section appears to mark a substantial retreat from the absolutist tone of the July 26 tweets. In trying to construe the tweets, there had been speculation that transgender service members would be immediately discharged or pressured to resign in order to avoid discharge. Leaks from the White House, while staff members were working on a written guidance for the president to sign, led to reports that transgender enlisted personnel would be allowed to serve out their enlistments but then be denied reenlistment while being encouraged to resign earlier, and that transgender officers could continue to serve their commissions, but would be required to resign if being considered for promotions.

Based on the leaks, GLBTQ Legal Advocates and Defenders (GLAD), the Boston-based New England public interest law firm, and the National Center for Lesbian Rights (NCLR), based in San Francisco, with cooperating attorneys from Foley Hoag LLP and Wilmer Cutler Pickering Hale & Dorr LLP, filed a lawsuit on August 9 in the U.S. District Court for the District of Columbia, representing five “Jane Doe” plaintiffs, all presently serving transgender individuals, seeking declaratory and injunctive relief. Doe v. Trump, Case 1:17-cv-01597. The case was assigned to District Judge Colleen Kollar-Kotelly, who was nominated to the court in 1997 by President Bill Clinton. The plaintiffs, with varying lengths of service, present compelling stories about the harms the
proposed policy would have on them, based, of course, on what was known when the complaint was filed. Among them, of course, were interference with ongoing transitions, interference with attaining military pensions (which some were close to vesting), and loss of career and benefits, affecting not only the plaintiffs, but their family members as well. There was also the emotional stress generated by uncertainty about their future employment and welfare.

The three-count complaint asserts violations of equal protection and due process (Fifth Amendment) and invokes the doctrine of estoppel to prevent adverse moves against the plaintiffs and those similarly situated as presently serving transgender members of the military who had been encouraged to “come out” as transgender under the earlier policy. The named defendants, in addition to the president, are Secretary of Defense James Mattis, Chairman of the Joint Chiefs of Staff Joseph F. Dunford, Jr., the Departments of the Army, Air Force, and Coast Guard, Army Secretary Ryan D. McCarthy, Air Force Secretary Heather A. Wilson, Acting Homeland Security Secretary Elaine C. Duke, and, for good measure, THE UNITED STATES OF AMERICA. There was some speculation and criticism that filing the lawsuit before a formal policy was announced or implemented was premature and might result in a dismissal on grounds of standing or ripeness, but the release of the formal guidance just a few weeks after the suit was filed will undoubtedly lead to the filing of an amended complaint focusing more specifically at the changes announced in the Memorandum. The lengthy delay specified by the Memorandum for implementing changes may be invoked by the Justice Department in seeking to get this case dismissed. Perhaps the Memorandum was drafted with this strategic use in mind.

Press coverage of the July 26 tweets showed overwhelming opposition and criticism from media, many government officials, and members of both parties in Congress. Those who voiced support of the president’s announcement came from the House Republicans who had waged a losing battle to amend a pending Defense budget measure to ban use of any appropriations to pay for sex reassignment surgery for military members, and there were soon press reports that supporters of that amendment had specifically asked the president to take steps to prevent spending federal funds for this purpose. Furthermore, it was reported that threats had been made to block passage of the Defense measure – which was intended to provide some funding for the president’s project to “build a wall” along the U.S. border with Mexico (reflecting his ignorance of world history, and most specifically of the spectacular failure of the vaunted “Maginot Line” constructed after World War I to protect France from any future invasion by German military forces) – unless the president prevented military expenditures on sex reassignment procedures. To the simple-minded president, the solution was obvious. Reviving a ban on all military service by transgender individuals meant that there would be no openly transgender individuals in the military seeking to have such procedures performed and, since reversing Obama Administration policies regardless of their merits seems to be the main goal of many of Trump’s actions, simply overturning the Obama Administration policy became his simplistic solution to his political problem. There was no indication that Trump made this decision after consulting “my Generals” or military experts – at least, the White House never revealed the names of any such individuals who were consulted, and it appeared that Secretary Mattis had merely been informed of the president’s intentions the night before the tweets. One suspects that Trump’s “expert” was likely former White House Chief Strategist Steve Bannon, a former Marine.

The August 25 Memorandum did not necessarily require the immediate, or even eventual, discharge of all transgender personnel, and appeared to give Secretary Mattis discretion to come up with an implementing plan and at least six months to do it, while barring any action against transgender service members during the intervening time. Rather, it charged Defense Secretary Mattis with the task of coming up with implementation procedures, and stating that he could submit written recommendations documenting that the concerns expressed in the Memorandum were not supported by banning transgender service. In typical “kick the can down the road” Trump style (which is, admittedly, a typical style of U.S. politicians generally, only more pronounced in this president), it leaves open the possibility that the Obama Administration policies will ultimately be left in place, provided Mattis asks for this in writing, summoning persuasive evidence that nothing is gained and much is lost by preventing transgender individuals from enlisting, by being commissioned out of the service academies, or by blocking transgender service members (including commissioned officers) from continuing their service. Press accounts noted that the anticipated expense of covering sex reassignment surgery was dwarfed by the annual military expenditure on Viagra and similar drugs (who knew, as Trump might ask, that the Defense Department, the government’s most “macho” agency, was spending so much money to stiffen the limp genitals of male members!?), and that the replacement costs for several thousand fully-trained and productive military members would far outweigh the costs of down-time for the relatively small number of individuals at any given time who might be unavailable for assignment while recovering from sex reassignment surgery. (There is no indication that the other steps in gender transition, including hormone therapy, are disabling in a way that would interfere with military service.)

As worded, the Memorandum leant itself to the interpretation that with the passage of time, as the immediate political problem that “inspired” Trump to emit his tweets had been surmounted, sober heads could prevail, Mattis could reassure the transgender troops that nothing was happening right away, and eventually the president would accept Mattis’s written recommendation to allow transgender individuals to serve after all. (This interpretation depends on Mattis having the fortitude and political courage to tell the president, as
he had done during the transition after the election on the subject of torture as an interrogation device, that Trump’s announced position did not make sense as a matter of military policy.) Of course, the Memorandum directive means continuing discrimination against transgender individuals who seek to enlist, raising serious constitutional issues in light of the increasing recognition by federal courts that gender identity discrimination is a form of sex discrimination in equal protection doctrine, but the Memorandum, as it plays out, could avoid the loss of employment for transgender individuals now serving, although it would pose continuing emotional stress stemming from the uncertainty of future developments until Mattis convinces the president to countermand his new “policy.”

A few days after the Memorandum was released, Secretary Mattis indicated that he would convene an expert panel to conduct a study on the implementation issue regarding currently serving members, and that in the interim, no steps would be taken to dismiss any serving transgender personnel because of their gender identity. Media reports about Mattis’s announcement ranged widely in their interpretations, from the inaccurate contention that he was putting a “freeze” on Trump’s policy announcement (an apparent misinterpretation, since the Memorandum itself delayed its implementation until March 2018 with respect to serving members), or that the policy would never go into effect because Mattis would persuade the president to rescind it, to those who argued that the Memorandum only authorized Mattis to study how to implement the newly-announced policy and the ban was required to go into effect on March 23, 2018.

When the GLAD/NCLR suit was filed, other organizations, including Lambda Legal and the ACLU, announced that they would file lawsuits as well, and the release of the Memorandum on August 25 led to immediate announcements that more lawsuits would be filed, which they were on August 28. “See you in court,” wrote ACLU Executive Director Anthony Romero to the organization’s supporters.

Lambda Legal and OutServe-SLDN, Inc. filed Karnoski v. Trump in the U.S. District Court in Seattle (W.D. Wash.), assisted by cooperating attorneys from Kirkland & Ellis LLP and local counsel Derek A. Newman. The American Civil Liberties Union (ACLU) and the ACLU Foundation of Maryland filed Stone v. Trump in the U.S. District Court in Maryland, assisted by cooperating attorneys from Covington & Burling LLP. Each of these cases differ in some respects from the lawsuit filed earlier in August by NCLR and GLAD. The Lambda case, Karnoski v. Trump, includes among its plaintiffs two individuals affected by the continuing policy against allowing transgender people to enlist, and also adds two institutional plaintiffs, the Human Rights Campaign and Gender Justice League, which sue on behalf of their transgender members who are either currently serving or wish to enlist. This complaint asserts equal protection and due process claims, and adds a free speech claim under the First Amendment, arguing that service members who told their commanders about their gender identity and continued to serve openly will be subject to dismissal for being open under the ban, and that the plaintiffs who seek to enlist had also spoken about their gender identity; thus, their speech was burdened by the policy without rational justification. The ACLU plaintiffs are all currently serving. One of them is serving in the National Guard and seeks a commission in the Army, but the enlistment ban will block that step. The ACLU lawsuit limits itself to equal protection and due process claims. Unlike the NCLR/GLAD lawsuit, neither of the lawsuits filed on August 28 makes an estoppel claim on behalf of the serving members.

Between them, the three complaints include detailed accounts of the steps taken by the Defense Department in 2015 and 2016 to thoroughly study the issue of transgender service and address all the issues that Trump raised in his tweets and the Memorandum, highlighting the lie to Trump’s claim that the policy implemented in June 2016 was undertaken with insufficient study. Ironically, while Trump implicitly accused the Obama Administration as having improperly treated the issue of transgender service as entirely political, it was Trump who failed to consult generals and experts, who was cautioned against changing existing policy by legal staff in the White House, and who was apparently motivated primarily by political concerns about securing enough votes in the House for his wall with Mexico, who actually treated it as political. Depriving individuals of constitutional rights for political reasons has never been accepted by the courts as legitimate.

On August 31, NCLR/GLAD filed a motion for preliminary injunction and sought to amend their complaint to add two more plaintiffs, a Naval Academy midshipman and a college Army ROTC member, both of whose eventual continued participation and eventual commissioning as officers are directly threatened by implementation of the policy. The motion was backed up by affidavits from former Secretary of the Army Eric Fanning, former Secretary of the Navy Ray Mabus, former Secretary of the Air Force Deborah Lee James, former Acting Secretary for Personnel and Readiness Rogers Carson, and former Deputy Surgeon General for Mobilization, Readiness, and Army Reserve Affairs Margaret Chamberlain Wilmoth, all of whom attested to the careful study and well-supported policy decision taken by the Defense Department to end the ban on military service by transgender people. These affidavits would provide powerful support to the argument that the newly-announced policy, devised in the White House and not based on professional military judgment, was not entitled to the traditional deference that federal courts pay to military judgments on personnel issues, and that under the least demanding level of judicial review would not survive 5th Amendment scrutiny.

On September 5, just as we were finishing work on this issue of Law Notes, Equality California and a group of transgender plaintiffs, including
currently enlisted military personnel, filed a fourth lawsuit challenging the ban in the U.S. District Court in Los Angeles, Stockman v. Trump, Case 2:17-cv-06516 (C.D. Cal.). This complaint is a more concise version of the other complaints in terms of its legal arguments, relying on the 5th Amendment to make due process, equal protection and privacy claims, and the 1st Amendment to challenge subjecting trans service members who “came out” to their commanders in reliance on the 2016 policy change with the loss of their jobs and benefits for their speech. (The First Amendment claims in this and other complaints strike this writer as a bit of a stretch; similar claims were rejected in early lawsuits challenging the Don’t Ask Don’t Tell policy, on the government’s argument that the individuals were not being excluded for saying they were gay, but rather for being gay. Whether that argument will hold up in this context is anybody’s guess until the courts start making decisions.)

As with other “bold” executive actions by Trump, this anti-transgender initiative may be stopped in its tracks by preliminary injunctions, although the Memorandum was drafted to try to minimize that likelihood by suggesting that nothing much is going to happen right away other than the continuing ban on enlistment. Mattis’s announcement that he will convene an expert study panel to make recommendations on implementation would seem to remove any such argument, however. As to the continuing enlistment ban, it was questionable that the original GLAD/NCLR plaintiffs, all currently serving members, had standing to challenge it, but the proposed additional plaintiffs would eliminate that problem, at least with respect to individuals whose commissioning would be blocked by the policy, and the other two lawsuits include a sufficient array of plaintiffs to support standing to challenge all aspects of the Memorandum. As we went to press on this issue of Law Notes, the GLAD/NCLR motion for preliminary injunction was pending before District Judge Kollar-Kotelly, and similar preliminary injunction motions were expected in the other two lawsuits.

U.S. Supreme Court’s October 2017 Term May be an LGBTQ Blockbuster

The Supreme Court’s Term beginning on the first Monday in October and extending through the end of June may become a “blockbuster” term for LGBT legal issues. The Court has already agreed to review the Colorado Court of Appeals’ decision that a baker’s refusal to make a wedding cake for a gay couple is not protected from prosecution under the state’s public accommodations law by the 1st Amendment’s protection for free speech and religious freedom, and in July the Court was asked to review a similar ruling from the Washington State Supreme Court concerning a florist who refused to provide floral designs for a same-sex wedding. On August 25, the Kenosha (Wisconsin) School District asked the Court to review a recent ruling by the Chicago-based 7th Circuit Court of Appeals that the district must allow transgender high school senior Ash Whitaker to use the boy’s restroom facilities, and the Court will also be asked to consider whether a Georgia hospital violated the federal ban on employment discrimination because of sex when it discharged a lesbian security guard. Since the Court is likely to grant at least one or two of these petitions, this could be a term in which Court decides an unprecedented number of LGBTQ-related cases.

The Court’s potential agreement to decide the Kenosha case would not be surprising, since just a year ago it agreed to review a ruling by the Richmond-based 4th Circuit Court of Appeals that another transgender high school student, Gavin Grimm, could pursue his claim that the Gloucester County School District violated his rights under Title IX of the federal Education Amendments Act of 1972, which forbids sex discrimination by schools that receive federal money, when it prohibited him from using boys’ restrooms at the county high school. The 4th Circuit’s ruling reversed a dismissal of Grimm’s claim by the federal district court, finding that the court should have deferred to an interpretation of the relevant Education Department regulation embraced by the Obama Administration. The case was set for oral argument late in the Term, but within weeks of Donald Trump’s inauguration and installation of Betsy DeVos as Secretary of Education and Jeff Sessions as Attorney General, their departments had released a joint “Dear Colleague” letter to public schools “withdrawing” the Obama Administration’s interpretation, instead substituting a statement that the issue of bathroom access should be left to state and local school authorities. After they advised the Court of this action, it vacated the 4th Circuit’s decision for reconsideration, and the 4th Circuit has since sent the case back to the district court to determine whether Grimm’s June graduation has rendered the case moot and subject to dismissal. Grimm, represented by the ACLU, argues that as an alumnus, he has a continuing interest in restroom access at the high school, but the school district argues that this is too speculative to give him continuing standing to maintain his lawsuit. The district judge, who originally dismissed the case, will make the initial ruling on mootness.

The Kenosha petition gives the Court an immediate second chance to take up the question whether gender identity discrimination is a form of sex discrimination prohibited by Title IX. The school district’s petition, filed by attorney Ronald S. Stadler of the Milwaukee firm of Mallery and Zimmerman, persuasively argues that it is important for the Supreme Court to take up this issue and resolve it for the country, pointing to accelerating demands by transgender students in many different states confronting school districts with controversial decisions. The Petition points out that the current situation puts school districts in a Catch-22 position. If they refuse to let transgender students use facilities consistent with their gender
identity, they risk being sued under Title IX for discrimination. If they allow transgender students to use the facilities, they risk being sued — as some district are now experiencing — by groups of cisgender students and their parents claiming that their privacy rights will be violated by exposing them to the gaze of transgender students while using the facilities. Although none of these privacy suits has produced a final ruling against the trans-friendly school districts, some district courts have ruled against Title IX claims by transgender students.

Perhaps more importantly, the Petition cogently argues that the 7th Circuit’s ruling, the first by a federal appeals court to rule directly on the merits that Title IX covers gender identity discrimination, opens up a split of circuit court authority. One of the central roles for the Supreme Court is to resolve such splits and provide a uniform interpretation of federal statutes for the entire country. The Petition particularly notes a 2007 ruling by the Denver-based 10th Circuit, in a case involving a transgender bus driver whose access to restroom facilities along his route was the subject of a discrimination lawsuit under Title VII of the Civil Rights Act. Most courts dealing with Title IX claims look to interpretations of Title VII, as did the 7th Circuit in the Kenosha case, but some district courts have held that the workplace and the school present different issues that justify different results. Such was the ruling of a federal district court in Pittsburgh, which rejected the application of Title VII precedents to a lawsuit by a transgender college student asserting a facilities access claim under Title IX.

The 7th Circuit’s decision was alternatively based on its view that the Equal Protection Clause of the 14th Amendment requires a public school to have an exceedingly persuasive reason to discriminate because of gender identity. In the 7th Circuit’s view, such discrimination is really a form of sex discrimination, which gets “heightened scrutiny” from the courts. In the Kenosha case, the 7th Circuit upheld a trial court’s decision to issue a preliminary injunction requiring the school to let Whitaker use the boys’ restroom while the litigation proceeds, and refused to stay the injunction pending a final ruling in the case. The trial court concluded that Ash Whitaker was likely to win his lawsuit on the merits, and the 7th Circuit concurred, finding the equities weighed in his favor.

If the Court adds the Kenosha case to its docket, this will be only the third time in its history that the Court has agreed to rule on a transgender rights case. In 1994, the Court ruled in Farmer v. Brennan that a correctional institution had some obligation under the 8th Amendment, which prohibits “cruel and unusual punishments” for criminal convictions, to protect transgender inmates from sexual assaults by fellow inmates. Apart from that ruling, the Court has never opined on the rights of transgender people to equal protection of the laws, although a little-noted consequence of its rulings in the same-sex marriage cases has been to remove existing impediments that transgender people faced because most states insisted that sex was “immutable” for purposes of marriage, and bans on same-sex marriage meant, for example, that a transgender man could not marry a cisgender woman. Now that couples need not be of the opposite sex to marry, transgender people face no such restrictions. Ironically, this issue not even mentioned by the Supreme Court in its marriage rulings, which focused entirely on marriages involving cisgender same-sex couples.

The Court has been asked many times over the past quarter century to decide whether gay people can sue for sexual orientation discrimination under Title VII, but it has repeatedly denied the petitions, which always arose from lower court decisions against gay plaintiffs. Lambda Legal won an unprecedented victory in the 7th Circuit earlier this year when a majority of the 11-judge en banc court ruled that sexual orientation discrimination claims could be pursued under Title VII. The employer in that case did not seek Supreme Court review, however. More recently, a panel of the Atlanta-based 11th Circuit Court of Appeals rejected a Title VII sexual orientation discrimination claim that Lambda Legal was litigating, and the full 11th Circuit denied a petition for review “en banc.” Lambda Legal represents the lesbian security guard in this case, Jameka Evans, and filed a certiorari petition with the Supreme Court on September 7.

Meanwhile, late in September the New York-based 2nd Circuit Court of Appeals will take up the same issue in an en banc hearing of a case involving a gay sky diver who claimed he was discharged because of his sexual orientation. Don Zarda subsequently died in a sky diving accident, but his estate has continued to press the claim for damages under Title VII. A three-judge panel, relying on prior 2nd Circuit rulings, ruled that he could not sue under Title VII, but the full court granted rehearing, and a decision allowing Zarda’s claim to go forward is widely anticipated in light of a concurring opinion authored by the chief judge of the Circuit, Robert Katzmann, in a similar case decided earlier this year. Katzmann, noting the 7th Circuit’s ruling and a similar ruling by the federal Equal Employment Opportunity Commission, agreed that sexual orientation claims should be accepted under Title VII. The trend seems to be in that direction, as several trial judges in the Circuit have “bucked” precedent and refused to dismiss such claims. If the 2nd Circuit rules quickly, the Supreme Court may soon face yet another petition presenting this issue, making it even more likely that either Lambda’s petition in the Evans case or a petition in the Zarda case (or both) will be granted, making it highly likely that the Court will take up the issue this Term.

The timing of these various cases is fortuitous, because this may be the last Term with the current balance of judges: four Democratic nominees who appear to be most open to voting in favor of the LGBTQ plaintiffs, four Republican nominees who appear to be most likely opposed, and the man in the
New York Appellate Division Rules on Controversial Custody Dispute Between Hasidic Father and Ex-Hasidic Lesbian Mother

The New York Appellate Division court in Brooklyn has unanimously reversed a trial judge’s decision to take away a formerly-Hasidic lesbian mother’s custody of her three children, finding, among other things, that the settlement agreement drafted by her ex-husband’s father at the time of their divorce imposed an unconstitutional requirement that she continue to observe the tenets of a Hasidic lifestyle as a condition of her custody of their children. The August 16 decision in Weisberger v. Weisberger, 2017 WL 3496090, 2017 N.Y. App. Div. LEXIS 6174, 2017 N.Y.

The settlement agreement required that she continue to observe the tenets of a Hasidic lifestyle as a condition of her custody of their children.

Slip Op 06212, issued per curiam by a four-judge bench, aroused concern among the Hasidic community, as it applied well-established principles of family law that the trial judge, himself an Orthodox Jew, seemed to have overlooked in giving preemptive weight to the father’s religious desires.

Naftali and Chava Weisberger were married in 2002. They were brought together, according to established custom in the Hasidic community, by a professional matchmaker (called a shadchan), and were both 19 years old at the time. They moved to Boro Park, Brooklyn, from the tight Hasidic community in Monsey, N.Y., and had three children together. The move was prompted by Naftali’s desire to pursue religious studies. They raised their children according to traditional Hasidic practices and beliefs, in a home with no television or internet, observing strict restrictions of diet and dress and speaking Yiddish at home.

After a few years of marriage, Chava informed Naftali that “she did not enjoy sexual relations with men and that she was attracted to women.” They continued to live together, but after several years Naftali agreed to give Chava a “Get” (a Jewish divorce), and they signed a settlement agreement (which was drafted by Naftali’s father) on November 3, 2008. Naftali married another woman a few weeks later, and has since had two children with her, prompting the speculation that he was finally willing to grant a religious divorce to free himself to marry somebody else.

Under the written settlement terms, the parents had joint custody of the children with Chava having primary residential custody. They agreed that Naftali’s visitation with the children would be for a two-hour period once a week after school (which would increase for the son as he grew older, for the purposes of religious study), overnight visitation every other Friday for the purposes of religious study, and they signed a settlement agreement drafted by her ex-husband’s father and Stephen Breyer, both appointed by Bill Clinton a quarter century ago. The Court may be on the verge of major changes in membership and jurisprudential orientation in the next few years, so getting these question before the justices now would be preferable to having them come up after this term is over.
for visitation, hosting them instead at his parents’ home.

The central provision in the custody dispute was the “religious upbringing clause,” which provided: “Parties agree to give the children a Hasidic upbringing in all details, in home or outside of home, compatible with that of their families. Father shall decide which school the children attend. Mother to ensure that the children arrive in school in a timely manner and have all their needs provided.” The settlement also provided that each party “shall be free from interference, authority and control, direct or indirect, by the other.” Chava agreed to waive any claim to marital assets or further financial support for herself, but the agreement obligated Naftali to pay $600 a month for support of the children.

Several events appear to have contributed to lead Naftali to file his motion with the court on November 29, 2012, more than three years after the divorce. He alleged that Chava had “radically changed her lifestyle in a way that conflicted with the parties’ religious upbringing clause.” For one thing, she had eventually decided that the older daughter was old enough to be told about Chava’s sexual orientation, to the consternation of Naftali, who expected Chava to keep this a secret and to keep any relationship she had with a woman secret from the children. Naftali claimed that Chava had come out publicly as a lesbian, disparaged the basic tenets of Hasidic Judaism in front of the children, allowed the children to wear non-Hasidic clothes, permitted them to violate the Sabbath and kosher dietary laws, and had referred to them by English names rather than the names by which they were known in the Hasidic community. To top things off, Chava was not dressing according to Hasidic tradition, she had dyed her hair, and a transgender man had moved in and was participating in taking care of the children.

Naftali sought sole legal and residential custody of the children and final decision-making authority over their lives, limiting Chava to a few hours of supervised “therapeutic visitation” each week, and to require strict compliance with the religious upbringing clause when the children were in her presence, either for visitation or at school.

Upon filing the lawsuit, Naftali sought an immediate order giving him temporary residential custody, which he got from Judge Eric Prus. A few days later, the parties agreed to a temporary visitation order for Chava, giving her several days a week but providing that she would “encourage and practice full religious observance in accordance with the practices of Emunas Yisroel in the presence of the children” and “in the Boro Park community, the mother shall dress in the Hasidic modest fashion.”

Chava came back with her own motion, seeking to modify the religious upbringing clause. She wanted permission from the court to bring up the children with “a conservative or progressive modern orthodox Jewish upbringing” in a community that “is inclusive of gay individuals.” She wanted permission to locate them outside of Boro Park, but within the borough of Brooklyn, and to attend a “conservative or progressive modern orthodox Jewish school that is similarly inclusive.” She wanted educational decisions to be made jointly, not dictated solely by Naftali. She proposed that the father be able to continue the children’s Hasidic education by having visitation each Sabbath, and she would promise to keep a kosher home and insure that the children go to school and have their needs provided. She was also willing for Naftali to have the children for all Jewish holidays.

Judge Prus held a hearing at which Naftali and Chava testified about their marriage and relationship with the children. It seemed that during the marriage Naftali left the house early in the morning and didn’t return in the evening until after the children were asleep, leaving Chava primarily responsible for taking care of them. They had a strictly Hasidic kosher home. Naftali testified that upon the divorce he had expected that Chava would keep her sexual orientation a secret from the children and the community, even though the written settlement did not state this.

It was clear from Naftali’s testimony that he did not have extensive contact with the children after the divorce, and even when he resumed some contact, he had visitation in his parents’ home rather than his own home, presumably to shield his new wife and children from being contaminated by non-Hasidic influences. He filed his motion to change custody shortly after learning that a transgender man had moved into the mother’s home and was assisting in taking care of the children. He had also recently noticed the children wearing non-Hasidic clothing and learned they were eating non-kosher food. Chava had even allowed them to see movies – forbidden in the Hasidic community.

Naftali also testified that “in March, 2013, the younger daughter told him that she had read a book about children with two fathers and other books about homosexuality.”

Naftali denied that the motivation behind his request for a change in custody was Chava’s lesbian identity. Instead, he pointed to her failure to keep it a secret from the children, and said he wanted sole custody to ensure that they would get a traditional Hasidic upbringing without “interference” from their mother. He objected to them being exposed to non-religious people, or to intimate relationships that were against Jewish law. “The father believed that homosexuality violated the Torah,” wrote the court, and when asked if he was amenable to some compromise, he said, “There’s no place for compromising in our religion.”

Chava testified that she was not represented by a lawyer during the divorce process, and that a rabbi guided her in negotiating the settlement. A rabbi served as mediator. She was under the impression that various changes she sought would be made in the settlement agreement, but when she appeared at the Beth Din (religious court) to sign the agreement, it did not include her changes. Under the settlement, she agreed to waive her right to support for herself or any of the marital property, leaving as Naftali’s only obligation the
monthly support payments, which she testified she never received from him, although the obligation was spelled out in the settlement agreement.

She testified that she had never been as strictly observant as Naftali, even before the divorce and that she had taken the children for counseling at the Jewish Board of Family and Children's Services and enrolled the older daughter in group therapy for children from divorced families. She never told the children about her sexual orientation until in 2012, when she learned that the older daughter suspected that Chava was gay, so Chava consulted with the daughter’s therapist and then confided in her daughter. She testified that her transgender friend came to live with them in September 2012, got along well with the children, but then the older daughter returned from a visit with her father apparently confused and upset, because some of father’s family had “teased about her level of religious observance” and told her that Chava’s friend was “really a woman.”

After the temporary custody arrangement was ordered by the court and the children were spending half of each week with Naftali’s family, Chava “found the children would often be upset and confused.” She said that she felt hypocritical for continuing to obey the religious observance requirements of the court’s order so that she could continue to have the children without supervision, and she found Naftali’s custody proposal to be “devastating, as she had been the most present parent in the children’s lives since they were born,” and she was concerned about their emotional well-being in their father’s custody. She wanted to raise the children as Jewish, but not according to strict Hasidic requirements and rather in the context of a community that respected and accepted diversity.

Justice Prus, finding that Chava’s conduct had been in conflict with the settlement agreement, said that there been no such agreement, he might have considered the parties’ arguments “differently,” but “given the existence of the Agreement’s very clear directives, the Court was obligated to consider the religious upbringing of the children as a paramount factor in any custody determination.” He ruled largely in favor of Naftali, awarding him sole legal and residential custody and final decision-making authority for the children, and decreed that Chava would only have limited supervised visitation if she did not comply fully with the religious upbringing clause. Denying Chava’s motion to modify the religious upbringing clause, Prus made clear that if she wanted unsupervised visitation with the children several days a week, she would have to “practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy” whenever the children were with her, and she would have to direct the children “to practice full religious observance in accordance with Hasidic practices of ultra Orthodoxy at all times.”

Chava appealed this draconian ruling. She was represented by attorneys from Seward & Kissel LLP and the N.Y. Legal Assistance Group, which has a dedicated LGBT assistance practice, and she had amicus brief support from Lambda Legal and the NYCLU, as well as two organizations particularly concerned with her situation: Footsteps, Inc., which assists women seeking to leave the Hasidic community, and Unchained at Last, Inc., an organization assisting women who seek to leave arranged marriages. According to a Hasidic website commenting on the case, Chava actually works with Footsteps, Inc. An amicus brief by the prominent firm of Fried, Frank, Harris, Shriver & Jacobson LLP represented the views of these two organizations.

The case was argued before the Appellate Division on November 14, 2016, and it took nine months for the court to compose its opinion, released on August 16.

While acknowledging that a trial court’s determinations in a custody case are normally given great weight, the Appellate Division panel wrote that its authority in such a case is “as broad as that of the hearing court,” and in this case the court decided to discard much of the trial court’s ruling. To begin with, it found that Justice Prus’s decision to award Naftali sole legal and residential custody and decision-making power over the children, while consigning Chava to brief supervised visitation unless she adhered to strict Hasidic practice, “lacked a sound and substantial basis in the record,” as the

Justice Prus ruled largely in favor of Naftali and decreed that Chava would only have limited supervised visitation if she did not comply fully with the religious upbringing clause.
The court concluded that it was not in the children’s best interest “to have their mother categorically conceal the true nature of her feelings and beliefs from them at all times and in all respects.”

Detrimental to the children and “it was wholly inappropriate to use supervised visitation as a tool to compel the mother to comport herself in a particular religious manner.”

The court pointed out that the settlement agreement itself was focused on giving the children a Hasidic upbringing, and “did not require the mother to practice any type of religion, to dress in any particular way, or to hide her views or identity from the children. Nor may the courts compel any person to adopt any particular religious lifestyle.” Citing, for example, the U.S. Supreme Court’s 2003 decision striking down the Texas sodomy law, *Lawrence v. Texas*, the court said that “a religious upbringing clause should not, and cannot, be enforced to the extent that it violates a parent’s legitimate due process right to express oneself and live freely.” The court particularly noted the provision in the settlement agreement that each party “shall be free from interference, authority and control, direct or indirect by the other.”

The court concluded that it was not in the children’s best interest “to have their mother categorically conceal the true nature of her feelings and beliefs from them at all times and in all respects, or to otherwise force her to adhere to practices and beliefs that she no longer shares.” However, the court was not ready to completely grant Chava’s motion to modify the religious upbringing clause in the settlement agreement. Since the children had spent their lives in the Hasidic community, attended Hasidic schools, and visited with extended family who were observant Hasidic Jews, the court decided that Naftali should continue to exercise final decision-making authority about their education, and that he could continue to require that, at least while they were in his custody or attending their Hasidic school, they “practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy.”

The court said it would be best for the children if the parents “work together to surmount the challenges the children will face as they continue on their current educational path. As such, we deem it appropriate to direct the mother to make all reasonable efforts to ensure that the children’s appearance and conduct comply with the Hasidic religious requirements of the father and of the children’s schools while the children are in the physical custody of their father or their respective schools.” Also, it noted that Chava intended to keep a kosher home and to provide the children exclusively with kosher food. However, “we otherwise modify the religious upbringing clause to allow each parent to exercise his or her discretion when the children are in his or her custody.” The court also decreed more visitation time for Naftali than was provided in the original settlement, and accepted Chava’s proposal that Naftali have the children for all Jewish holidays and that she get the non-religious holidays and vacation time. For two weeks in the summer, the children will be with Naftali, as had been provided in the original settlement agreement.

The court acknowledged that neither party would be fully satisfied with its disposition of the case, but, it said, “courts do not always have the perfect solution for all of the complexities and contradictions that life may bring – the parties must forge a way forward as parents despite their differences. We are confident that both parties will exercise their best judgment in these matters in a manner that furthers the best interests of their children.” The court reminded the parties that their original settlement provided that neither would seek to alienate the children from the other, or “speak idly about the other party in front of the children.”

As neither party got everything they were seeking, it would not be surprising if one or both try to appeal this ruling to the Court of Appeals. The Appellate Division has left them to negotiate over issues as to which Naftali, at least, testified that there could be “no compromise.” Since the divorce, Chava has come out of the Hasidic community and sought to raise her children in a progressive modern Orthodox community. How these concerns will be reconciled is anybody’s guess, and the idea that these children will shuttle back and forth each week between two very different worlds will pose an extraordinary challenge to them. We may not have heard the last about this case.
Federal Court Refuses to Enjoin School District from Allowing Transgender Students to Use Facilities Consistent With Their Gender Identity

After rendering a bench ruling in mid-August in anticipation of the approaching resumption of school for the fall semester, U.S. District Judge Edward G. Smith released a lengthy opinion (running over 75 pages in LEXIS) on August 25, explaining why he was denying a preliminary injunction motion by plaintiffs in Doe v. Boyertown Area School District, 2017 U.S. Dist. LEXIS 137317, 2017 WL 3675418 (E.D. Pa.), in which the plaintiffs, cisgender students and their parents, sought to block the school district’s unwritten policy of allowing transgender students to use bathroom and changing room facilities consistent with their gender identity.

Alliance Defending Freedom (ADF), a non-profit law firm self-identified with conservative Christian principles which has filed similar lawsuits against other school districts, represents the plaintiffs in arguing that constitutional and common law privacy rights of the students are violated by the school district’s policy. In addition to local attorneys representing the school district, intervenors on behalf of defendants are represented by attorneys from the ACLU’s LGBT Rights Project and ACLU of Pennsylvania with cooperating attorneys from Cozen O’Connor’s New York and Philadelphia offices.

This case presents in many respects a mirror image of the lawsuits brought by transgender teens seeking the right to use bathroom and changing facilities at their high schools consistent with their gender identity. In both kinds of cases, testimony is presented that the plaintiffs have suffered emotional and physical harm because the schools’ usage policy interferes with their ability to use a convenient, non-stigmatizing restroom when they need it. In this case, cisgender students affirmed that they were so traumatized at the prospect of encountering a “student of the other sex” – as they insist on calling transgender students – in the restroom or locker room, that they avoid using the facilities altogether during the school day, and the fear of such encounters haunts them throughout the day. The court rejected the underlying premise, because Boyertown Area High School (referred to by the acronym BASH throughout the opinion) has provided numerous single-user facilities and alternative locations that would accommodate the plaintiffs’ concerns, and has made physical alterations in the common facilities to enhance the ability of individuals to avoid exposing themselves unclothed (fully or partially) to other students. The plaintiffs’ position is to argue that transgender boys are really girls, and transgender girls are really boys, and the traditional of sex-segregated restroom and locker-room facilities must be preserved in order to protect the long-recognized privacy interests of cisgender people. But to the court, the issue for decision in August 2017 had to be based on the facilities available for the upcoming academic year, as to which alterations and additions have changed the situation since the incidents during the 2016-17 school year that gave rise to the lawsuit.

The court sets out the factual allegations in great detail, including findings that this writer – having attended high school in the 1960s – found startling, such as a finding that few of the students at the high school actually use the showers after their gym classes. (When this writer attended high school, showering after gym was mandatory and closely monitored by the coaches, and the required freshman swimming course at his college prohibited students in the class from wearing anything in the pool.) Another startling finding: that the high school, even before the recent renovations, had several single-user restrooms available to students, and not just in the nurse’s and administrative offices, so that any student seeking absolute privacy for their restroom needs could easily avail themselves of such facilities.

This lawsuit can be traced to several instances during the Fall Semester of 2016 when plaintiffs claim to have been startled, abashed, and disturbed to discover students whom they considered to be of the opposite sex in the locker room or restroom, leading them to approach administrators to complain and subsequently to involve their parents in further complaints. The transgender students were in these facilities after having obtained permission from school administrators who had determined that the students had sufficiently transitioned to make it appropriate. The administrators were determining, on a case-by-case basis, the students in question had transitioned sufficiently that it would have been awkward, unsettling, and perhaps even dangerous to them for them to use facilities consistent with the sex originally noted on their birth certificates.

The evidence presented to the court was that transgender students went through a transitional facilities usage period as they were transitioning in their gender presentation, generally preferring the single-user facilities until their transition was far enough along that they would feel more comfortable using facilities consistent with their gender expression and expected their presence would not cause problems. Indeed, there was testimony that when one transgender boy went into the girls’ restroom, he was chased out by the girls, who perceived him a boy and didn’t want him in there! Because surgical transition is not available under established standards of care before age 18, none of the transgender students at the high school had genital surgery, so their transitions were based on puberty-blocking drugs, hormones, grooming and dress. One suspects that parents particularly objected to the presence of transgender girls who still had male genitals in the girls’ facilities, but there
were no allegations that any transgender girl was exposing male genitals to the view of others in the common facilities.

When the issue arose and the administrators had to respond to a handful of protesting students and parents, they had long since received the “Dear Colleague” letter sent out by the Obama Administration’s Education and Justice Departments in May 2016, which advised that Title IX required public schools to accommodate transgender students by allowing them to use restrooms consistent with their gender identity and presentation. The Boyertown administrators, who did not seek authorization from the school board prior to problems arising, treated that letter as “the law of the land” and informally extended approval on a case-by-case basis to transgender students seeking permission to use appropriate facilities, a phenomenon which began to surface in that school district prior to the 2016 school year. Not only did they refrain from adopting a formal written policy, but they also refrained from announcing the school’s policy to the student body or parents generally. Thus, it is not surprising that some students were startled to encounter students who they considered to be of the “wrong sex” in their facilities. The response of the administrators to the complaints was the this was the school’s policy and the students should just treat the situation as natural and adjust to it, which some students and their parents found unacceptable.

After the issue blew up during the 2016-2017 school year, the board of education voted 6-3 to back up the administrators, but there was still no formal written policy, and the school actually refused a demand by some parents to produce a written policy. Although the Trump Administration “withdrew” the Obama Administration’s interpretation of TitleIX, the substitute letter issued in 2017 did not take a firm position on whether Title IX required such accommodations, merely asserting that the matter required further “study” and should be left to state and local officials to decide. The Boyertown administrators decided to continue the policy they were following. This lawsuit was first filed in March 2017, with an amended complaint adding more plaintiffs on April 18.

The complaint asserted claims under the 14th Amendment, Title IX, and Pennsylvania common and statutory law (the Public School Code, which mandates that public schools provide separate facilities for boys and girls).

They claimed a substantive due process violation (privacy), hostile environment sex discrimination in violation of Title IX, and Pennsylvania common law invasion of privacy in violation of public policy.

Judge Smith’s opinion thoroughly dissects the plaintiff’s arguments and carefully distinguishes the cases they cite as precedents, taking the perspective that the issue in deciding the motion for preliminary injunction is whether to preserve the status quo (the school district’s current policy of allowing transgender students, with permission given on a case-by-case basis depending upon their stage of transition and gender presentation, to the use the facilities with which they are comfortable), or to upset the status quo by requiring transgender students to restrict themselves to using single-user facilities or those consistent with their sex as identified at birth. There is a strong bias in considering preliminary injunctions in favor of preserving the status quo, so the plaintiffs had a heavy burden to persuade the court that they were likely to prevail on the merits of their claim in an ultimate ruling, and that the status quo policy inflicted real harm on them that would outweigh the harm that halting the policy would impose on the transgender students and the district. As to both of those issues, Judge Smith found that plaintiffs had failed to make their case.

In particular, the school’s alteration and expansion of its facilities had significantly undermined the privacy arguments, and the court easily rejected the contention that the possibility of encountering one of about half a dozen transgender students in a high school with well over a thousand students had created a “hostile environment” for cisgender students. The court also noted that the common law privacy precedents concerned situations where the individual defendants had physically invaded the private space of the plaintiffs. In this case, the individual defendants are school administrators, none of whom had personally invaded the private space of students using restroom and locker room facilities.

Judge Smith devoted a substantial portion of his opinion to recounting expert testimony, presenting a virtual primer on the phenomena of gender identity, gender dysphoria, and transition from a medical and social perspective. The opinion clearly and strongly rejects the plaintiffs’ argument that this case is about boys invading girls’ facilities or vice versa. The tone and detail of the opinion reflect the considerable progress that has been made in educating courts and the public about these issues.

On the plaintiff’s likelihood of ultimately winning their case on the merits, Judge Smith pointed to the most definitive appellate ruling so far on the contested transgender bathroom issue, a recent decision by the U.S. Court of Appeals for the 7th Circuit involving a lawsuit by Ash Whitaker, a transgender student, against the Kenosha (Wisconsin) school district, which the
school district asked the Supreme Court to review, coincidentally on the date that Judge Smith released this opinion (see separate article in this issue of Law Notes). No other federal circuit appeals court has issued a ruling on the merits of the constitutional and Title VII claims being put forth on this issue, although the 4th Circuit had in 2016 dictated deference to the Obama Administration’s interpretation in Gavin Grimm’s lawsuit against the Gloucester County (Virginia) school district, only to have that decision vacated by the Supreme Court last spring after the Trump Administration “withdrew” the Obama Administration’s “Dear Colleague” letter. That case is still continuing, now focused on a judicial determination of the merits after the filing of an amended complaint by the ACLU (see story elsewhere in this issue of Law Notes).

Because ADF is on a crusade to defeat transgender-friendly facilities policies, it will most likely seek to appeal this denial of injunctive relief to the 3rd Circuit, which has yet to weigh in directly on the issue, although there are conflicting rulings by district courts within the circuit in lawsuits brought by transgender students. ADF’s first step could be to seek emergency injunctive relief from the Circuit court and, failing that, the Supreme Court (which had during the summer of 2016 granted a stay of the preliminary injunction issued in the Grimm case). If the Supreme Court grants the Kenosha school district’s petition, as seems likely, the underlying legal issues may be decided during its 2017-18 Term, before the Boyertown case gets to a ruling on the merits of plaintiffs’ claims.

Judge Smith was nominated to the district court by President Obama in 2013, winning confirmation from the Senate in 2014. A substantial part of his prior career involved service as a military judge, followed by a period of private practice and then service as a state court judge. In his Senate confirmation vote he received more votes from Republicans than Democrats. The Washington Post reported at the time that Smith was the first Obama judicial nominee to win more Republican than Democratic votes. ■

Supreme Court of India Finds a Constitutional Right to Privacy

On August 24, in Puttaswamy v. Union of India (WRIT PETITION (CIVIL) NO 494 OF 2012), an exceptional nine-judge panel of the Supreme Court of India (which has 25 judges who generally sit in two-judge panels) made an order declaring: “The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution [of India].” In addition to the four-page “Order of the Court”, the nine judges wrote six separate opinions totaling 543 pages! (The full text of the opinion can be found at: http://supremecourtofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf)

A challenge to a national identity card scheme gave rise to the finding of a constitutional right to privacy. Although the Court’s focus was informational privacy and data protection, five of nine judges commented on the potential application of the right to privacy to Section 377 of the Indian Penal Code, which prohibits “carnal intercourse against the order of nature” (penile penetration of a mouth or anus, but not a vagina), and stigmatizes more LGBT people than any similar criminal law in the world. (India has the second largest population in the world. The largest country by population, China, does not treat the conduct in question as criminal.)

The opinion by Justice Chandrachud, writing for Chief Justice Khehar, Justice Agrawal, Justice Nazeer and himself, concluded (emphasis added): “Privacy is the constitutional core of human dignity. . . . Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”

At paragraphs 124-128, under the heading “Discordant Notes,” Justice Chandrachud discussed the December 2013 judgment of a two-judge panel of the Supreme Court, which had reversed the Delhi High Court’s 2009 decision to “read down” Section 377 as not applying to private, consensual, adult sexual activity, to make it comply with the Constitution. Justice Chandrachud rejected the reasons given by the two-judge panel, for reversing the Delhi High Court’s historic gay rights ruling: “The size of India’s LGBT minority (“a miniscule fraction of the country’s population”), the irrelevance of legal developments outside India (which must have pleased the late Justice Scalia), and the small number of prosecutions under Section 377. On the contrary, Justice Chandrachud wrote:

“The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. . . . Sexual orientation is an essential attribute of privacy. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.”

Justice Chandrachud added that “[t]he view in Koushal [the 2013 decision] that the [Delhi] High Court had erroneously relied upon international precedents ‘in its anxiety to protect the so-called rights of LGBT persons’ is similarly, in our view, unsustainable. . . . Their rights are not ‘so-called’ but are real rights founded on sound constitutional doctrine. . . . Sexual orientation is an essential component of identity. Equal protection demands protection of the identity of every individual without discrimination. . . . The decision
in *Koushal* presents a de minimis rationale when it asserts that there have been only two hundred prosecutions for violating Section 377. The de minimis hypothesis is misplaced because the invasion of a fundamental right is not rendered tolerable when a few, as opposed to a large number of persons, are subjected to hostile treatment. The reason why such acts of hostile discrimination are constitutionally impermissible is because of the chilling effect which they have on the exercise of the fundamental right in the first place. . . . The chilling effect on the exercise of the right poses a grave danger to the unhindered fulfilment of one’s sexual orientation, as an element of privacy and dignity. The chilling effect is due to the danger of a human being subjected to social opprobrium or disapproval, as reflected in the punishment of crime. Hence the *Koushal* rationale that prosecution of a few is not an index of violation is flawed and cannot be accepted. Consequently, we disagree with the manner in which *Koushal* has dealt with the privacy – dignity based claims of LGBT persons on this aspect. Since the challenge to Section 377 is pending consideration before a larger [five-judge] Bench of this Court, we would leave the constitutional validity to be decided in an appropriate proceeding.” Justice Kaul agreed with the criticisms of *Koushal* made by the four judges (at para. 80 of his own opinion): “One’s sexual orientation is undoubtedly an attribute of privacy.”

With five of nine judges expressly disagreeing with *Koushal*, it seems likely that the five-judge bench will “read down” Section 377 and consign blanket criminalization of certain forms of same-sex sexual activity in India to history. Such a judgment, if and when it is issued, would provide very persuasive support for potential future challenges to similar British colonial laws in Pakistan, Bangladesh, Sri Lanka, Myanmar, Malaysia, Singapore and Brunei, as well as in Africa and the Caribbean. – Robert Wintemute

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**6th Circuit Denies Asylum in Honduran HIV-Related Economic Persecution Case**

The U.S. Court of Appeals for the Sixth Circuit has denied a Honduran woman (and her derivative daughter’s) applications for asylum, withholding of removal, and Convention against Torture relief based upon her claim she had and would suffer persecution on account of being a business owner subject to extortion and because she is HIV-positive, in *Diaz-Gonzales v. Sessions*, 2017 WL3142312, 2017 U.S. App. LEXIS 13649 (6th Cir., July 25, 2017).

Petitioner lived with her husband and children in Honduras, where they ran a family business. She learned in 2008 that she was HIV-positive and believes that the business’s sales of prepared food declined because people knew her HIV status and believed the food to be “contaminated.” She also had several adverse encounters in Honduras, one involving a robbery, another involving a man who threatened to kill her and rape her daughters if she told anybody and failed to pay them monthly sums. Eventually she and her also-petitioning daughter decided to flee to the United States to avoid persecution and surrendered to border officials upon their arrival. Their case was heard jointly before an Immigration Judge.

Petitioner claimed she qualified (and her daughter qualified as a derivative) for asylum as a member of a particular social group of business owners subject to extortion and persecution and further that she qualified under a separate social group of persons living with HIV. Both claims were denied by the Immigration Judge, who was affirmed by the Board of Immigration Appeals. Petitioner timely appealed the Board’s decision by filing a petition for review.

Writing for a 6th Circuit panel, Circuit Judge Jane B. Stranch first held that binding case law had already decided that “one’s status as a business owner who refuses to pay extortion demands does not constitute a protected social group,” and further that Petitioner had waived the issue because she did not raise it on appeal.

With respect to the HIV social group argument, Judge Stranch noted that the Immigration Judge found Petitioner’s testimony credible that her “HIV status was one of many reasons for the difficulty in running her business,” but agreed with the Immigration Judge and the Board that Petitioner had not experienced past harm “rising to the level of past persecution.”

With respect to future persecution, Judge Stranch referenced a recent case in which the Seventh Circuit had remanded for further consideration the case of an HIV-positive Honduran man who claimed he would suffer persecution not only because of his HIV status but because he would further be presumed to be homosexual because of the HIV status. See *Valasquez-Banegas v. Lynch*, 846 F.3d 258 (7th Cir. 2017).

Judge Stranch distinguished the Petitioner’s case, however, because she had made no claim she would be perceived as homosexual and suffer further persecution because of it. Judge Stranch stated that “although [Petitioners] have pointed out very real challenges facing those with HIV in Honduras . . . Petitioner has not shown that economic hardship due to decreased business caused by the stigma of HIV is ‘sufficiently severe’ to rise to the level of economic persecution.”

Judge Stranch noted that Petitioners now requested “humanitarian asylum,” but unfortunately had failed to make this request to the Board, and that the court had no jurisdiction over a claim that has not exhausted the administrative process. Finally, finding that Petitioners had failed to show they are refugees, Judge Stranch ruled that they were also ineligible for withholding of removal and dismissed the petition for review. – Bryan Johnson-Xenitelis

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6th Circuit Denies a Gay Somali Man’s Petition to Review Adverse BIA Orders

A sk any gay person about his or her experience of coming out. Such stories are frequently characterized by periods of denial, lies to loved ones, and fear. Unfortunately, Mohammed Ahmed Ali’s coming-out story had the added stress of fleeing Somalia for the United States. On August 7, 2017, a three-judge panel of the 6th Circuit Court of Appeals denied Ali’s petition to review two adverse orders by the Board of Immigration Appeals (BIA). *Ali v. Sessions*, 2017 WL 3381895, 2017 U.S. App. LEXIS 14641 (6th Cir. 2017). Ali challenged the BIA’s dismissal of his appeal from an Immigration Judge’s (IJ) denial of his application for asylum, withholding of removal, and protection under the Convention against Torture (CAT). He also challenged the denial of his motion for reconsideration or reopening to a three-member panel of the BIA.

Ali is a Somali citizen who was detained on November 16, 2015, for entering the United States with a fake passport and no other identification. The Sunni Muslim man was 28 years old at the time, and was previously married to a Somali woman. While detained, Ali told authorities that he fled Somalia after he had sexual intercourse with Noor Amed, a male friend, while they were intoxicated. The men’s families, tribal elders, and religious leaders then decided to kill Ali for violating their Islamic faith. While recounting his escape, Ali also told authorities that it was the first time he had sexual relations with another man, that he was not gay, and that he liked both men and women.

Though Ali conceded removability, he later filed an application for asylum, withholding of removal, and protection under the CAT. He feared he would be killed or tortured if he returned to Somalia, and claimed that other gay youths, including Amed, were stoned to death.

With the assistance of an interpreter during a merits hearing on April 6, 2016, Ali testified as the sole witness before an IJ. However, the IJ ultimately denied Ali’s application because Ali was not a credible witness. Ali’s testimony contained four primary inconsistencies: (i) whether Amed was stoned to death, or left Somalia; (ii) who brought the alcohol to Ali on the night he slept with Amed; (iii) how the men’s sexual activity was discovered; and (iv) whether Ali only feared Amed’s family or also feared his own family, tribe, religious leaders, and/or the East African Islamist militant group Al-Shabaab. The IJ also found, in the alternative, that Ali had not alleged past persecution nor demonstrated that it was more likely than not that he would be persecuted on the same grounds.

Lastly, the IJ concluded that Ali failed to prove entitlement to relief under the CAT. Ali then filed a timely appeal that was denied by the BIA. Afterwards, the board also denied his motion to reconsider or reopen the proceedings in front of a three-member panel.

Writing for panel, Circuit Judge Ralph B. Guy, Jr., first addressed Ali’s challenges to the BIA’s review of the IJ’s adverse credibility determination. The court quickly dismissed Ali’s contentions that the BIA (i) did not identify or use the correct standard of review and (ii) erred by not regarding the IJ’s decision as a finding of “partial credibility.” The BIA’s orders expressly stated that it applied the clear error standard rather than the substantial error standard, which the 6th Circuit held as the correct application. Furthermore, the IJ expressly stated, “The Court finds the respondent not credible.”

An adverse credibility determination is generally fatal to an applicant’s claims when he relies principally on his own testimony. *Slyusar v. Holder*, 740 F.3d 1068, 1072 (6th Cir. 2014). Thus, Ali alternatively contended that he qualified for relief, despite the adverse credibility determination, due to independent evidence in the record sufficient to meet his burden of proof. *See Yao Shi v. Holder*, 530 F. App’x 557, 559 (6th Cir. 2013); *Vakeesan v. Holder*, 343 F. App’x 117, 125 (6th Cir. 2009). However, the court pointed out that there was no such evidence available because Ali relied solely on his own discredited testimony.

Interestingly, the court never considered why the discrepancies existed, particularly Ali’s changed stance of being gay. Given his religious upbringing and the added threat posed by the Somali government, it appears that he only began to come to terms with his sexuality when he fled the country. Additionally, the court never questioned why there was a lack of independent evidence. Obviously, a man in a foreign country does not have many allies, especially when his family and community decided to kill him.

Next, Judge Guy addressed Ali’s challenge to the BIA’s finding that he did not establish he was entitled to relief under the CAT. Under the CAT, an applicant is entitled to relief upon showing that it is more likely than not that he would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2). 6th Circuit precedent holds that torture includes the intentional infliction of physical pain upon an individual at the acquiescence of a public official. *Bi Qing Zheng v. Lynch*, 819 F.3d 287, 294-95 (6th Cir. 2016). Such acquiescence requires a public official to have awareness of the torture before it happens, thereby breaching of his or her legal responsibility to prevent the torture. 8 C.F.R. § 1208.18(a)(7).

Here, the court held that Ali failed to show that the alleged executions of homosexuals in Somalia are done with official instigation, consent, or acquiescence. It appears that Ali did not clarify whether or not Al-Shabaab controlled his region. Referencing a 2016 report by Ben Christman on the treatment of homosexuals in Somalia, the court notes that Al-Shabaab imposes the death penalty on homosexuals in regions the militant group controls. Otherwise, regions not controlled by Al-Shabaab impose jail sentences lasting up to three years; notably, the Christman Report deemed these Somali prisons as inhumane under the United Nation’s standards. This author finds the court’s reliance on which regime retained control of Ali’s home to be unnecessary. Clearly, both regimes acquiesce in the intentional infliction of pain on
homosexuals—one allows executions, while the other allows for imprisonment in substandard facilities. Even so, one cannot help but wonder whether either regime can be said to have breached its legal responsibility to prevent the torture, when both prescribe such treatment in their laws.

Lastly, Judge Guy rejected Ali’s challenge to the BIA’s dismissal of his motion for reconsideration or reopening to a three-member panel. First, the 6th Circuit concluded that the BIA did not abuse its discretion in denying Ali’s motion for reconsideration because the board applied the correct standard of review, did not misread the IJ’s credibility determination, and reasonably concluded that Ali was not a partially credible witness. The court also found that the BIA did not abuse its discretion in denying Ali’s motion to reopen because Ali did not provide newly available evidence of changed country conditions, nor did he establish prima facie eligibility for relief or that he had a particularized risk of being subjected to harm or torture if returned to Somalia; the exhibits he prepared for his motion merely reiterated his fear of returning to the country. Lastly, the court declined to review the BIA’s refusal to assign Ali’s motion to a three-member panel. Judge Guy stated that while other circuits remain split on whether the BIA’s assignment decisions are subject to judicial review, the 6th Circuit has repeatedly found it unnecessary to decide the issue. Amezola-Garcia v. Lynch, 846 F.3d 135, 140 n.2 (6th Cir. 2016); Lopez-Salgado v. Lynch, 618 F. App’x 828, 833-34 (6th Cir. 2015). Here, the court had already determined that the BIA applied the correct standard in reviewing the IJ’s determination, and that the BIA’s findings were supported by substantial evidence. Even so, it appears plausible that the court, BIA, and IJ overlooked unquestioned testimony regarding why Ali fled, his death sentence, and the Christian Report’s express recommendation that homosexuals should not be returned to Somalia due to persecution.

Ali was represented in this appeal by George P. Mann and Maris J. Liss of George P. Mann & Associates, Farmington Hills, MI. – Timothy Ramos (NYLS class of 2019)

4th Circuit Revives Gay Hate Crime Prosecution

The U.S. Court of Appeals for the 4th Circuit has revived a federal hate crime prosecution against a man who physically assaulted a gay co-worker without provocation at an Amazon Fulfillment Center in Chester, Virginia. U.S. District Judge John A. Gibney, Jr. (E.D. Va.), had dismissed the case, accepting defendant James William Hill, III’s argument that prosecuting him would violate Congress’s constitutional authority to enact legislation under the Commerce Clause, because his conduct was not motivated by any desire to interfere with interstate commerce and was a purely private dispute. United States v. Hill, 2017 WL 3575241, 2017 U.S. App. LEXIS 15678 (August 18, 2017). According to the opinion for the appeals court by Judge Dennis W. Shedd, the indictment against Hill alleges that he “willfully caused bodily injury to C.T. because of C.T.’s actual and perceived sexual orientation” in violation of the Hate Crimes Prevention Act of 2009, and that this was sufficient to withstand a motion to dismiss the indictment. An opinion agreeing that the case can be prosecuted but dissenting from the “basis for the judgment” by the panel, was written by Judge James A. Wynne, and provides more factual details about the case. Wynne charged the majority with failing to confront an important question about the application of the federal hate crimes law that was directly presented by this case.

C.T. was preparing packages for interstate shipment when Hill assaulted him around 7:00 p.m. on May 22, 2015. According to Wynne, “Defendant approached C.T. from behind and – without provocation or warning – repeatedly punched him in the face. As a result of the attack, C.T. sustained numerous injuries, including a bloody nose, abrasions on his nose and cheeks, and lacerations and bruising around his left eye. Following the incident, neither Defendant nor C.T. returned to their work stations for the remainder of their ten-hour shifts. Their absences affected more than 5,500 items, which were either not shipped or not ‘re-binned’ during that time.” After the incident, Hill provided a statement to Amazon’s staff and subsequently to the Chesterfield County police. Both times, he stated that he “felt disrespected by C.T. because C.T. was a homosexual; that he does not like homosexuals; and that C.T. deserved to be punched because he was a homosexual.” “Hill offered no other explanation for the assault,” wrote Judge Wynne.

Because Virginia’s hate crimes law does not cover sexual orientation, the local prosecutor referred the case to the U.S. Attorney. Six months later, the Attorney General (at that time Eric Holder) certified that prosecuting Hill under the federal law “is in the public interest and is necessary to secure substantial justice.” The case was presented to a federal grand jury, which returned an indictment alleging one count of a violation of the federal hate crime law. The indictment states that Hill “interfered with commercial and other economic activity in which C.T. was engaged at the time of the conduct” and that the assault “otherwise affected interstate and foreign commerce.” These statements about commerce may seem strange, but they are necessary in order for the federal Hate Crimes Prevention Act to apply. Congress does not have broad power to enact criminal statutes. Its power is limited by the categories listed in Article I of the Constitution, which do not include general power to pass criminal statutes. Congress does have power to regulate interstate commerce, so it justified passing the federal hate crime law by providing that it applies to crimes that somehow affect interstate commerce. In relation to this case, the crucial language is that the conduct “interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or otherwise affects interstate or foreign commerce.” Judge Gibney concluded, mistakenly, that only an economic crime would fit this jurisdictional requirement.

Writing for the majority of the panel, Judge Shedd found that “the indictment specifically alleges that Hill’s conduct
had an effect on interstate commerce,” and as such “is legally sufficient and does not present an unconstitutional exercise of Congressional power.” Hill’s motion to dismiss the indictment was not a facial challenge to the constitutionality of the law, but rather an “as-applied” challenge, arguing, in effect, that Congress could not constitutionally turn an assault in a private business establishment involving co-workers into a federal offense. The factual question, wrote Shedd, is “whether Hill’s conduct sufficiently affects interstate commerce as to satisfy the constitutional limitations placed on Congress’s Commerce Clause power” and this “may well depend on a consideration of facts, and because the facts proffered here” in the indictment “may or may not be developed at trial, it is premature to determine the constitutional issues.” Shedd noted prior cases holding that “an indictment that tracks the statutory language is ordinarily valid.”

Thus, it was inappropriate for District Judge Gibney to dismiss an as-applied challenge to the prosecution when the indictment, tracking statutory language, asserted that the assault had “interfered with commercial and other economic activity in which C.T. was engaged at the time of the conduct” and that the assault “otherwise affected interstate and foreign commerce.” This, according to Shedd’s opinion, was sufficient to meet the requirement that a federal indictment inform the defendant of the nature of the crime and allege facts sufficient to meet the statute’s jurisdictional requirement. “Facts outside of an indictment should not be used to conclusively decide whether an element of a criminal offense is satisfied during a pretrial motion,” wrote Shedd, “and a Congressional statute should not be overturned on an incomplete record.”

This was too timid to satisfy Judge Wynne. “On review to this Court,” he wrote, “the majority opinion now ignores the district court’s basis for dismissing the indictment and instead concludes that, because the government’s indictment sets forth the charged offense in the language of the statute, it satisfies the specificity requirement imposed by Fifth and Sixth Amendments.” To Wynne, the question posed is: “Whether Congress can enact a statute, pursuant to its authority to regulate interstate commerce, proscribing the physical assault of a victim whose job involves packing products for interstate sale and shipment and who is doing that job at the time of the assault?” Wynne argued that a proper answer to this question would lead to the conclusion that the statute “easily falls under Congress’s broad authority to regulate interstate commerce.” He cited a recent Supreme Court decision, Taylor v. United States (2016), holding that “Congress has the authority to regulate criminal conduct that interferes with ongoing commercial activity.”

“Cavalierly, the majority ducks the only issue in this case and instead decides an issue that was neither presented by the parties nor addressed by the district court,” he charged. “The only issue in this case is one of first impression and of great importance – it was addressed by the district court and has now been placed squarely before us by the parties. We should not, on our own volition, create a basis for avoiding it.”

Judge Wynne makes an important point. The 2009 enactment of this statute was the first successful legislative achievement of the Obama Administration’s LGBT rights agenda, and the focus of much agitation by LGBT political groups, but there was always a question whether it would have significant application in the real world beyond a symbolic declaration by Congress that committing a violent crime because of a victim’s sexual orientation was wrong, precisely because of the constitutional limitation on Congress’s authority.

The main practical purpose of the statute was to fill the gap left by the many states that have balked at including sexual orientation in their state hate crimes laws, as is the case with Virginia. Thus far, there have actually been few successful prosecutions of anti-gay hate crimes under this law, despite the continuing epidemic of anti-gay violence in many parts of the country, because of the limitation that the statute applies only if the jurisdictional requirements are met, and only where local prosecutors are not empowered specifically to prosecute anti-gay hate crimes. Successful prosecutions have involved crimes committed with cars traveling on interstate highways, or using weapons that had been sold across state lines, but, as Judge Wynne points out, this is the first case to present the question whether a physical assault of one worker against another in a private (that is, non-governmental) workplace is covered by the law.

And, as Judge Wynne pointed out, in a certain sense this case is a no-brainer. This workplace is an Amazon Fulfillment Center, selecting and packaging thousands of goods for shipment to on-line customers in many different states. Any interruption in workplace activity would clearly affect the shipment of goods in interstate commerce, and an assault that at least temporarily disables the victim from performing his job will clearly interfere with commerce. Wynne pointed to the cases in which the Supreme Court has found that even a slight interference with commercial activity can provide the basis for applying a federal regulation. Missing several hours of a shift, delaying the dispatch of thousands of parcels, would clearly seem to qualify.

Hill argued that his assault was not motivated by any attempt to interfere with commerce, and thus did not come within the statute, but, wrote Wynne, “the Supreme Court has recognized that the economic or non-economic nature of proscribed conduct turns on whether the conduct can be shown to affect economic activity subject to congressional regulation – and therefore interstate commerce – and not whether the perpetrator of the conduct was motivated by economic interest. Indeed, we have consistently rejected the argument that a defendant must intend for his criminal conduct to affect interstate commerce for such conduct to be susceptible to congressional regulation under the Commerce Clause.”

For example, he wrote, “this Court and other circuits have concluded that federal arson statutes may be applied against defendants who set fire to property used in interstate commerce, notwithstanding that such defendants
were motivated by purely personal reasons, and not any economic interest.” He insisted that “there is no constitutional or logical basis to conclude that the Commerce Clause authorized Congress to regulate interference with one factor of production (capital in the form of real property), but not another (labor). On the contrary, the Supreme Court’s longstanding recognition that Congress may pervasively regulate the labor market and the terms and conditions of employment indicates that Congress may proscribe conduct that interferes with labor as well as capital.”

Thus, Wynne decisively rejected Judge Gibney’s holding that because Hill’s conduct was not an economic crime, it could not be constitutionally prosecuted in federal court, or that allowing the prosecution to go forward would violate Hill’s constitutional right to a presumption of innocence until proven guilty.

“The immediate impact of Defendant’s assault of C.T. on ongoing commercial activity demonstrates a sufficient relationship to interstate commerce to support Defendant’s prosecution under the Hate Crimes Act,” wrote Wynne, and because Hill had failed to make a plain showing to the contrary, the case should be allowed to go forward. Of course, in order to secure a conviction, the government will have to prove actual interference with commerce by presenting relevant evidence at trial. Wynne rejected the argument that because the indictment did not specifically state how much interference had taken place, it was jurisdictionally defective, noting that so long as any interference could be shown, the jurisdictional requirement would be satisfied.

Ending his dissent, Wynne chided the majority for producing an opinion that “elides” the important issue of whether anti-gay violence in the workplace in the form of an assault with fists (rather than a weapon such as a pistol that has moved across state lines) can be prosecuted under the federal Hate Crimes law. The question remains unanswered, but at least Wynne’s dissenting opinion is published and can provide some persuasive support for a future prosecution.

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**New Jersey Appellate Division Finds Father’s Beating of Son Due to Son’s Sexuality to be Abuse and Neglect**

In a May 24, 2017 *per curiam* opinion, the Appellate Division of the New Jersey Superior Court upheld the Family Part’s finding that a father, motivated by anti-gay bias, who punched his son so hard the son lost consciousness, had abused and neglected his son within the meaning of N.J.S.A. 9:6-8.21(c)(4) (b). *New Jersey Div. of Child Prot. & Permanency v. N.H.*, 2017 N.J. Super. Unpub., LEXIS 1783.

According to New Jersey law, an abused or neglected child is “a child less than 18 years of age . . . whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of . . . his parent or guardian . . . unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment.”

N.H., biological father of N.H. Jr. (given the pseudonym Neil in the opinion), assaulted his then-15-year-old son in the fall of 2013 because he was wearing makeup.

New Jersey Div. of Child Prot. & Permanency v. N.H.

N.H., biological father of N.H. Jr., assaulted his then-15-year-old son in the fall of 2013 because he was wearing makeup.

result of . . . his parent or guardian . . . unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment.”

N.H., biological father of N.H. Jr. (given the pseudonym Neil in the opinion), assaulted his then-15-year-old son in the fall of 2013 because Neil was wearing makeup. In the verified complaint filed by the Division of Child Protection & Permanency, the Division alleged that N.H. had punched Neil “‘hard in his mouth with a closed fist.’ The force of the blow was so severe that it left the child momentarily unconscious and knocked loose one of his front teeth. Neil told the Division investigator that his father attacked him because he was wearing makeup as an expression of his sexual orientation.” The Division investigated “made a smart remark” in response to his father’s yelling, his father punched him in the face. The blow apparently knocked out one of Neil’s front teeth. Broyles also testified that Neil had alleged physical abuse at his father’s hands for approximately a year and a half, with N.H. calling him slurs “such as ‘fairy’ and ‘faggot.’” Neil’s stepmother, an employee of the Division, was present during these assaults, but no one called the police. Apparently, Neil told Broyles that his stepmother often stood up for him and stopped N.H.’s abuse, but she was afraid to report N.H.’s violent behavior to the Division.

Neil had a knife in his pocket, the handle of which N.H. claims to have seen when he began chastising Neil for not taking out the garbage. The father reported to Broyles he believed his son’s
tooth fell out when “he grabbed his son to prevent him from doing anything drastic.” They then struggled and fell to the floor. When Broyles questioned Neil about the knife, he denied threatening his father with it.

However, on cross-examination during the hearing, N.H. denied admitting to Broyles that he struck his son on November 18, 2013. N.H. also testified that the injury to his left hand had nothing to do with striking his son in the face, and that as far as his son’s sexual orientation was concerned, this was not a problem for N.H. and he “still loved him the same.” N.H. testified he did tell his son not to wear makeup out of a concern for his protection and that the altercation on November 18th had nothing to do with his sexuality.

The Family Part judge found N.H.’s testimony not to be credible and accepted the Division witnesses’ testimony describing Neil as “looking ‘like a beaten puppy, upset, afraid to go home, meek.’”

The Appellate Division upheld the Family Part’s finding that the violence in this case was “excessive corporal punishment.” The court went on to cite precedent stating “a single incident of violence against a child may be sufficient to constitute excessive corporal punishment. A situation where a child suffers a fracture of a limb, or a serious laceration, or any other event where medical intervention proves to be necessary may be sufficient to sustain a finding of excessive corporal punishment . . .” N.J. Div. of Youth & Family Servs. v. K.A., 413 N.J. Super. 504, 512, 996 A.2d 1040 (App. Div.).

Finally, the court wrote, “we conclude the violence defendant inflicted on his son was motivated, in large part, by defendant’s odious homophobic repudiation of his son’s sexual orientation. This make’s defendant’s actions particularly reprehensible.” – Matthew Goodwin

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York, specializing in matrimonial and family law.
With respect to the defendant’s claim that Ayala lacked standing, Judge Winmill explained that the plaintiff bore the burden of showing three elements: “(1) she suffered an injury in fact, (2) the injury is fairly traceable to the defendant, and (3) it is likely that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Judge Winmill noted that Ayala claimed the application of three Idaho statutes violated her fundamental due process and equal protection rights under the Fourteenth Amendment. In her complaint, Ayala alleged that the three statutes, “facially, and as applied, discriminate on the basis of sexual orientation and sex.” Rejecting Ayala’s argument that Idaho’s statutes facially discriminated, Judge Winmill analyzed only the “as applied” challenge to each statute. Winmill analyzed Idaho’s Paternity Act, Vital Statistics Act, and Artificial Insemination Act (Idaho Codes §39–255(e)(1), 39–5405(3), § 7–1106) individually.

Addressing Idaho Code § 39-255(e) (1), Judge Winmill observed that the code “provides that if the birth mother is married, the name of the husband is entered as father on the birth certificate unless there has been judicial determination or affidavit establishing he is not the biological father.” Finding that Idaho had prevented Ayala from being married to L.O.A.’s birth mother at the time of conception or birth, Judge Winmill reasoned that the statute had prevented Ayala from being entered as a parent on L.O.A.’s birth certificate. As a result, Ayala was prevented from having all the rights of a legal parent. Winmill reasoned that the injury was both directly traceable to Idaho’s “unconstitutional laws preventing same-sex marriage and parenthood based on marriage,” and that the injury would likely be redressed by a favorable decision. Accordingly, the Judge held that Ayala had standing to pursue the claim and that I.C. § 39-255(e)(1) was unconstitutional as applied to her.

With respect to Idaho Code §39-5405(3), Judge Winmill observed that the code “gives the husband of a married mother who gave birth through artificial insemination parental rights if he consented to the artificial insemination.” Likewise Judge Winmill found the injury directly traceable to Idaho’s unconstitutional laws, and found the injury likely to be redressed by a favorable decision. Accordingly, Judge Winmill found Ayala had standing to pursue a claim that I.C. § 39-5405(3) was unconstitutional as applied to her.

The third statute, Idaho Code § 7-1106, permits “the alleged father of a child to acknowledge paternity even though he is not married to the child’s mother.” Citing Idaho Code § 7-1103(4), Judge Winmill noted, “for the purpose of Section 7-1106, ‘father’ refers to the biological father of a child born out of wedlock.” Finding that Ayala had not asserted that she was the biological parent of L.O.A., Judge Winmill held that Ayala did not have standing to challenge I.C. § 7-1106 and dismissed that claim.

In her complaint, Ayala asked the court “to enjoin Defendants from continuing to enforce their policy, custom, and practice of denying same-sex couples the ability to (1) file a voluntary acknowledgement of paternity affidavit; (2) file a consent and request form for a child conceived and born by artificial insemination; and (3) obtain a two-parent birth certificate.” Moreover, Ayala sought an injunction ordering Defendants to issue an amended birth certificate recognizing Ayala as L.O.A.’s parent.

“To obtain injunctive relief,” wrote Judge Winmill, “a party must show: 1) a likelihood of success on the merits; 2) a likelihood of irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in plaintiff’s favor; and 4) an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

Analyzing the likelihood of success on the merits of the case, Judge Winmill reasoned that Ayala would “likely succeed on her assertion that, but for Idaho’s unconstitutional law prohibiting same-sex marriage, Ayala would have been married to L.O.A.’s birth mother at the time of conception and birth, and therefore would have been listed as a parent on L.O.A.’s birth certificate pursuant to I.C. § 39-255 and I.C. §39-5405.”

However, Winmill completely dismissed the remaining requests for permanent injunction. Finding that the ability to file a voluntary acknowledgement of paternity affidavit was related to I.C. § 7-1106, Judge Winmill dismissed the first request for lack of standing.

With respect to the latter two requests, Judge Winmill reasoned that they were “untethered to marriage, which is at the heart of why the statutes were discriminately applied to Ayala.” Further, Judge Winmill found that “there is no assertion that the statutes are currently being applied differently to same-sex couples than heterosexual couples.” Instead, Justice Winmill contended the claims affected a small group of individuals – those “where one member of the couple gave birth to a child, but the other member of the couple was prevented from being listed on the child’s birth certificate because of the State of Idaho unconstitutionally prevented the couple from marrying at some point in the past.”

Addressing the issue of irreparable harm, Judge Winmill acknowledged that Ayala and L.O.A. “will be irreparably harmed if the status quo is not maintained until this case is resolved.” However, Judge Winmill observed that there was no immediate fear of irreparable harm or immediate need to issue an amended birth certificate, since Oquendo had declared “that she believed Ayala should be legally declared L.O.A.’s parent.”

Here, Judge Winmill concluded that the balance of hardships tipped in favor of Ayala, and that “the public has an interest in maintaining the relationship between Ayala and L.O.A.” Consequently, Judge Winmill reasoned that public interest warranted an injunction that Ayala remain L.O.A.’s foster parent until the case is resolved.

Accordingly, Ayala’s motion for permanent injunction was granted in part and denied in part, and the defendants’ motion to dismiss was granted in part and denied in part. – *Chan Tov McNamarah (Cornell Law School class of 2019)*
The South Carolina Supreme Court finds some gays are protected from domestic violence

The plaintiff in the case would not be protected by the court’s decision to invalidate the definitional portion of the law.

The plaintiff in the case would not be protected by the court’s decision to invalidate the definitional portion of the law.
question of a remedy. He found that both of the state’s domestic violence statutes contain severability clauses, under which the court could strike out unconstitutional provisions while otherwise leaving the statute in effect. “In this case,” he wrote, “the test for severability is met. Specifically, all provisions of the Acts, save the discriminatory definitions, are capable of being executed in accordance with the legislative intent. Further, it may be fairly presumed the General Assembly would have passed each Act absent the offending provision, and both Acts contain severability clauses. Therefore, the remedy for this constitutional infirmity is to sever the discriminatory provision from each Act. The remainder of each Act – providing domestic violence protection to ‘household members’ defined as a spouse, former spouse, or persons who have a child in common – remain in effect.”

This creates a new problem, however. By stripping out the cohabitation portion of the definition, the court is narrowing the protective scope of the statute to apply only to present or former spouses, or unmarried couples who have a “child in common.” That would provide protection to married same-sex couples but not to other same-sex couples. Cohabitants, whether same-sex or different-sex, would lose the protection of the statute. Arguably, both same-sex and different-sex couples who had a child in common would still be protected, since that part of the definition referred to “persons” rather than to “a male and a female.”

Two members of the five-member court wrote separate opinions because of their discomfort with this result. Chief Justice Donald W. Beatty, while agreeing that the “household member” definitions as they stand violate Doe’s Equal Protection rights, disagreed that the solution was to sever the offending portions of the definitional provisions. “Instead,” he wrote, “in order to remain within the confines of the Court’s jurisdiction and preserve the validity of the Act, I would declare the sections . . . unconstitutional as applied to Doe.” He noted that in her petition Doe claimed that the statutes were both unconstitutional on their face and as applied to her, but, he wrote, “I would find that Doe can only utilize an ‘as-applied’ challenge.”

A facial challenge, he explained, would work only if the statutes had no constitutionally valid application as written. In this case, he argued, the laws were valid as applied to the other kinds of family arrangements described in the definitional provisions. The constitutional flaw, as to which he agreed with Justice Pleiones, was in specifically excluding protection for cohabiting same-sex couples while extending it to different-sex couples. He found that the definitional sections are “facially valid” because they do “not overtly discriminate based on sexual orientation. Though not an all-inclusive list, the statutes would be valid as to same-sex married couples, opposite-sex married couples, and unmarried opposite-sex couples who live together or have lived together. Because there are numerous valid applications of the definition of ‘household member,’ it is not ‘invalid in toto.’”

Turning to the “as-applied” challenge, Justice Beatty concluded that Doe met her burden of “showing that similarly situated persons received disparate treatment.” Although she was arguing for heightened scrutiny in this case, Beatty concluded that was not necessary, as “she seems to concede that the appropriate standard is the rational basis test” and, he concluded, “the definition of ‘household member’ as applied to Doe cannot even satisfy the rational basis test.” Excluding same-sex couples from protection “‘bears no relation to the legislative purpose of the Acts, treats same-sex couples who live together or have lived together differently than all other couples, and lacks a rational reason to justify this disparate treatment.” He referred to statistical evidence concerning domestic violence to show that the need for the statute was just as great for unmarried same-sex couples as for the other categories that were covered by the statutory language. “There is no reasonable basis,” he concluded, “and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabited.”

He observed that the remedy embraced by the majority “is unavailing since the constitutional infirmity still remains. Specifically, protection afforded by the Acts would still be elusive to Doe and would no longer be available to opposite-sex couples who are cohabiting or formerly have cohabited. Yet, it would be available to unmarried persons such as former spouses (same-sex or not) and persons (same-sex or not) with a child in common. Absent an ‘as-applied’ analysis, the ‘household member’ definitional sections must be struck down. As a result, the Acts would be rendered useless. Such a drastic measure is neither necessary nor desired.”

Thus, he would not sever the definitional sections, and would not invalidate the Acts in their entirety, since those steps would leave many victims of domestic violence in South Carolina totally unprotected. Instead, he would declare the definitional sections unconstitutional as applied to Doe and others similarly situated. Thus, the family court could not refuse to provide protection to unmarried same-sex cohabitants, because to do so would violate their constitutional right to equal protection.

Justice John Cannon Few embraced a different approach. Unlike the other members of the court, he found the statutory definitions to be sufficiently ambiguous that the court would be justified in avoiding a constitutional ruling entirely by interpreting the statute to protect unmarried same-sex couples. “Jane Doe, the State, and all members of this Court agree to this central point,” he wrote: “if the Acts exclude unmarried same-sex couples from the protection they provide all other citizens, they are obviously unconstitutional.” But he would not declare them unconstitutional for two reasons: First, Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and thus, there is no controversy before this Court. Second, Doe and the State are correct: ambiguity in both Acts – particularly in the definition of household member – requires this Court to construe the Acts to provide Doe the same protections they provide all citizens, and thus, the Acts are not unconstitutional.”
He pointed out that this “original jurisdiction” action was a suit by Doe against the state. But the state agreed with her, or at least the attorneys representing the state in the current action agree with her. The problem is that the family court wrongly interpreted the statutes to deny her relief based on the definitional sections. But she didn’t appeal that ruling, in which her former partner was the defendant. Since the state now agrees with her that she should be protected, Justice Few wrote, the court should interpret the statute to provide that protection for the future.

Justice Few observed that South Carolina precedent requires courts to avoid declaring a statute unconstitutional unless it is absolutely necessary to do so, unless “its repugnance to the Constitution is clear beyond a reasonable doubt.” Justice Few went through a convoluted explanation of why he found the statutory definition to be ambiguous, mainly due to changes in wording and emphasis over the course of successive amendments, and argued that the majority was misled by its reliance on legislative history and the presumed intent of the legislature when it amended the original definitions. “If the statutory text truly was clear and unambiguous,” he wrote, “the majority would not need to consider legislative history to determine the motives of the General Assembly. The statutory text is not clear, and therefore, this Court must find a way to construe the Acts as constitutional. I respectfully believe Doe and other members of same-sex unmarried couples are covered by the Acts and the Acts are therefore constitutional.”

As noted above, on July 28 the court stayed the ruling. Perhaps it will rethink the remedial issue and amend its opinion. Otherwise, it is up to the legislature to sort things out. The opinion is sufficiently complicated that the initial Associated Press report about the decision fails to explain how the Court’s remedy leaves unmarried couples in South Carolina unprotected – not a result, presumably, that the legislature would favor.

“Jane Doe” is represented by John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., and Bakari T. Sellers and Alexandra Marie Benevento, both of Strom Law Firm, L.L.C., all of Columbia.

Florida Appeals Court Holds Birth Mother’s Constitutional Right Trumps Co-Parent’s Parental Claims

Affirming a decision by Miami-Dade County Circuit Judge Amy Steel Donner to dismiss an action by a lesbian co-parent to reestablish contact with the child born to her former partner whom she was participating in raising for four years prior to the end of the parents’ relationship, a unanimous three-judge panel of the Florida Court of Appeal found that Florida state constitutional privacy precedents entitle the birth mother to exclude her former partner from continued contact with the child. De Los Milagros Castellat v. Pereira, 2017 WL 3495773, 2017 Fla. App. LEXIS 11812 (3rd Dist. Ct. App., Aug. 16, 2017).

The plaintiff and Gisela Lissette Pereira were domestic partners for ten years before their relationship terminated in 2013. Although the women held themselves out as married, Florida law prohibited them from marrying and they did not take advantage of the possibility of marrying in one of the other states that allowed non-resident same-sex couples to marry. They decided to have children together and used donor insemination for Pereira to conceive. In 2009, she gave birth prematurely to twins; one survived only two days, but the other survived with intensive medical care. At the time of birth, both children were given Castellat’s surname, but Pereira was listed as their sole parent on the birth certificates after the U.S. Supreme Court’s Obergefell decision, which some Florida officials had persisted in giving an inaccurately narrow reading). After the mothers’ relationship terminated, Pereira cut off all contact between Castellat and the child and changed the child’s surname without giving any notice to Castellat.

Castellat filed a six-count complaint seeking (1) a determination of parentage pursuant to the Florida parentage statute, (2) a determination of parentage pursuant to “common law implied contract,” (3) a determination of

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third party, but the court explained that over the past two decades Florida courts have developed the state constitutional right to privacy to overrule those earlier cases.

“The Florida Constitution’s express right to privacy states: ‘Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life, except as provided herein.’” (Art. I, Sec. 23, Fla. Const.) In 1998 the Florida Supreme Court declared in *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), that the “state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart.” Based on this broad view of privacy, the Florida courts have recognized a “zone of autonomy” around nuclear families bound by blood and law, and the Supreme Court held in 2013 that this zone protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013). In this context, only a showing that a breach of the zone of privacy is necessary to prevent great harm to a family member will justify the court intruding into the privacy of the biological/legal family. From the birth of the child in this case to the time when the parents’ relationship dissolved, the parents had no legal relationship with each other and the co-parent had no legal relationship with the child. Although they had briefly explored a co-parent adoption, they did not go through with it.

The court found this case to be “remarkably similar” to a 2006 ruling by the 1st District Court of Appeal, *Wakeman v. Dixon*, 921 So.2d 669, in which the court, upholding a dismissal by the trial court, wrote “absent evidence of detriment to the child, courts have no authority to grant custody or compel visitation by a person who is not a natural parent and that agreements providing for visitation by a non-parent are unenforceable.”

Applying that logic to Castellat’s petition, the Court of Appeal observed that the trial court found that “there simply has been no showing of any harm to the child that would warrant government interference with the birth mother’s right as the parent to control who has access to her child.” (Surprisingly, there is no mention here of any attempt by Castellat to present evidence that the abrupt severing of contact between the child and her and the total block on contact since then was psychologically and emotionally harmful to the child, a point that has contributed to a different result in some other jurisdictions.)

Castellat placed her hopes on *D.M.T. v. T.M.D.*, cited above, in which the Florida Supreme Court addressed the unusual circumstances in which both members of the lesbian couple were biological parents of the child, one as egg donor and the other as birth parent. In that case, the court had refused to enforce against the donor a standard form document she had executed which purported to waive her rights as a biological parent, and found that the form was intended to apply to anonymous egg donors, not to a situation where a same-sex couple intended to bear and raise a child together. Then, because the egg donor was the genetic mother of the child, she retained the constitutional right of parentage, and the court, unusually, found that both women had parental rights. The Court of Appeal rejected Castellat’s argument, asserting: “But the former partner is not the biological mother or birth mother. In *D.M.T.*, the Florida Supreme Court expressly approved *Wakeman’s* holding that the lesbian partner who was the birth mother had parental rights protected by the constitution that prevailed over the claims of a partner who was neither the biological nor legal mother, even though the couple clearly intended to raise the children together.”

Quoting the state supreme court further to support its holding, the court said, “As our Supreme Court has held, ‘there may be many beneficial relationships for a child, but it is not for the government to decide with whom the child builds these relationships. This concept implicates the very core of our constitutional freedoms and embodies the essence of Florida’s constitutional right to privacy. The child’s life may well be enhanced by the additional financial, social, spiritual, and emotional support the former partner might provide. But whether the benefits of such support, from a former partner who is neither the biological or legal parent, outweigh possible detriments lies in the hands of the birth mother: the State of Florida cannot wrest that choice from her.’”

In a footnote commenting on the fact that the women had not gone out of state to marry even though they might have had a claim to recognition of such a marriage in Florida under the U.S. Constitution’s full faith and credit clause (a point that was actually established in a Florida Court of Appeal decision two years after these women separated, see *Brandon-Thomas v. Brandon-Thomas*, 163 So.3d 644 (Fla. 2nd Dist. Ct. App. 2015), the court asserted that “the marital status of the parties does not play a role in our analysis of the facts presented in this case.” The statement sounds odd, since presumably today the same-sex marital status of a couple battling over custody or visitation would definitely need to be taken into account, pursuant to the U.S. Supreme Court’s rulings in *Obergefell v. Hodges* and *Pavan v. Smith* requiring that the state must acknowledge the parental status of a woman whose same-sex spouse gives birth to a child, and the entire point of the court’s ruling in this case seems to be that the women were not married when the child at issue was born. It is worth noting that courts in many other states have rejected the reasoning of this case and found that lesbian co-parents do have standing and are entitled to seek continued visitation with the children born to their former non-marital same-sex partners when the women had planned together to have and raise the child and the co-parent had formed a parental relationship with the child. See, e.g., *Matter of Brooke S.B. v. Elizabeth A. C. C.*, 28 NY3d 192 (2016). So this is definitely a “bad old days” decision that strikes one as archaic in light of the direction LGBT family law has taken over the past several years.

Castellat is represented by Christopher V. Carlyle (The Villages, Florida). Pereira is represented by Cecilia Perez-Matos (Delray Beach).
Missouri Court of Appeals Holds the State’s Human Rights Act Does Not Protect against Gender-Identity Discrimination

On July 18, 2017, the Missouri Court of Appeals held in a 2-to-1 decision that the Missouri Human Rights Act’s (MHRA) protections against sex discrimination do not extend to gender-identity claims. *R.M.A. by Appleberry v. Blue Springs R-IV School District*, 2017 WL 3026757, 2017 Mo. App. LEXIS 716 (Mo. App. W.D., 2017). Writing for the majority of the panel, Judge Cynthia L. Martin held that R.M.A., a transgender boy, failed to state a claim of sex discrimination in a place of public accommodation under MHRA § 213.010 *et seq.* Thus, the court affirmed the Circuit Court of Jackson County’s dismissal of R.M.A.’s petition against the Blue Springs R–IV School District and Board of Education with prejudice. In a dissenting opinion, Presiding Judge Anthony Rex Gabbert criticized the court’s unwarranted use of legislative history to narrowly interpret sex discrimination under the MHRA. Judge Gabbert believed that the plain language of the MHRA's definition of sex discrimination was clear enough to extend the law’s protections to R.M.A.’s claim, even though the enacting legislature may not have foreseen that a transgender individual would seek the law’s protection against sex discrimination. (A previous attempt by M.R.A. to get a writ of mandamus against the school district was rejected as premature by the Court of Appeals in an opinion released on December 8, 2015 (see *R.M.A. v. Blue Springs R-IV School District*, 477 S.W.3d 185), noting that he had failed to exhaust administrative remedies before resorting to court.)

Unlike the court’s recital of the MHRA’s legislative history, the facts of this case are relatively straightforward. R.M.A. began his freshman year of high school in 2013. Since transitioning in 2009, he has lived as a male, changed his legal name to a traditionally male name, and presented himself as a male to all faculty, staff, and students of the School District. Although the School District allowed R.M.A. to participate in the boys’ physical education classes, football team, and track team, it prohibited him from using the boys’ locker room or bathrooms during the 2013-2014 academic year. R.M.A. filed a petition in 2014 for a writ of mandamus from the Circuit Court of Jackson County. The petition alleged that the School District violated the MHRA’s protections against sex discrimination in a place of public accommodation by prohibiting R.M.A., a transgender male, from using the boys’ locker room and restrooms. The petition requested the Circuit Court to order the School District to grant R.M.A., and all other transgender students, full and equal access to facilities consistent with their gender identity.

Under MHRA § 213.065, a person is entitled to full and equal use and enjoyment of any place of public accommodation without discrimination or segregation on the grounds of sex. Furthermore, schools are considered places of public accommodation. *State ex rel. Washington University v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013). Rather than acknowledge that R.M.A. sufficiently stated a sex discrimination claim—that he was prohibited from using the boys’ locker room and bathrooms due to his female genitalia—Judge Martin concluded that R.M.A. was discriminated against due to his “transitioning transgender status.”

In order to arrive at this distinction, Judge Martin analyzed the MHRA’s legislative history, its predecessor’s relation to Title VII of the Civil Rights Act of 1964, and Title VII’s amendments concerning discrimination on the basis of sex. By cherry-picking quotes from U.S. Supreme Court cases such as *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), and *General Electric v. Gilbert* (1976), the court determined that the MHRA’s protections against sex discrimination are strictly limited to practices depriving one sex of a right or privilege afforded the other sex.

Judge Martin analyzed the MHRA’s legislative history, its predecessor’s relation to Title VII of the Civil Rights Act of 1964, and Title VII’s amendments concerning discrimination on the basis of sex.

including a deprivation based on a trait unique to one sex. To exemplify its narrow interpretation, the court cited *Midstate Oil Co., Inc. v. Missouri Comm’n on Human Rights*, 679 S.W.2d 842, 846 (Mo., 1984). In *Midstate Oil Co.*, the Missouri Supreme Court addressed the deprivation of an employment right based on pregnancy, and deemed pregnancy as a “gender-related trait” because it is a trait plainly unique to one sex.

Applying *Midstate Oil Co.* to the case at hand, the court concluded that R.M.A. had not suffered discrimination on the basis of sex because his “transitioning transgender status” is not, in the court’s opinion, a gender-related trait; therefore, R.M.A.’s petition was properly dismissed. According to the
court, R.M.A.’s status as a transgender teenager is not unique to one sex, and is therefore not susceptible to use as a means to deprive one sex of a right or privilege afforded to the other sex. Judge Martin is admittedly correct in determining that discrimination based on an individual’s transgender status does not fall squarely within the court’s narrow interpretation of sex discrimination. However, her analysis failed to take account of the MHRA’s plain language. As Judge Gabbert correctly pointed out—and the School District conceded to—“sex” is defined as the categorization of individuals as a male or female based on their reproductive organs. Here, R.M.A. alleged that the School District discriminated against him on the basis of his sexual anatomy, specifically, because he retained female genitalia. Even under the court’s strict interpretation of the MHRA, R.M.A. clearly stated a sufficient claim of discrimination on the basis of sex. Like pregnancy, female genitalia are a trait unique to one sex!

At the time of writing, R.M.A.’s counsel, Alexander Edelman of Kansas City, had yet to announce plans to appeal the case to the Missouri Supreme Court. A decision by the state’s highest court would have major implications in construing federal laws against sex discrimination. However, her analysis failed to take account of the MHRA’s plain language. As Judge Gabbert correctly pointed out—and the School District conceded to—“sex” is defined as the categorization of individuals as a male or female based on their reproductive organs. Here, R.M.A. alleged that the School District discriminated against him on the basis of his sexual anatomy, specifically, because he retained female genitalia. Even under the court’s strict interpretation of the MHRA, R.M.A. clearly stated a sufficient claim of discrimination on the basis of sex. Like pregnancy, female genitalia are a trait unique to one sex!

At the time of writing, R.M.A.’s counsel, Alexander Edelman of Kansas City, had yet to announce plans to appeal the case to the Missouri Supreme Court. A decision by the state’s highest court would have major implications regarding the protection of transgender individuals and gender-identity claims under the MHRA. As Judge Martin pointed out, no Missouri case has yet concluded that gender stereotyping claims fall within the MHRA’s intended scope, although many federal courts have reached such a conclusion in construing federal laws against sex discrimination. Furthermore, outside of public accommodations, the MHRA also encompasses discrimination claims in the employment and housing contexts. Sadly, as evinced by the travel warning issued by the NAACP’s Missouri chapter in early August, the state is not a known champion of civil rights in any of the aforementioned contexts. – Timothy Ramos (NYLS class of 2019)

Indiana Appeals Court Allows Anonymous Document Changes for Transgender Men

Finding that enforcing a statutory publication requirement for a transgender name change would result in a dangerous “outing” of the applicants, a three-judge panel of the Indiana Court of Appeals unanimously reversed two rulings by the Tippecanoe Circuit Court on August 10 in In re Name Changes of A.L. and L.S., 2017 Ind. App. LEXIS 340, 2017 WL 3429074, holding that the publication requirement should be waived such cases. The court also ruled that the circuit judge erred in requiring publication of an intent to seek a change of gender marker on a birth certificate, which is not specifically required by statute.

An Indiana statute provides that anybody who applies for a name change must publish their intention to do so in a newspaper of general circulation, indicating their existing name and proposed new name. An administrative regulation provides that a court can exercise discretion to waive the requirement if publication would present a risk to the health or safety of the applicant, and to seal the court record to protect the privacy of the individuals involved. The August 10 ruling involves two applicants, identified by the court as A.L. and L.S., both transgender men seeking alteration of their official records.

On May 11, 2016, A.L. filed a petition for a name change, having previously published his intent to do so in a newspaper, and the trial court granted his petition. He had been living as a man for two years at that point, and had undergone “medical procedures in line with his transition,” according to the Court of Appeals opinion by Judge John Baker. At the hearing on his name change, A.L. asked to have his gender marker changed on his birth certificate. The judge instructed him to publish his intent to change his gender marker in a newspaper and scheduled a new hearing on this request. A.L., who had been representing himself up to that point, then obtained a lawyer who filed a “motion to correct error,” arguing that Indiana law did not require such a publication for a gender marker change.

At the subsequent hearing, A.L. testified about his reasons for seeking the change and presented evidence of his medical transition, but the court denied his motion because he had not published his intention in a newspaper. The court subsequently ordered A.L. to provide proof of publication before it would issue the requested order.

The judge said that although he found the application to be made in good faith, without any fraudulent intent, and that A.L. had presented evidence that “transgender individuals are disproportionately subject to violence based on their status as transgender individuals,” where A.L. feel short, in the judge’s view, was in failing to show that he “is personally at increased risk for violence (other than as a general member of the transgender community) or that this Petition would lead to an increased risk of violence for the Petitioner.”

The trial judge rejected the idea that there should be “a general rule that would require no notice for an individual seeking to change their legal gender and have their birth certificate amended,” speculating that this could increase the potential for fraud “in that individuals might be able to seek multiple gender changes in attempts to avoid identification by creditors, governmental actors, or other aggrieved parties without those parties having an opportunity to object or even be aware of said changes.” Thus, the judge concluded, it was in the public interest to require publication both of gender identification changes as well as name changes, even though the statute only specifically addressed name changes.
While the trial judge expressed reluctance “to force well-meaning and potentially vulnerable individuals to address intimate and personal issues central to their personal identity in the harsh public light of open court,” he said this was common to anybody who sought “court intervention in the most personal areas of their lives” and noted the judicial preference for court proceedings that are “open” and “transparent” is “well established in American jurisprudence.”

L.S. filed his petition for change of name and gender on September 7, 2016, in the same circuit court, and encountered the same response. L.S. had not arranged for any publication of his intentions, and the trial judge ruled that he could not grant the petition unless L.S. presented proof of publication. According to Judge Baker’s opinion, the trial judge basically repeated the same statements he had made in response to A.L.’s petition.

The two cases were consolidated for appeal, and the Court of Appeals totally rejected the trial judge’s reasoning.

First, the court pointed out that authority to change gender markers on birth certificates stemmed from its own prior ruling in 2014, not from the statute governing name changes. Instead, it had relied on a different statute that authorized the state’s health department to “make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence.” In its 2014 ruling, the court had pointed out that “the vast majority of states” had allowed for corrections to be made to birth certificates, including, by that date, for changes of gender, as part of the “inherent equity power of a court of general jurisdiction.”

As the legislature had not reacted to the 2014 decision by enacting any new requirements, and there was no specific statutory requirement for advance publication in a newspaper of an intention to request a correction to a birth certificate regarding gender, “it was erroneous to create a requirement where none exists.” As far as the Court of Appeals was concerned, when a petitioner establishes that their request is made in good faith and without fraudulent or unlawful purpose, which the trial court had found to be true as to L.S. and A.L., “no further requirements need to be met and the petition should be granted.”

As to the name changes, the court said, the issue was whether the trial court should have waived the statutory publication requirement. “The rule seeks to balance, among other things, the risk of injury to individuals with the promotion of accessibility to court records as well as governmental transparency,” wrote Judge Baker. The judge quoted the published Commentary in the Indiana statute book, which “notes that the rule ‘attempts to balance competing interests and recognizes that unrestricted access to certain information in Court Records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses.’” The same considerations govern requests to seal a Court Record. The petitioner must show that leaving the record open to public inspection “will create a significant risk of substantial harm to the requestor” in order to get a judicial waiver.

Judge Baker then summarized the evidence L.S. had presented about violence against transgender people, including the significant percentage who had responded to surveys showing workplace harassment, harassment at school, and physical assaults. L.S. had also testified about a transgender friend who had been brutally assaulted on the street, and about the discrimination he had encountered in seeking a work internship, because the way he was identified on his Social Security card did not “match” how he appeared. L.S. “testified that he believes that if information about his transgender status became public, he would be ‘at great risk of potential harm.’”

The trial judge had considered this evidence credible, but nonetheless denied waiver of the publication requirement or sealing of the record because he found that L.S. had not specifically shown that there was an individualized risk to himself, as opposed to the generalized risk to the transgender community as a whole. The Court of Appeals disagreed with this conclusion.

Baker wrote, “L.S. provided evidence that, as an out member of the transgender community, he would face a significantly higher risk of violence, harassment, and homicide. He has personally witnessed a transgender friend being violently assaulted because of her gender identity. He has personally experienced discrimination in the workplace after a discrepancy between the way he looked and the way he was identified by Social Security outed him as a transgender individual. Publication of his birth name and new name would enable members of the general public to seek him out, placing him at a significant risk of harm. And in today’s day an age, information that is published in a newspaper is likely to be published on the Internet, where it will remain in perpetuity, leaving L.S. at risk for the rest of his life. There was no evidence in opposition to L.S.’s evidence.”

The Court of Appeals found that this evidence was sufficient to establish that “public of notice of his petition for a name change would create a significant risk of substantial harm to him. As a result, the trial court should have granted his requests to seal the record and waive publication” under the administrative rule.

The court sent the case back to the Tippecanoe Circuit Court “with instructions to ensure that the record of this case remains sealed, and for consideration of L.S.’s petition for a name change.” The court also ordered that as to the petitions for gender marker changes on birth certificates for both petitioners, the trial court should “grant both petitions and issue orders” to the health department to “amend both certificates to reflect their male gender.”

The two transgender men were represented on appeal by Theo Ciccarelli Cornetta and Jon Laramore, Indiana Legal Services, Inc., Indianapolis, Indiana.
Federal Court Revives Student’s Harassment/Bullying Case against Connecticut School District and Football Coach

A fter agreeing to reconsider an earlier ruling dismissing all claims against the Torrington Board of Education and various school employees by a former Torrington High School student who alleged that he had been the victim of extensive and severe bullying by fellow students (including several physical assaults and a sexual assault) to which school officials failed adequately to respond and even tolerated and encouraged, U.S. District Judge Michael P. Shea ruled in Doe v. Torrington Board of Education, 2017 U.S. Dist. LEXIS 124031, 2017 WL 3392734 (D. Conn., Aug. 7, 2017), that the student could proceed on a claim 179 F.Supp.3d 179 (D. Conn. 2016). The decision to reconsider was reported at 2016 WL 6821061, in which Judge Shea allowed Doe to replead a due process claim only against Coach Dunaj on a “state-created danger” theory. Permission to file a new amended complaint gave Doe an opening to plead supplementary state common law claims.

Reading the court’s detailed recounting of “John Doe’s” factual allegations leads one to question the professional competence of the administrators at Torrington High School, beginning with their hiring of Coach Dunaj, who had been the subject of numerous factually relevant complaints during his prior employment at Seymour Public Schools in Seymour, Connecticut. Somebody didn’t do proper vetting. Assuming the accuracy of Doe’s allegations for purposes of ruling on Coach Dunaj’s dismissal motion, Dunaj actively encouraged his players to hae other students, was indifferent to reports of physical assault, and actually engaged in conduct that he had reason to know would cause students to believe they were immune from discipline for harassing and hazing other, usually younger, students. Much of the harassment of Doe took on homophobic overtones, including the coach calling him “pussy,” “bitch,” and “baby” in the presence of other football team members during his freshman year. During Doe’s sophomore year, the harassment had advanced to other students calling Doe “faggot” and “fat ass” in class, in the hearing of teachers who did nothing to discourage or discipline the harassers. Doe was reluctant to report the names of his harassers after the incidents in his freshman year, and a guidance counselor indicated to Doe’s mother that she was aware of harassment but could not take action because Doe would not name names. During the summer after his freshman year, Doe was sexually assaulted by another student, but did not tell his mother or school authorities because he was embarrassed. In one meeting early in Doe’s sophomore year, a district administrator angrily told Doe, “I am sick of hearing about phantom bullies,” so Doe finally began reporting names. This backfired on him, because students who were named and subjected to investigation then ramped up their harassment.

Although Doe’s mother and grandmother met with school officials and repeatedly urged that they take steps to protect Doe, the response was a “boys will be boys” attitude that was broadly tolerant of “horseplay” and a reluctance to hold Coach Dunaj responsible for anything.

Although Doe’s mother and grandmother met with school officials and repeatedly urged that they take steps to protect Doe, the response was a “boys will be boys” attitude that was broadly tolerant of “horseplay” and a reluctance to hold Coach Dunaj responsible for anything. In one incident in the spring of Doe’s sophomore year, another student, unprovoked, pushed Doe in the chest and said, “What the fuck, gay boy.” Doe, defending himself, pushed back. “A teacher witnessed this but ‘dismissed it as mutual’ and took no action.” The next day Doe’s mother told an administrator that Doe was afraid to go to school, and she called a school counselor to complaint about the bullying. (This same counselor, who was supposed to be meeting with Doe to help him cope with his difficulties in school had failed to do so, begging off the grounds that he had too large a caseload.) Rather than taking action against harassing students, the school actually honored some of them in public assemblies for their athletic heroics, and moderated discipline in other
cases in order to avoid endangering the students’ eligibility for athletic scholarships to college.

On April 1, 2013, two students “cornered Doe at track practice, pushed him against a fence, and punched him repeatedly, producing contusions and causing his shirt to rip.” His mother called the school and reported the names of the assailants to the Vice Principal, but later that day the track coach called Doe’s mother and claimed that Doe was “embellishing” his complaints and the incident was just “mutual horseplay.” At this point, Doe and a state trooper who was aware of it told Doe’s mother about the sexual assault from the previous summer, and she decided to remove Doe from further attendance at Torrington High School. In order to comply with the state’s compulsory attendance law, Doe then participated in a tutoring program off-site offered by the Torrington district for students who had been expelled from school.

At a June 2013 meeting, the defendants “denied any incidents of bullying, harassment, or retaliation,” and they never reported any of the incidents to the police or state social welfare authorities, and never informed Doe’s mother that she could report such incidents to the police. In July 2013, the family moved out of Torrington so that Doe could go to school in another district, and this lawsuit was filed. Given this litany of facts, it seems incredible that the court dismissed Doe’s first complaint, but the motion for reconsideration presented unspecified additional factual allegations that evidently convinced the court to reopen the case and accepted a second amended complaint.

The court rejected Coach Dunaj’s suggestion that the due process claim against him should be dismissed. “The Court already held that the newly discovered evidence presented in Doe’s motion for reconsideration – which is now incorporated into the second amended complaint – sufficiently stated a due process claim,” wrote Judge Shea. “Specifically, the Court ruled that ‘the newly discovered evidence presented by Doe is sufficient to state a plausible claim that Dunaj, and Dunaj only, is liable for violating Doe’s substantive due process rights under a theory of state-created danger.’ The Court explained that ‘the new evidence is sufficient to allege that Dunaj “plainly transmitted the message” that what the students did “was permissible and would not cause [them] problems with authorities,” and further that these alleged actions were “egregious.” The Court sees no reason to depart from its earlier decision.”

As to the negligence counts, Judge Shea acknowledged that under Connecticut tort law, municipal boards of education and school officials are generally immune from liability for ordinary negligence in carrying out their discretionary functions, but he found that Doe had stated a “plausible claim under the ‘identifiable victim, imminent harm’ exception to discretionary act immunity.” Under this doctrine, officials can be held liable for negligence in carrying out their discretionary functions when “the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm,” and it was clear from Doe’s factual allegations that this case can come within that exception.

“Here, defendants have not argued that the allegations are inadequate as to particular defendants, but instead have made a broad brush argument as to all defendants,” which Shea found to be an inadequate response to justify dismissing the negligence counts. “In this case,” he wrote, “although the harassment of Doe allegedly occurred over a period of two years and in different locations, the magnitude of the risk associated with repeated beatings was sufficient to create an imminent harm,” and Connecticut law already identifies public school students as “a class of identifiable persons” for purposes of this exception. Furthermore, “the second amended complaint pleads enough facts to make it plausible that it was apparent that the defendants’ failure to act more decisively to stop the bullying of Doe would subject him to harm . . . In this case, while the allegations might not be sufficient to state that defendants were aware of imminent harm from particular students the first or second time Doe was attacked, by the fourth or fifth time – with all the verbal harassment of Doe and the continuing culture of condoning violence by student athletes – one can infer that the harm would have been apparent to a reasonable school official. Doe alleges, for example, that defendant knew of bullying and assaults occurring within the school, including rapes of two female students in November 2011, a culture of bullying and hazing, and assaults such as a football player having a pencil eraser placed in his rectum.” (Amazingly, this was an “initiation ritual” started by a quarterback years earlier that was allegedly known to and tolerated by Coach Dunaj.)

Judge Shea noted prior Connecticut court opinions where school officials had been held liable for negligence when they knew that dangerous horseplay among students was going on and did nothing to discourage or stop it. “Here,” he wrote, “though bullying, like the ‘horseplay’ in [a cited Connecticut state court case], was technically prohibited by the school, it would have been apparent to a reasonable school official that it was nevertheless an ‘ongoing issue’ and ‘dangerous.’ Similar to a broken locker in an area with ongoing horseplay, the dangerous condition of bullying – and, in particular, Doe’s continuing status as a target of repeated assaults – was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm.”

Finally, it is very unusual for a court to refuse to dismiss a claim of intentional infliction of emotional distress, a tort cause of action that courts tend to reserve for the most egregious, outrageous cases, and Judge Shea agreed that all but one of the defendants should be granted dismissal of this claim against them. While this reader thinks that the alleged conduct of several of the administrators, as described in Doe’s complaint, is fairly outrageous, it is clear that the alleged conduct of Coach Dunaj is actionable, and Shea so held. “Doe alleges that Dunaj encouraged and condoned student athletes’ violent behavior – conduct, which, if true, would go beyond a mere failure to act. For example, Dunaj allegedly called Doe a ‘pussy,’ ‘bitch,’ and ‘baby.’ Dunaj also told the football team about Doe’s
in-school suspension and punished the entire team by forcing them to run sprinting exercises – a punishment he allegedly knew would result in other players physically retaliating against Doe. And one coach, who may have been Dunaj but was at least under Dunaj’s supervision, responded to an assault where students held a younger student down and put Icy-Hot on his genitals, by saying, ‘just don’t mount each other.’ Also, as a football coach and school employee, Dunaj was in a position of power over Doe, and Doe alleges that he abused that power . . . Bearing in mind that the Court must draw all reasonable inferences in favor of the plaintiff [in ruling on a motion to dismiss], the Court finds that a high school football coach encouraging hazing of students of the severity alleged here is not merely insulting or impolite, but, at least as construed at the pleading stage, beyond all possible bounds of decency, i.e., the sort of conduct that could lead ‘an average member of the community to exclaim, “Outrageous!”’ which is the test for stating such a claim under Connecticut law.

Teacher training programs would do well to take opinions such as this one to incorporate into courses for potential teachers and school administrators about their responsibilities for the welfare of their students, and they could well serve as teaching materials for continuing education training of teachers and administrators. At least, it would be salutary for the Torrington Board of Education to mandate reading and discussion of this opinion by all the administrators and teachers in the school district, as it ponders whether it really wants to litigate this case further rather than settle with a substantial damage award to Doe on the negligence claim against them. One suspects that former Coach Dunaj and other individual defendants may be relatively judgment-proof as far as substantial damages go, but under the negligence claims the school district will be the main source of compensation.

Doe is represented by Elizabeth Knight Adams of Hartford, CT, who apparently did a spectacular job on the motion for reconsideration and in opposing the motions to dismiss. ■

New York Appellate Division Panel Affirms Stiff Sentence and Denial of Youthful Offender Status to Troubled Gay Teen

By a 4-1 vote, a five-judge panel of the Albany-based New York Appellate Division, Third Department, affirmed the eight-year prison sentence of a gay man who had served as the driver for a group of burglars as a teenager. People v. Strong, 2017 N.Y. App. Div. LEXIS 5811, 2017 WL 3176292 (July 27, 2017). The lone dissenter, Justice Elizabeth A. Garry, found that the “tragic and compelling” life circumstances of the defendant called out for the court to grant him youthful offender status.

Justice Garry penned a much longer and more sympathetic profile of Strong, identifying the time period in which he drove his codefendants as happening simultaneously with “what can only be understood as a major life crisis.”

and significantly shorten his sentence. Justice Garry is the only openly-gay judge on the Third Department bench and serves as co-chair of the statewide Richard C. Failla LGBTQ Commission of the New York State Courts.

As part of a plea bargain, Joseph Strong pleaded guilty to seven counts of burglary in the second degree for his role in 2012 as the driver for a group of burglars that targeted homes and cars in the greater Monticello, New York, area. Sullivan County Court Judge Michael McGuire sentenced him to an aggregate prison term of eight years, followed by five years of post-release supervision. After an earlier appeal, Judge McGuire removed the payment of restitution from Strong’s sentence and denied youthful offender status. Strong appealed again, arguing that Judge McGuire abused his discretion by denying him youthful offender status and had imposed an unduly harsh and excessive sentence.

Justice John C. Egan, Jr. wrote the short three-paragraph opinion for the majority; Justices Christine M. Clark, Eugene P. Devine, and William E. McCarthy joined him. According to Justice Egan, “Based upon the seriousness of the charges for which defendant was convicted and the fact that he willingly participated in seven separate and distinct residential burglaries over a two-week period, we perceive no abuse of discretion in County Court’s ultimate decision to deny defendant youthful offender status.”

Justice Garry penned a much longer and more sympathetic profile of Strong, identifying the time period in which he drove his codefendants as happening simultaneously with “what can only be understood as a major life crisis” and “a brief and terrible downward spiral.” His mother had left when he was three years old and his father died when he was sixteen, leaving him and his brother to fend for themselves. He had previously been a capable student-athlete, with good grades and no disciplinary record.
at school, and had been accepted into college.

As Justice Garry noted, though, the death of his father was a calamitous turning point. “In the absence of any supportive family contacts, his life apparently spiraled out of control and there was no one present to check his descent.” At that point, and at the same time that he realized he was gay, Strong dropped out of school and began abusing drugs and alcohol. According to the record below, the group of delinquents he would later drive had “targeted” him because of his sexual orientation and moved into his house. After the police arrested him, he was fully cooperative and implicated the codefendants in his confession. “His remorse was immediate and apparently genuine,” added Justice Garry.

Pulling these facts together, other than the severity of the crimes and the impact on the victims, Justice Garry argued that “[v]irtually all of the factors favor granting youthful offender status to defendant,” including “his tragic background, the complete lack of any prior violent or criminal acts whatsoever, and, in particular, the clear reasons for hope, based upon his blameless, successful life before the loss of his father and his remorse thereafter.” She also pointed out that the Legislature made clear that the seriousness of the crime alone should not disqualify a defendant from youthful offender status, as even someone charged with first degree manslaughter can potentially qualify.

In closing, Justice Garry worried that the long sentence may “operate to foreclose the opportunity that may have previously existed for him to become a contributing member of society.” If she were in the majority, she would have resentenced him to one to four years.

Strong was represented on appeal by Jane M. Bloom of Monticello, N.Y. – Matthew Skinner

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York (LeGaL).

Federal Judge’s Novel Decision to Monitor Transgender Inmate’s Case, Claimed to be Moot, Results in Maryland’s Liberalization of Transgender Treatment Standards

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ast year, Law Notes (April 2016 at pages 165-6) reported that U.S. District Judge Theodore D. Chuang declined to accept Maryland officials’ defense that the medical treatment claims of transgender inmate Shawnte Anne Levy were moot because treatment had begun, in Levy v. Wexford, 2016 U.S. Dist. LEXIS 28384, 2016 WL 865364 at *1-3 (D. Md. Mar. 7, 2016). Instead, Judge Chuang ordered the motion held in abeyance for six months and directed reports every 60 days on the care of this pro se plaintiff, writing at that time: “In an abundance of caution, the Court instituted a six-month monitoring period to ensure full implementation of that treatment.”

Now, in Levy v. Wexford Med. Sources, Inc., 2017 U.S. Dist. LEXIS 126694, 2017 WL 3431951 (D. Md., August 9, 2017), Judge Chuang discusses the progression of treatment of Levy at length, including the involvement of numerous specialists, hormone regimens, and Levy’s responses over the course of the last year. Levy is receiving hormones as ordered (with only a few interruptions), as well as psychotherapy. Both the level of hormones and the frequency of psychotherapy have been increased during this period.

Levy now claims that the court should order sex reassignment surgery [SRS], and she has been self-tying her genitals, causing trauma (which has been treated). Judge Chuang found that SRS was not in Levy’s original or amended complaints and that it would be considered only as an amended pleading, which would not be granted. After noting that defendants had complied with orders for the three years of this litigation and that inserting SRS into the case would be akin to starting over with new experts, Judge Chuang observed that no medical professional had recommended SRS for Levy, so that there could be no deliberate indifference to it as a necessary medical need. In fact, the treating mental health worker recommended caution because the effect of SRS on Levy’s co-existing psychotic diagnoses was not fully evaluated. Judge Chuang found that the Maryland Declaration of Rights provided no greater protection than the Eighth Amendment, citing Evans v. State, 914 A.2d 25, 67 (Md. 2006).

At the time Levy filed suit, Maryland had a policy (often referred to as a “freeze frame” policy) that transgender inmates would receive treatment while in Corrections only if they had a diagnosis or were in a treatment program prior to incarceration. Because Levy failed to produce such evidence, all treatment was denied. In 2015, after suit was filed, Maryland officials “received” copies of Levy’s prior psychiatric records, which showed the diagnoses. As a result, Levy was referred to an endocrinologist, and treatment commenced – leading to the state’s motion and the Court’s watch period.

During the watch period, Levy also began receiving women’s undergarments. Her claims for cosmetics from the commissary was denied, but she failed to appeal her grievance on this point, so Judge Chuang declined to hear it, under the Prison Litigation Reform Act’s strict exhaustion requirements.

While the state had to account for Levy’s treatment every 60 days, the state dropped its “freeze frame” policy and allowed inmates to be diagnosed in need of transgender treatment after beginning incarceration. Such treatment is subject to review by a committee and other health executives within the state Corrections department. The opinion does not state the state’s position on SRS. The “committee” that reviews treatment orders appears empowered to overrule treating physicians. More
One of the few rich countries which has not achieved marriage equality. In 2013, the High Court of Australia (Australia’s apex court) confirmed that the federal Parliament’s constitutional power to legislate in respect of marriage meant a state or territory could not pass a law inconsistent with the Commonwealth’s legislation confining the marriage right to opposite sex couples. At the same time, it declared that the constitutional marriage power extended to legislating for same sex marriage.

While the current conservative Liberal/National Party coalition came into government and has been riven by struggles between moderate and far right factions. To head off a move for a free vote on marriage equality, the former Prime Minister, a right wing opponent of gay marriage, made it policy that first there must be a compulsory plebiscite of all voting Australians – although a result in favor of allowing same sex marriage would not be binding on any MP. The present Prime Minister, formerly a moderate, accepted that policy as one of two conditions to being made leader of the coalition (the other was not to introduce an emissions trading scheme).

In an election in 2016, the government’s majority in the lower house was reduced to one MP. While the current Prime Minister supports marriage equality, he cannot afford to offend the far right. Consequently, the far right’s policy of preventing a vote on a marriage equality bill without a plebiscite first has prevailed.

After doing nothing about marriage equality when in government in 2010-2013, the Labor Party (now in opposition) decided its policy was in favor of same sex marriage and early 2017 took its lead from the LGBTI communities and opposed a plebiscite on same sex marriage and promised to introduce legislation for marriage equality as soon as it won an election.

This year the conservative government got a bill through the lower house for a compulsory plebiscite but it was defeated in the Senate by a combination of Labor, Greens and cross-bench senators. In July-early August, a number of openly gay moderate government MPs moved to introduce legislation for change and called for a free vote on it. To head that off, the government adopted a fall-back scheme.  

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.
through the motions of reintroducing its compulsory plebiscite bill and again it was defeated in the Senate. Now there is to be a voluntary “postal plebiscite” of citizens on the electoral roll. Unless the result of the postal plebiscite is a majority of respondents in favor of marriage equality, the government will not introduce legislation for change and will not allow a free vote on a non-government bill for change. The openly gay MPs have now backed off and the postal plebiscite has been fixed for September with a result to be announced in November.

Already the anti-marriage equality advocates, prominently the Catholic Church, the evangelical Christians and the former Prime Minister, are splashing their hostility to LGBT people and their families across the media in favor of a No vote in the postal plebiscite. But, beyond the opportunity for a public campaign of homophobia, the reason a postal plebiscite was proposed by the conservatives is obvious – it suppresses the Yes vote (largely the younger, more transient and significantly less likely to be registered on the electoral roll or to use mail) and enhances the No vote (largely the older and people who are established in dwellings which are registered on the electoral roll).

Not only will the postal plebiscite be voluntary but it will be conducted, not by the widely respected Australian Electoral Commission, but by the Australian Bureau of Statistics. The ABS covered itself with ordure in 2016 when the national census was digital and, of course, it got hacked.

The reason the ABS has been chosen? Because there is already legislation allowing the ABS to conduct surveys of opinion. The postal plebiscite is being funded (more than $US92M) from money already appropriated by Parliament, reserved for emergency and other “unforeseen” expenditure. Whether the expenditure was “unforeseen” within the meaning of the Appropriations Act will be the focus of a constitutional challenge in the High Court. Applications have been filed in the High Court by marriage equality activists, PFLAG and by an independent MP, for an injunction stopping the postal plebiscite on the ground that, substantively, it is a device to avoid the Constitutional requirement for funds expended by the Executive to be appropriated by Parliament. The applications were listed for hearing on September 5-6.

The fact that the ABS is conducting the plebiscite has had consequences. First, its advertisements promoting it, the ABS is using the words “postal survey” rather than “postal plebiscite”. Second, statisticians and pollsters have been rubbing the exercise as a very expensive way to get a very unreliable result.

Best practice as normally applied by the ABS, even in the hugely representative national census, is to give a greater weight to the under-represented responses and a lesser weight to the over-represented ones. But the ABS won’t be doing this in its “postal survey” because it has been directed not to do so. This is despite the fact that, more than ever, the results of the “survey” will be biased because there will be a much lower response rate from youth and poor people who don’t enroll to vote and don’t use the mail or have postal addresses. However, the ABS has quietly announced it will collect data as to the gender, age and electorate of the respondents and will publish it along with the Yes/No results. It will thus be possible to analyze the results to see, to some extent, how representative they are of the eligible voting population.

Gay former High Court Judge Michael Kirby has publicly opposed the postal plebiscite, describing it as “a Mickey Mouse proposal . . . completely unprecedented.” He said that it disrespected the Australian people, discriminated against marginalized voters, and “flies in the face of Australian democracy.” “It’s unscientific, it doesn’t conform to the rudimentary requirements of polling,” he said. “It has never been attempted ever in the making of laws in Australia. It doesn’t even have the merit that a plebiscite had of a national compulsory vote, which has at least been done once” (for the national anthem). Judge Kirby predicted that a high number of gay and lesbian voters would boycott the postal vote. He declined to comment on the legalities of the plebiscite given there are proceedings in the High Court.

Compounding the problems, if there were to be a Yes vote, the government will introduce legislation for same sex marriage but MPs and senators will be free to vote against it notwithstanding the result of the plebiscite. That is, a No result will be binding but a Yes result will not!

There has all along been concern in the LGBTI communities, not only that the idea of a postal plebiscite came from those opposed to marriage equality, but also that the former Prime Minister has a track record of engineering the defeat of a popular proposal at a national referendum (in 1999, to change from a monarchy to a republic). Already, in the postal plebiscite campaign, he and other opponents are focusing on issues other than marriage equality – children of same sex relationships, freedom of religion, political correctness, etc. Opinion polls show that a significant majority of the population oppose the postal plebiscite and think Parliament should just vote on the subject. So far opinion polls show that, of those committed to voting, a majority will vote Yes, but there are a number of weeks to go.

The only saving grace is that opinion polls also say that, if parliamentary elections were held today, the Australian Labor Party would win – and Labor says it is party policy that its MPs and senators vote for the marriage equality legislation it says it will introduce. Unfortunately, the next federal election is not likely until 2019.

Unless the High Court challenge succeeds, Australian LGBTI people and their families are in for a nasty, brutish few months. – David Buchanan

David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.
ACLU Reboots Gavin Grimm Challenge to Gloucester School Board Policy

On August 2, the Richmond-based 4th Circuit Court of Appeals announced that instead of holding oral argument in Gavin Grimm's lawsuit challenging the Gloucester County School Board's bathroom access policy, it was sending the case back to the district court for a determination whether Grimm's recent graduation from high school made the appeal moot. Did Grimm still have standing to seek the injunctive relief that he sought? Grimm v. Gloucester County School Board, 2017 U.S. App. LEXIS 14158. The three-judge panel had tentatively scheduled an oral argument for September to a stipulation to the 4th Circuit to that effect, resulting in a one-sentence order by that court dismissing the appeal. Grimm v. Gloucester County School Board, 2017 U.S. App. LEXIS 16697 (4th Cir. Aug. 30, 2017). But they did not agree to end the case, instead filing an amended complaint on August 11, of which more details follow below.

Grimm's mother originally filed suit on his behalf against the school board in July 2015, during the summer before his junior year, alleging that the Board's policy of requiring students to use restrooms based on their biological sex rather than their gender identity violated Grimm's right to be free of sex discrimination forbidden under Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the 14th Amendment. Grimm sought a preliminary injunction so he could resume using the boys' restrooms at the high school while the case was pending. The Board moved to dismiss, arguing that Title IX did not apply to this dispute and that its action did not violate the Constitution. Judge Doumar ruled on September 17, 2015, in favor of the Board's motion to dismiss the Title IX claim, while reserving judgment on the 14th Amendment claim, and denied Grimm's motion for a preliminary injunction to allow him to use the boys' bathrooms as he appealed the dismissal. While the case was pending before Judge Doumar, the U.S. Departments of Education and Justice filed a joint statement with the court supporting Grimm's claim that barring him from using the boys' bathrooms violated Title IX.

Ruling on Grimm's appeal of the dismissal on April 19, 2016, the 4th Circuit focused on the document issued by the federal agencies, finding that the district court should have deferred to their interpretation of the Title IX regulations, finding it to be a reasonable interpretation of the regulations. The court reversed Judge Doumar's dismissal of the Title IX claim, and sent the case back to Doumar to reconsider Grimm's request for a preliminary injunction. Shortly thereafter, the Departments of Education and Justice sent a joint “Dear Colleague” letter to all the nation's public schools that receive federal funds, more formally stating their position on Title IX coverage of the transgender facilities access issue and other issues relevant to equal educational opportunity for transgender students. Responding to the Circuit's remand, Doumar issued a preliminary injunction on June 23, 2016, too late to get Grimm access to the boys’ bathrooms during his junior year but potentially ensuring that he could use appropriate bathrooms at the high school during his senior year. But that was not to be. Even though Judge Doumar and the 4th Circuit refused to stay the preliminary injunction while the case was on appeal, the School Board successfully petitioned the Supreme Court for a stay while it prepared to file a request for a preliminary injunction. Thus, as the 2016-17 school year began, Grimm was still barred from using the boys’ bathrooms at his high school.

The Supreme Court subsequently granted the Board's petition to review the 4th Circuit's decision, continuing the stay of the preliminary injunction, and scheduled an oral argument to take place on March 28, 2017. Meanwhile, Donald Trump was elected president, took office

Grimm’s lawyers from the ACLU agreed with the School Board to end the appeal concerning the preliminary injunction, submitting a stipulation to the 4th Circuit to that effect, resulting in a one-sentence order by that court dismissing the appeal.

consider yet again whether Senior U.S. District Judge Robert G. Doumar erred when he dismissed Grimm's Title IX sex discrimination claim against the Gloucester County School Board and denied Grimm's motion for a preliminary injunction. The circuit panel speculated that its jurisdiction to decide the case may have been ended by Grimm’s graduation, but that it was not clear from the record before the court and the supplemental briefs filed by the parties earlier in July whether this is so, and the court concluded that more fact-finding was necessary before the issue of its jurisdiction could be decided. A week later, however, Grimm's lawyers from the ACLU agreed with the School Board to end the appeal concerning the preliminary injunction, submitting
in January, and appointed Jeff Sessions to be Attorney General and Betsy DeVos to be Secretary of Education. Sessions and DeVos disagreed with the Obama Administration’s interpretation of Title IX, and on February 22 they announced that the Departments of Education and Justice were “withdrawing” the Obama Administration’s “Dear Colleague” letter and issuing a new one that, in effect, took no position on the appropriate interpretation of Title IX, instead stating that the question of bathroom access in public schools should be decided by the states and localities, not the federal government. The Supreme Court reacted to this development by granting the Solicitor General’s subsequent request to cancel the oral argument, vacated the 4th Circuit’s decision, and sent the case back to the 4th Circuit to address the merits of Grimm’s appeal as a matter of judicial interpretation of the relevant statutory and regulatory provisions, there no longer being an executive branch interpretation to which the court need defer. The 4th Circuit directed the district court to quash the preliminary injunction and tentatively scheduled an argument to be held in September. After Grimm graduated in June, the parties filed supplemental briefs to update the court on what had happened since it last considered the case.

The School Board argued that the case had become moot because Grimm had graduated. “The School Board argues that, absent any allegation of a ‘particular intention to return to school after graduation,’ this change of status deprives Grimm of a continued interest in the litigation, rendering the case moot,” wrote the court in its brief order issued on August 2. “The School Board states further that its bathroom policy does not necessarily apply to alumni, and that the issue of whether the policy is applicable to alumni is not yet ripe for adjudication.” Grimm responded that it was enough that his possible “future attendance at alumni and school-community events” at the high school gave him a continuing concrete interest in obtaining the injunctive relief he was seeking in this lawsuit. He also pointed out that the School Board’s “noncommittal statement” that the policy did “not necessarily apply” to alumni “falls short of a representation that the Board will voluntarily cease discriminating against” him.

The court does not have jurisdiction of the case unless there is an “actual case or controversy” between the parties. The Supreme Court has established that this means that the plaintiff, Grimm, must have a concrete interest in the outcome, which would mean that the policy he is challenging must actually affect him personally. “Thus,” wrote the court, “a crucial threshold question arises in this appeal whether ‘one or both of the parties plainly lack a continuing interest’ in the resolution of this case such that it has become moot.” The court decided that “the facts on which our jurisdiction could be decided are not in the record before us.” The factual record in this case consisted of the sworn allegations that were presented to the district court in 2015 when it was ruling on the Board’s motion to dismiss the case, when Grimm was but a rising junior at the high school. Thus, the 4th Circuit panel decided it was necessary to send the case back to the district court for “factual development of the record by the district court and possibly additional jurisdictional discovery.” They were not sending the case back for a new ruling by the district court on the merits, just for a ruling on the question of mootness after additional fact-finding. Any determination by Judge Doumar that the case was moot could, of course, be appealed by Grimm.

But litigating over the issue of mootness with respect to the preliminary injunction did not strike the ACLU as the best approach at this point in the litigation, so it secured agreement from the School Board to move the 4th Circuit to dismiss the appeal, and proceeded to file an amended complaint. The new complaint supplements the original complaint with factual allegations bringing the story up to date, culminating with the following: “As an alumnus with close ties to the community, Gavin will continue to be on school grounds when attending football games, alumni activities, or social events with friends who are still in high school.” This would support his continuing personal stake in the issue of appropriate restroom access at the school. The complaint restates 14th Amendment and Title IX as sources of legal authority for the argument that the school board’s policy violates federal law. The request for relief is reframed to reflect Grimm’s alumni status, seeking a declaration that the policy is illegal, nominal damages (symbolic of the injury done to Grimm by denying him appropriate restroom access), a permanent injunction allowing Grimm to use the same restrooms as “other male alumni,” his reasonable litigation costs and attorneys’ fees, and “such other relief as the Court deems just and proper.” The school board can be expected to move to dismiss the amended complaint with the argument it made to the court in suggesting that the case was moot, but this time the standing question will be litigated solely with respect to Grimm’s alumni status going forward.

It appears from the docket number stamped on the amended complaint by the court clerk’s office, 4:15-cv-00054-AWA-DEM, that the case is now assigned to District Judge Arenda L. Wright Allen, who was appointed by President Obama in 2011. Judge Doumar, 87, who issued the earlier rulings for the district court, is a senior judge who was appointed by Ronald Reagan in 1981.

While this litigation drama was unfolding in Gloucester County, the Chicago-based 7th Circuit Court of Appeals ruled on May 30 in Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F.3d 1034, that Title IX prohibits a public school from refusing to let transgender students use bathrooms appropriate for their gender identity, so the issue has percolated further elsewhere in the country. The Kenosha School District filed a petition for certiorari with the Supreme Court on August 25. So it is distinctly possible, that the action on this issue will move there and this case may well end up being put “on hold” by the court if the Supreme Court agrees to hear the Kenosha appeal.
At-Will Transgender Employee Can Assert Tort Claims Against Employer for Broken Promises


Jean Hopkins is a transwoman who applied to be a truck driver with Hazmat Environmental Group, Inc. During her interview, a Hazmat operations manager allegedly told Hopkins that she was interviewing for a position driving a lucrative and desirable route to Ashtabula, OH. Hopkins further alleged that Hazmat’s agent knew that he was lying when he made this representation, and that he did so to induce Hopkins into accepting the job. Hopkins also alleged that Hazmat’s agent thought that he could make this hollow promise because Hazmat was an older transwoman. Finally, Hopkins alleged that she ended her then-existing employment to accept the Hazmat job in reliance on what she was told in her interview.

Despite Hazmat’s alleged promises, Hopkins was rarely assigned the Ashtabula route during her employment. Rather, she claims that she was often assigned a less-lucrative and less-desirable route. Hopkins goes on to allege that Hazmat assigned her these routes because of her age, sex, and transgender status, citing as evidence a conversation with the dispatcher who gave her these assignments. Allegedly, after Hopkins complained to the dispatcher, he told her that he assigned the better routes to younger, male, cisgender drivers with less seniority than Hopkins because he did not want them to quit. Finally, Hopkins alleged that Hazmat fired her.

Hopkins filed an eleven-count complaint against Hazmat alleging, among other things, that Hazmat intentionally inflicted emotional distress and fraudulently induced her into leaving her old job and accepting this one. Hazmat filed a motion to dismiss these two counts. The court made quick work of Hopkins’s intentional infliction of emotional distress claim given that Hopkins conceded that she had brought it beyond the statute of limitations. Yet, her fraudulent inducement claim was timely, so the court proceeded to the merits.

To state a claim for fraudulent inducement under New York common law, a plaintiff must plausibly allege that: (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false; (3) the defendant intended plaintiff to rely on it; (4) plaintiff reasonably relied on the misrepresentation; and (5) plaintiff was injured as a result. Hazmat’s motion to dismiss focused on alleged deficiencies with elements (1) and (4) of these requirements, arguing that there was no actionable misrepresentation and that Hopkins did not reasonably rely on any such misrepresentation.

First, Hazmat argued that the alleged promises to Hopkins were aspirational promises about what would happen in the future, not concrete promises about a present fact. The court rejected this argument, citing several cases supporting the proposition that fraudulent inducement can rely on a misrepresentation “made with a preconceived and undisclosed intention of not performing it.” Hence, the court examined whether Hopkins’s allegations supported her claim that Hazmat had no intention of honoring its promise about route assignments. The court held that these allegations plausibly alleged that Hazmat had no intention of fulfilling its alleged promise and, thus, had made a material misrepresentation to Hopkins.

Second, Hazmat argued that Hopkins could not have reasonably relied on this statement because Hazmat retained its right to terminate their relationship for any reason or for no reason, citing the tried-and-true principle of employment at-will. The court rejected this argument, too, noting that Hopkins’s fraudulent inducement claim had nothing to do with her eventual termination. Thus, the court concluded that Hopkins plausibly alleged that she reasonably relied on Hazmat’s alleged promise that she would be assigned the Ashtabula route.

Having disposed of Hazmat’s two arguments, the court denied its motion to dismiss Hopkins’s fraudulent inducement claim.

In sum, this case provides a great example of how allegations of discrimination can support a claim of intentional misrepresentation. In other words, a plaintiff alleging that her employer treated her poorly because of her age, sex, and transgender status during her employment plausibly alleges that the employer intended to treat her poorly before her employment despite representations to the contrary because, after all, she was the same age (roughly), sex, and transgender status back then.

Finally, this case offers a probative look into the state of the employment at-will doctrine by reminding us that employment at-will does not shield employers from tort liability arising from alleged misrepresentations made to induce an employee into accepting employment, but rather serves only a principle that terminations are not actionable as such without more (e.g., the violation of a statutory prohibition on discrimination).

Hopkins is represented by Anna Marie Richmond of Buffalo, N.Y. — Ryan Nelson

Ryan Nelson is corporate counsel for employment law at MetLife.
3rd Circuit Directs Board of Immigration Appeals to Reconsider Bisexual Guyanese Man’s Motion to Reopen His Refugee Case

A bisexual Muslim man from Guyana obtained a remand to the Board of Immigration Appeals (BIA) from a 3rd Circuit Court of Appeals panel, which concluded that the BIA’s decision appealed from, denying a motion to reopen his case to present new evidence, did not adequately explain why the new evidence offered by the petitioner would not change the result previously reached by an Immigration Judge in ruling on his case. Mohamed v. Attorney General, 2017 WL 3635521, 2017 U.S. App. LEXIS 16179 (Aug. 24, 2017). The opinion by Circuit Judge Cheryl Ann Krause is frustrating to read, is it would seem that there were several significant defects in the administrative portion of this case that could have served as a basis to set aside the BIA’s final ruling, but the jurisdictional barriers imposed by Congress were deemed to have tied the court’s hands with respect to most of them. The court is limited to considering errors of law and constitutional claims, but is generally precluded from making much of gross procedural defects.

Petitioner claims he was forced to flee from Guyana “after neighbors attacked and threatened him for being bisexual,” having discovered him engaged in sex with a man. He used a fake visa to enter the U.S. and was later detained and placed into removal proceedings after having been convicted of a crime. He then sought to claim asylum, as well as seeking withholding of removal and CAT protection.

The petitioner was pro se through every stage of his case except for some pro bono help on a motion to reopen removal proceedings, which was denied by the BIA, and his appeal to the 3rd Circuit, for which he was represented by attorneys from Crowell & Moring (Washington and New York offices), who were undoubtedly disturbed to hear how he had been treated earlier in the process.

He had reported at a preliminary hearing that “gang members” in Guyana had “caught” him with another man, “jumped” him, and told him that if he did not leave the country, they would “burn your house down with you inside.” He submitted a written application for asylum which was deemed untimely because he was in the U.S. more than a year. Although the court does not make this explicit, it is a reasonable inference that he was too embarrassed at the time to explain that his lack of English literacy got in the way of representing himself, or helped to explain why subsequent procedural defects.

written submissions included facts not articulated in his earliest dealings with the immigration officials. In his written application, he amplified to report that he was “constantly abused and beaten in my home town,” and “constantly threatened,” including one instance where he was beaten so badly that “I almost died.” But he evidently felt intimidated in a subsequent hearing, leaving out many details, and the IJ asked no follow-up questions, issuing an oral ruling denying the application for asylum on timeliness grounds, finding that petitioner did not “establish any extraordinary circumstances for delay” and that he had failed to establish that he was a victim of past persecution, so as to “trigger a rebuttable presumption of a well-founded fear of future persecution.” As far as the IJ was concerned, he had reported only a “single incident of a bad beating” and “no evidence that he required significant medical attention.” Further, he did not show that the government would consent or acquiesce in future attacks against him.

The BIA upheld the IJ’s ruling denying asylum, but held that it was unable to determine, based on the IJ’s factual findings, whether the petitioner was likely to be subject to future persecution, and remanded the case for further fact-finding and legal analysis on this issue. The case went to a different IJ who, amazingly, felt no need to conduct a hearing and take new evidence, rather just issuing a decision based on the existing written record, finding the petitioner “partially credible,” but criticizing his evidence on the hearing record as “somewhat unclear and inconsistent,” and denying relief. The BIA upheld this decision in a short opinion, reaffirming the removal order, rejecting petitioner’s argument that there was a due process violation because the IJ failed to allow him to present additional evidence in a hearing on remand. The BIA said that the IJ “adequately explained the hearing,” that petitioner failed to meet the burden of showing likelihood of persecution “even if he testified credibly,” and that there was no need for BIA to “revisit” its early review on the issue of timeliness of the asylum petition.
With assistance from pro bono counsel, petitioner filed a motion to reopen his case to present new evidence, attaching a detailed affidavit with much new factual matter, but the BIA rejected this with another brief opinion, asserting that petitioner failed to show that his proposed new evidence would “alter the outcome of this case.”

The 3rd Circuit rejected many of petitioner’s arguments on appeal, in most instances due to statutory jurisdictional limitations on its power to review BIA proceedings. However, the court found itself “troubled”, unsurprisingly, at the failure to allow petitioner to present his entire story and for the BIA to address all the evidence. It also noted that the record reflected the IJ interfering with petitioner’s hearing testimony and limiting what he could present, and the second IJ not even holding a hearing to receive new evidence, even though the BIA had sent the case back for more “fact-finding.”

While the court refused to find these errors sufficiently egregious to amount to a Due Process violation, nonetheless it thought the BIA needed to give further consideration to the motion to re-open the case and to explain its conclusion. “On the merits . . . ,” wrote Judge Krause, “the BIA’s cursory opinion ‘frustrates our ability to reach any conclusion on this issue.’” BIA has a “duty to explicitly consider any evidence submitted by an applicant that materially bears on his claim, and it must provide an indication that it considered such evidence, and if the evidence is rejected, an explanation as to why it was rejected. Here, the BIA has not sufficiently articulated the facts it considered or its reasoning for reaching the conclusion that the facts ‘would not alter the outcome of this case.’”

This despite the BIA mentioning that the petition presented “new evidence,” which it did not bother to discuss in any detail. Judge Krause summarized the new evidence, and commented, “These details concern facts essential to the claim that the IJ previously said were lacking, like the extent of his past persecution, the severity of his injuries, the involvement of official authorities, and his identity as a ‘Muslim bisexual.’ The BIA opinion does not meaningfully engage with the question of whether the additional testimony about these details would lead an IJ to conclude that Mohamed is likely to be subjected to persecution or torture, and therefore the Board’s conclusory review of this issue was an abuse of discretion.”

The court doesn’t even mention that rudimentary on-line research would reveal that Guyana is the only remaining country in South America that criminalizes gay sex (with penalties ranging up to life in prison), that reactionary religious forces stymied an attempt to amend the constitution to ban sexual orientation discrimination, and that public opinion polls show that an overwhelming majority of Guyanese hate homosexuals on religious and social grounds, with violence and discrimination against them widely reported. This case seems to stand as yet another example of the procedural deficiencies in the administrative bureaucracy that makes refugee decisions, the bias against applicants, and the shortcomings of a system that places the burden on each individual applicant to prove anew that their home country is intensely hostile to gay people, ignoring easily available information in the public record which, evidently, ethical rules governing law practice by government lawyers do not require counsel representing the government in these proceedings to disclose, and when such a conclusion may appear obvious from review of reports by human rights organizations and struggling LGBT organizations in the country. (It appears morally wrong to us that when the State Department is required by law to make written reports about human rights situations in foreign countries on an annual basis, the government lawyers opposing refugee applications in individual cases have no ethical duty – especially in pro se cases – to disclose what the government knows about conditions there, and that IJs have no duty to develop the record to include information that is known to the government and bears on the issues for decision. Through in the complicating factor that many applicants are not fluent in English and you have a perfect storm of unfairness.)

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CIVIL LITIGATION

U.S. COURT OF APPEALS, 2ND CIRCUIT – Matthew Swain was fired by Hermes as manager of its store at the Mall at Short Hills, New Jersey. Swain, a New Jersey resident, sued Hermes in New Jersey state court under the state’s law against discrimination, which covers sexual orientation claims, and asserting some other state law claims. Swain named as a co-defendant in the suit Lorenzo Bautista, a co-worker at the Short Hills store. Hermes then filed a petition on the Southern District of New York, seeking to compel arbitration of the discrimination claim, invoking the Federal Arbitration Act and a dispute resolution “protocol” that Swain allegedly signed is part of his employment contract with Hermes. The district court granted the petition in part, ordering that Swain submit to arbitration, but denied Hermes request to issue an injunction against the New Jersey state court proceeding. Swain appealed, arguing that the federal court did not have jurisdiction to order arbitration of these state law claims because there was no federal question in the case and there was not complete diversity between the parties in the state court case, as Bautista and he were both residents of New Jersey. Writing for the court in Hermes of Paris, Inc. v. Swain, 2017 U.S. App. LEXIS 15027 (Aug. 14, 2017), Circuit Judge Gerard E. Lynch said that the presence of Bautista as a co-defendant in the New Jersey state action was irrelevant. Hermes was seeking to enforce the arbitration protocol in an agreement between itself and Swain. Under the Federal Arbitration Act, federal courts have jurisdiction to enforce arbitration agreements between the parties to those agreements. Swain had argued that the federal court should “look through” the FAA complaint to the underlying state law suit to determine whether the requirements of diversity were met, but it seems that the 2nd Circuit has rejected such arguments in earlier cases. Among other things, this would provide employees with disputes against their employer subject to arbitration agreements with an easy way to avoid having to arbitrate by just adding another resident of the same state to the complaint to defeat diversity. “Swain’s challenge to the district court’s subject matter jurisdiction therefore fails,” wrote Lynch, “because under Doctor’s Associates, Inc. v. Distajo, [66 F.3d 438 (2nd Cir. 1995)] complete diversity is measured by reference to the parties to the petition to compel arbitration. Here, those parties are Hermes and Swain, who no one disputes are citizens of different states and thus completely diverse. Accordingly, the district court had subject matter jurisdiction over the petition to compel arbitration.” Swain is represented by Christopher W. Hager and Peter J. Heck of Niedweske Barber Hager LLC of Morristown, N.J.

U.S. COURT OF APPEALS, 3RD CIRCUIT – The 3rd Circuit ruled against a gay man from Haiti seeking protection under the Convention against Torture (CAT) in Jasmin v. Attorney General, 2017 U.S. App. LEXIS 15532 (August 17, 2017). Jasmin entered the United States (presumably in the company of parents?) in 1971 at age 3, and became a lawful permanent resident in 1990, but has fallen afoul of the law, being convicted of attempted criminal possession of a weapon in the third degree in New York and possession of cocaine with intent to distribute in Virginia. Those offenses brought him to the attention of Homeland Security, which seeks to deport him. He filed an application of withholding of removal and protection under the CAT, claiming that he would be persecuted and tortured in Haiti because he is gay. Because of the crimes of which he was committed, which the Attorney General has designated as “particularly serious,” he can’t obtain withholding of removal, so he is left to seeking CAT protection, which requires him to convince the immigration people that requiring him to return to Haiti would likely result in serious harm or death for him at the hands of the government or private forces that the government lets run wild over gays, in effect. The Immigration Judge who ruled against him, Roxanne C. Hladylowiycz, found that although there is evidence of “discrimination and violence against gay people in Haiti,” petitioner did not produce “any evidence that he would more likely than not be targeted for violent attacks that would rise to the level of torture.” She also characterized him as “well off” because his father has a medical practice in the U.S. and owns two houses in Haiti, and that “well-off Haitians have access to gay-friendly places.” (One wonders where she picked that up?) She suggested that Jasmin could locate in a gay-friendly area of Haiti. She also said the record did not support the conclusion that the Haitian government is “willfully blind to violence against gay people,” relying for this conclusion on the assertion that “there were no reports of police being involved in or condoning violence against gay people, and there was evidence that police have intervened to protect gay people from violence and are trained about issues relating to the gay community.” The BIA ruled against Jasmin on appeal, echoing the IJ’s findings, except it said it could reach this conclusion without assuming that Jasmin was “well off.” Circuit Judge Patty Shwartz noted that the court did not have jurisdiction to consider arguments that had not first been presented to the BIA, and in this case Jasmin had “conceded before the IJ that the only form of relief available to him was deferral from removal under CAT, so the court could not now address his claim that he should not be precluded from seeking withholding of removal for his criminal offenses. As to CAT relief, she said the court had no jurisdiction to consider the argument that BIA erred by affirming the IJ’s factual findings, since the court is limited to correcting

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errors of law in reviewing these refugee decisions by the administrative bodies. He challenged the BIA’s failure to engage with the question whether the harm he anticipated encountering in Haiti would meet the legal definition of torture but, the court responded, since the BIA had concluded that he was not likely to be harmed at all, a factual finding that the court could not review, there was no need for the agency to address the other question – whether anticipated harm would amount to torture. She also said he had misunderstood the BIA’s comment that it need not rely on Jasmin being “well off” to determine he was not entitled to CAT protection, since it could affirm the IJ’s conclusions with relying on that finding. Jasmin was represented by Sandra L. Greene of GreeneFitzgerald Advocates and Consultants, York, Pennsylvania.

U.S. COURT OF APPEALS, 4TH CIRCUIT – The 4th Circuit rejected a challenge by a self-described gay rights activist from Cameroon to the Board of Immigration Appeals’ affirmation of an Immigration Judge’s decision that the petitioner’s testimony was not credible due to significant inconsistencies, and thus he should be denied asylum, withholding of removal, or protection under the Convention against Torture (CAT). Fosso v. Sessions, 2017 U.S. App. LEXIS 12880, 2017 WL 3037457 (4th Cir. July 18, 2017). Gay sex is criminal in Cameroon, and the government is fairly hostile to gay people, according to State Department country reports from four or five years ago that were placed in evidence in this case, but the court was not convinced that the petitioner had shown that he was likely to be singled out for torture or serious harm if he was returned to his home country. Unless he was entitled to refugee status because of persecution due to his political opinions, he did not fit into any of the other categories for protection. The petitioner showed up at a port of entry to the U.S. without a visa. He told a story differing in details to the agent who interviewed him at the border, the agent who interviewed him in a reasonable fear hearing, and the Immigration Judge. The main line of the story was that he, a heterosexual man with a gay brother, was a co-founder of a gay-rights advocacy group in Cameroon called Rights for All that engaged in protest activity that attracted the attention of the police. Petitioner told the border agent that he, himself, had never been arrested, but in subsequent interviews he claimed to have been arrested twice and tortured at least once. He also gave stories at different times about how he got a passport to leave Cameroon and what route he took to end up in the U.S. He said that he had owned and operated a printing business in Cameroon that had printed materials for Rights for All, drawing threats against him by the police, and that ultimately somebody burned won the building in which his business was located, although he did not have details to give that would connect the first to his gay rights advocacy. There were various other discrepancies in his stories, and many of the documents he submitted to try to bolster his case were vague on details or contradicted one or more of his stories. Ultimately, the court would not second-guess the Immigration Judge and the BIA in light of the numerous inconsistencies which the court found significantly undermined the petitioner’s credibility. Ronald Darwin Richey of Rockville, MD, argued the appeal for the Petitioner.

U.S. COURT OF APPEALS, 8TH CIRCUIT – On August 11 a panel of the 8th Circuit issued yet another in a series of decisions by federal appeals courts rejecting constitutional challenges to state laws that seek to prevent disruptions of funerals. Phelps-Roper v. Rickets, 2017 U.S. App. LEXIS 14877, 2017 WL 3442567. Many of these laws were passed in response to the antics of the late Rev. Fred Phelps and his Westboro Baptist Church (a tiny establishment whose members consist largely of the extended Phelps family). Circuit Judge Bobby Shepherd concisely summarizes in his introductory section: “This is another in a series of cases about the precise location of the line between the State’s interest in protecting the privacy and peace of a vulnerable audience of mourners and the picketer’s freedom to express herself under the Constitution. Shirley Phelps-Roper and other Westboro Baptist Church (WBC) members consider military funerals to be ‘patriotic pep rallies’ which suggest that God approves of national politics that WBC believes to be contrary to Biblical instruction. They therefore picketed such funerals in Nebraska to warn the nation and to assert their belief that God does not bless a nation that tolerates homosexuality and adultery. Nebraska’s Funeral Picketing Law (NFPL) prohibits picketing within 500 feet of a cemetery, mortuary, or church from one hour prior through two hours following the commencement of a funeral. Neb. Rev. Stat. Secs. 28-1320.01 to .03. Phelps-Roper brought this action against the State of Nebraska and the Omaha Police Department (OPD) challenging the constitutionality of the NFPL, facially and as applied. After a bench trial, the district court upheld the NFPL and entered judgment for the appellees. Phelps-Roper appears the district court’s judgment. Having jurisdiction under 28 U.S.C. sec. 1291, we affirm.” The opinion recounts several lawsuits in which the plaintiffs herein have challenged various municipalities attempting to enforce the statute, the courts ultimately holding that the statutes are valid “time, place and manner” content-neutral restrictions on expressive activity, and thus do not run afoul of 1st Amendment protections for expressive, political speech. The particular occasion that gave rise to this lawsuit was picketing activity by the
Westboro crowd of the funeral of Caleb Nelson, a Navy SEAL who died in Afghanistan. Phelps-Roper complained that picketers were restrained by the police from demonstrating closer than 500 feet from the church where the funeral was held. “A picketer in a t-shirt announcing ‘GOD HATES FAGS’ held four colorful signs proclaiming in large font ‘THANK GOD FOR DEAD SOLDIERS,’ ‘SOLDIERS DIE 4 FAG MARRIAGE,’ ‘SHAME,’ and ‘DESTRUCTION IS IMMINENT.’ Another BWV picketer’s signs added ‘NO PEACE FOR THE WICKED’ AND ‘GOD IS YOUR ENEMY.’” while the t-shirted picketer shouted ‘God is watching YOU’ toward the passing cars to the blaring music of Bette Midler’s “From a Distance.” Phelps-Roper complained that while her compatriots were kept away, a contingent of Patriot Guard Riders (PGR), motorcyclists who show up at the invitation of the deceased’s family to show their respect for the veteran, were allowed to be closer. The court found that PGR was not there to engage in protest activity, but “instead, its mission is to honor those who ‘paid the supreme sacrifice’ and ‘shield the family from any distractions’ by ‘simply forming a flag line.’ It allows others who are not PGR members to join in its flag line as long as there are no signs or protest activities (including holding a flag upside down).” The court rejected both facial and as-applied challenges to the state law and its enforcement in this case. The court specifically rejected plaintiff’s argument that Omaha police violated their constitutional rights by allowing PGR to place their flag line where it would block the WBC protesters from being seen by those attending the funeral. “There is no evidence that OPD silenced WBC or selectively allowed the crowd to act in an unlawful manner at WBC’s October 2011 picket,” wrote Shepherd. “The decedent’s family and other private parties are under no obligation to listen to WBC’s message and can take whatever lawful means they wish to avoid hearing or seeing Phelps-Roper. The First Amendment guarantees free speech, not forced listeners.” And, in conclusion, after acknowledging the First Amendment right of Phelps-Roper and Westboro to demonstrate and picket to communicate their views: “Mourners, because of their vulnerable physical and emotional conditions, have a private right not to be intruded upon during their time of grief. We find that the NFPL strikes a balance between these competing interests of law-abiding speakers and unwilling listeners in a way that is not facially unconstitutional. We likewise find that Phelps-Roper has failed to demonstrate that the NFPL was applied to her in an unconstitutional manner.”

U.S. COURT OF APPEALS, 9TH CIRCUIT – In Ekeke-R v. Sessions, 2017 U.S. App. LEXIS 16122, 2017 WL 3616384 (Aug. 23, 2017), the court found that the Board of Immigration Appeals (BIA) did not abuse its discretion in denying the petitioner’s motion to reopen removal proceedings, referring to his claims for withholding of removal and protection under the Convention against Torture (CAT) based on his HIV status. Petitioner, from Nigeria, is removable and ineligible for asylum because he was convicted of an aggravated felony. (As usually, the court of appeals’ brief opinion does not go into any details about the nature of the crime.) He argued that he would be subject to persecution, even torture, were he removed back to Nigeria as a person living with HIV. The court commented that he “did not submit evidence demonstrating a material change in circumstances in Nigeria for people with HIV/AIDS. He also did not show prima facie eligibility for either withholding of removal or protection under CAT. Although he presented evidence that discrimination against people with HIV/AIDS exists in Nigeria, he failed to demonstrate the ‘either the government or persons or organizations which the government was unable or unwilling to control’ were responsible for this persecution.” As usual in this sort of summary case, the court does not provide any details about the record regarding conditions in Nigeria for people living with HIV/AIDS. Of note here is that petitioner was represented by counsel, Lori Beth Schoenberg of Los Angeles, and that the caption lists a dozen variants of his name, each somewhat different. One guesses they included every name under which he is referenced in some document or report to be sure that they are getting the right person deported.

U.S. COURT OF APPEALS, 11TH CIRCUIT – Some comic relief for troubled times. Alabama Attorney Austin Burdick channeled his outrage at the U.S. Supreme Court’s decision in Obergefell v. Hodges into a little pro se litigation of his own, filing suit in the U.S. District Court for the Northern District of Alabama against Justice Anthony M. Kennedy and the other four members of the majority in Obergefell. His case was assigned to U.S. District Judge Madeline H. Haikala. Burdick asserted a Due Process Bivens-type 5th Amendment Claim and claims of breach of contract and breach of fiduciary duty. The essence of his claim was that the Obergefell decision was issued by defendants “in violation of their oath of office and to the detriment of the plaintiff,” a trial and appellate lawyer who asserted that “he suffered a concrete injury when the Justices ‘rendered the Constitution a nullity’ in Obergefell, preventing him from making certain arguments to ‘protect his clients’ constitution rights’ and depriving him of his interest in his law license.” Judge Haikala dismissed his suit sua sponte for lack of standing, and alternatively on “independent grounds of judicial immunity and failure to state a plausible claim.” (Quotations above are from the 11th Circuit’s per
curiam opinion.) Burdick appealed, and was rebuffed by an 11th Circuit panel consisting of Judges Tjoflat, Marcus and William Pryor, Burdick v. Kennedy, 2017 WL 3207039 (July 28, 2017). What struck this writer as comical was that any practicing attorney (and according to his website Burdick has an active practice in family law, criminal defense, and constitutional law) would think that he could sue the justices of the Supreme Court in an individual capacity for their decision in a particular case. Any time the Supreme Court makes a decision, some attorneys will find they no longer can successfully make certain legal arguments because of the precedent created by the decision. In every case there are winners and losers, and it is odd to think that a lower federal court can be called upon to find that the Supreme Court erred in depriving legal practitioners of the ability to win on the arguments that the Supreme Court rejected. To state that it satisfies the Article III standing requirement that the plaintiff has suffered a particularized injury that can be redressed through civil litigation against the justices is absurd and frivolous. And yet, for some reason, the 11th Circuit takes pity on him and breaths not a word about “frivolous litigation” or “Rule 11 sanctions,” instead seriously and patiently explaining why Burdick lacks standing to bring this suit. The court points out that he has failed to state in any concrete way how the Obergefell ruling causes particularized harm to him. His claim is that his property interest in his law license is diminished when the Court’s ruling eliminates certain arguments that he could otherwise make on behalf of his clients, but he does not specify what those arguments are. Said the court, “Burdick has not said nearly enough to state an injury resulting from the Obergefell decision. In Obergefell, 135 S. Ct. 2584, the Supreme Court held that same-sex couples may exercise the fundamental right to marry in all states. With nothing more to go on that these bold allegations, we are left entirely to guess what his clients’ interests are, and how they will be implicated by the decision in Obergefell. All he tells us is his clients have constitutional rights that have been ‘destroyed’ by Obergefell. On this record, we cannot say that the district court erred – must less ‘belittled’ Burdick’s claim – by concluding that Burdick’s general proposition that he anticipates he will lose arguments that are based on legal theories that the Supreme Court rejected in Obergefell does not implicate a ‘legally protected interest.’ Indeed, at the hearing before the district court, Burdick acknowledged that he has not lost his law license, and his participation throughout this case has revealed that he is still able to practice law and make arguments in the federal courts. His only complaint, it seems, is that the arguments he makes on behalf of his clients will not be successful in light of Obergefell. But because there is no constitutional provision, statute, or other authority to suggest that a court must accept a party’s arguments, a lawyer has no legally protected interest in winning those arguments.” The court also noted that “Burdick’s complaint identifies no specific legal arguments he has lost or will imminently lose as a result of Obergefell.” The court confirmed on the grounds of lack of standing and lack of a justiciable case or controversy, and did not address the alternative ground of judicial immunity, but it strikes us that if attorneys could sue Supreme Court justices for their votes in particular cases, the entire system of the federal judiciary would be consumed with sore loser litigation by third parties who are dissatisfied by the Court’s decisions.

U.S. COURT OF APPEALS FOR VETERANS CLAIMS – Dwyane C. LyMore served on active duty in the Navy from January 1989 to January 1993. Like all military members at the time, records indicate he was screened for HIV and tested negative during his first year in the service. In March 1992, he was diagnosed with and treated for venereal warts. His separation examination in 1993 “only reflected abnormalities in the appellant’s abdomen.” His medical records show that in March 1996 his doctor told Lymore that he tested positive for HIV. At that time, he reported that the prior summer (while no longer in the service) had had sexual intercourse that was followed by a “viral type illness.” Logical conclusion followed that this might have been the transmission incident, but that is nowhere near certain. There is no record that he was tested for HIV as part of his separation examination, so there is no clear proof that he was already infected with HIV while in the service, and no clear proof that he wasn’t. He applied to have his HIV-related medical expenses covered as service-related, and was turned down in an April 1999 regional office decision. He persisted through various appeals and hearings producing conflicting views on when he might have been infected in the absence of concrete evidence. The record is muddied by varying facts and recollections as to when he had sex and with whom, including sex with men and sex with women. It is possible to read the court’s summary of the history of this claim and be thoroughly confused. In December 2013, the relevant Board requested that a Veterans Administration clinician offer an expert medical opinion as to “the etiology of the appellant’s HIV/AIDS and lymphoma.” In an opinion tendered in January 2014, this doctor opined that “it was not as least likely as not that the appellant’s HIV/AIDS had its onset in service or was related to any incident in service.” (Who taught this guy to write in English?) The Board relied on this to deny service connection, without getting into a detailed discussion of the factual evidence, and LyMore appealed to the court. The opinion by Judge Mary J. Schoelen of the Veterans Claims Court of Appeals then goes through a

ALABAMA – In Alabama, where the legislature has not included “sexual orientation” as a prohibited ground of discrimination under state law, LGBT individuals who are subjected to workplace discrimination try to assert their principal discrimination claims in federal court alleging a violation of Title VII, as did Adrian M. Whitt, an African-American lesbian, in Whitt v. McDonald’s a/k/a Berkman’s Food, 2017 U.S. Dist. LEXIS 127539, 2017 WL 3458956 (N.D. Alabama, Aug. 11, 2017). The employer moved to dismiss on three grounds: (1) Ms. Whitt’s EEOC charge and original complaint named only McDonald’s as the employer, when in fact the employer is Berkman’s Food, a McDonald’s franchisee; (2) Ms. Whitt filed her federal complaint on July 28, 2016, more than ninety days after the EEOC mailed her a right-to-sue letter; and (3) failure to state a claim. The original complaint alleged Title VII sexual harassment and Title VII sex discrimination, using a sex stereotyping theory. An amended complaint added supplementary state law claims of invasion of privacy, intentional infliction of emotional distress, and negligent and/or malicious retention, supervision, and training of the supervisor whose misconduct underlies the complaint. U.S. Magistrate Judge Staci G. Cornelius, denying the motion to dismiss, easily dispensed with all three arguments. First, noting that the proprietor of Berkman’s Food had responded to the EEOC charge and attempted to file a pro se answer to the federal court complaint (which the court declined to accept for filing because corporations must appear by counsel), the court accepted Whitt’s misidentification of the defendant under the “misnomer rule” as a “mere slip of the pen” and not a strategic decision. Second, Judge Cornelius observed that courts allow for three days for an EEOC complainant to receive their right-to-sue letter, counting the 90-day period running from three days after the EEOC letter is posted to the complainant, and courts extend the deadline for filing when the 90th day falls on a weekend or court-closure holiday. Taking these practices into account, Whitt’s complaint was filed several days within the deadline. Finally, Judge Cornelius observed that defendant’s assertion that the complaint fails to state a claim was “unsupported by analysis or legal authority” and “asserts factual issues inappropriate for determination on a motion to dismiss,” so the motion must be denied. In her complaint, Whitt
alleged that she was hired in October 2014 and worked as a shift manager at a McDonald’s restaurant. She alleges that her manager, Dena Pass, “made several comments about Whitt’s sexual orientation and sexual preferences in front of other employees and customers. Whitt contends these comments included but were not limited to: ‘I don’t deal with people like you who act like men’; ‘you are too aggressive’; and ‘I don’t see why you are like that because guys are always trying to talk to you.’” Whitt alleges that she was terminated because she “would not conform to the Defendant’s unlawful sexual stereotypical view of how a woman should act.” This should be sufficient to state a Title VII claim within the 11th Circuit, where the court has accepted the sex-stereotyping theory extension to LGBTQ plaintiffs in appropriate cases (although not without some controversy). Lambda Legal has filed a cert petition with the Supreme Court to review the 11th Circuit’s refusal to allow a sexual orientation discrimination claim under Title VII in a lawsuit by a lesbian security guard against a Georgia hospital. Whitt is represented by Charity Gilchrist-Davis, Law Office of Gilchrist-Davis LLC, and Roderick T. Cooks, Winston Cooks LLC, both of Birmingham, AL.

ALABAMA – Must a judge presiding in a custody dispute between a lesbian mother and a heterosexual father recuse himself when he is a minister in a church that condemns same-sex marriage, has himself stated religiously-based objections to same sex marriage and asserted that “God’s law” takes priority over civil law recuse himself when moved to do so by the mother? What if the judge reacted to the U.S. Supreme Court’s ruling in Obergefell v. Hodges by “retweeting” a “tweet” that stated that God created marriage and that God’s decision regarding marriage are not subject to review or revision by any man-made court, which he removed from his Twitter feed after the recusal motion was filed? DeKalb Circuit Judge Shaunathan C. Bell did not recuse himself, and Tiara Brooke Lycan quickly appealed the refusal to the Alabama Court of Civil Appeals, which released a decision on July 28 backing up Judge Bell. Ex parte Tiara Brooke Lycans; (In re Tiara Brooke Lycans v. Zachary Thomas Lycans), 2017 Ala. Civ. App. LEXIS 155, 2017 WL 3204437. The mother had argued that a reasonable person could question Judge Bell’s impartiality based on his public pronouncements, but the appeals court, which agreed with her as to that, said that this was not the test. The test was whether a person in the position of knowing what Judge Bell knew about his own record in this issue would have a reasonable basis for questioning his impartiality. Refuting the mother’s argument, Judge Bell noted that while this divorce case was pending he ordered that custody be shared between the parents, and furthermore that in two other divorce cases that he had decided involving lesbian mothers and non-gay fathers, he had ordered joint legal custody with physical custody alternating between the parents. Based on the “full record,” the Court of Civil Appeals ruled, Bell had made the correct call, showing that a reasonable person in possession of all the facts would not question his impartiality.

CALIFORNIA – Although two lesbian basketball players who claimed they suffered discrimination from their coach in 2014 because they were dating managed to beat back a motion to dismiss their case by Pepperdine University, see Videckis v. Pepperdine University., 150 F. Supp. 3d 1151 (C.D. Cal. 2015), they failed to persuade the jury, which found there was insufficient evidence to support a finding that the actions about which they complained were due to their sexual orientation. The verdict was announced on August 11. This was reported as one of the first times that a sexual orientation discrimination claim under Title IX actually went to trial. The jury evidently believed the University’s evidence that the coach’s intrusive questioning of the women about their relationship was motivated by her concern about the team, and that any negative statements about the effect of two women dating while playing on the same team were part of a desire to end off-court distractions, according to a report in the Los Angeles Times (August 12).

CALIFORNIA – In a ruling consistent with what other courts have done in similar situations, U.S. District Judge Yvonne Gonzalez Rogers ruled on July 26 that an HIV-positive plaintiff who is suing a disability insurance plan over the termination of his benefits may proceed anonymously as a “John Doe” plaintiff. Doe v. Lincoln National Life Insurance Co., 2017 U.S. Dist. LEXIS 117110 (N.D. Cal., July 26, 2017). The plaintiff sought to proceed this way “due to the sensitive and confidential nature of his HIV and psychiatric health issues.” Judge Rogers cited a ruling from earlier this year, Doe v. City and County of San Francisco, 2017 WL 1508982 (N.D. Cal., April 27, 2017), in which U.S. Magistrate Judge Kandis A. Westmore had authorized a “John Doe” pseudonym for the plaintiff in a case involving psychiatric issues. “Although public discourse, understanding, and acceptance of such issues has improved in recent years,” wrote Judge Rogers, “the Court recognizes that society continues to place at least some stigma on those diagnosed with HIV, and fear of negative treatment due to HIV remains reasonable and understandable. Moreover, plaintiff’s decision to maintain the confidentiality of his status implicates significant privacy concerns that demonstrate plaintiff’s need for anonymity.” The judge could find no
prejudice to defendant “at this juncture,” observing that he had “provided sufficient information in the complaint, such as his claim number and the dates of his communications with defendant, to allow defendant to ascertain his identity. Defendant, therefore, has no need for plaintiff to disclose the same in a public forum.” Acknowledging that defendant has not yet been served with the complaint, Rogers wrote that if the defendant identified “any prejudice that would attach as a result of plaintiff’s prosecution of this action anonymously, defendant may raise such issues so that the Court may evaluate the propriety of continuing to allow the action to proceed anonymously or whether any such prejudice may be mitigated.” Finally, the court found that “the public interest is not advanced by publication of plaintiff’s identity here.”

CALIFORNIA – Wrongful death is a statutory cause of action, and state statutes require that a person be closely related to the deceased in order to sue a malefactor who caused the death. Patrick Ferry learned this the hard way, when Senior U.S. District Judge Saundra Brown Armstrong (N.D. Cal.) dismissed his wrongful death action against manufacturer De Longhi America, Inc. on August 16. Ferry v. De Longhi America, Inc., 2017 WL 3535058. Ferry was the long-time domestic partner of Randy Sapp, who died as a result of a residential fire that was allegedly started by a defective heater manufactured by the defendant. Ferry and Sapp met in May 1984 and began living together in August 1985. In 1993, they had a religious marriage ceremony at the First Unitarian Church of San Francisco. They knew that their marriage was not recognized under the law of California, but they considered themselves to be married. They held themselves out as a married couple, and “shared everything,” according to Ferry’s declaration in opposition to the motion to dismiss. When registered domestic partnerships became available in San Francisco and then in California, they did not register because they considered themselves to be married already. They didn’t marry during the brief window period between a California Supreme Court decision in the spring of 2008 and the passage of Proposition 8 that fall, and they didn’t rush to marry after the Supreme Court dismissed the proponent’s appeal of the decision invalidating Prop 8. Then, six months later, tragedy struck, Ferry died, and Sapp sought to hold the manufacturer of the allegedly defective heater liable to him for the loss of his partner. He argued that Obergefell should be projected back in time to validate the legality of his 1993 religious marriage ceremony, but Judge Armstrong would not buy the argument. “Although Mr. Ferry urges the retroactive application of Perry and Obergefell, the Court finds that the facts of this case do not implicate a retroactivity issue. These decisions . . . established that same-sex couples have a constitutional right to marry in California and invalidated state laws that infringed upon the exercise of that right. Although Perry afforded same-sex couples the right to marry as of June 2013, it is undisputed that Messrs. Ferry and Sapp did not obtain a marriage license or otherwise take steps to legalize their marriage. Thus, they were not lawfully married at the time of Mr. Sapp’s death. The authorities upon which Mr. Ferry relies underscore the importance of this point.” The court also rejected the argument that Ferry should be considered a “putative spouse” of Sapp because he had a good faith belief that they were married, based on the 1993 ceremony. There are some putative spouse cases out there, but they predate the existence of a legal right for same-sex couples to marry. And, Ferry admits that he knew his 1993 marriage was not legally valid. Armstrong found that California’s version of the putative spouse doctrine protects “innocent parties who believe they were validly married,” but Ferry did not have any such belief. “Here, Mr. Ferry acknowledges that he and Mr. Sapp did not obtain a marriage license. Moreover, Mr. Ferry ‘recognized’ that his marriage ‘was not viewed under the law as “legal.”’ This was not a case of genuine mistaken belief in the validity of what purported to be a legal marriage. “While the state has an interest in protecting persons who believe in good faith that they entered into a lawful marriage (i.e., one that complies with statutory requirements), it has no such interest in protecting persons who have entered into facially invalid marriages,” wrote Armstrong. While stating that she did not doubt “the depth of Mr. Ferry and Mr. Sapp’s commitment to each other, or seek to diminish Mr. Ferry’s loss,” and that she was not “blind to the vestiges of inequity that remain even after the rights of same-sex couples have been declared,” “the act of obtaining a marriage license is an administrative burden that all couples must bear if they wish to avail themselves of the legal rights and privileges of a formal marriage,” she wrote. “Thus, although the equities might favor a different result, the Court’s ‘hands are tied.’”

CALIFORNIA – A California psychologist at the state prison medical facility at Vacaville has filed a whistleblower lawsuit against correction officials for harassment and punishment she has received when standing up for transgender and gay inmates at the facility. Dr. Lori Jespersen seeks damages and injunctive relief in Jespersen v. California Department of Corrections and Rehabilitation, et al., 17-cv-840 (E.D. Calif., filed August 14, 2017). Jespersen complained of a generally hostile environment for LGBTQ people, about which she complained, identifying herself as an “openly genderqueer lesbian.” She alleges that she suffered
discrimination and retaliation “due to her gender and sexual orientation, association with and advocacy on behalf of the LGBTQ community, and for complaining about unlawful harassment.” These include demotion in duties and deliberate placement in dangerous situations. The 39-page complaint has numerous examples and also draws on scholarly studies and other class action lawsuits on health care in California’s prisons. The complaint cites numerous examples of homophobia and transphobia and retaliation against Jespersen for exposing non-compliance with the Prison Rape Elimination Act and the HIPAA regulations regarding medical privacy of inmate records. The complaint includes numerous causes of action under California law, but it is excellent reading for anyone with a client who faces retaliation for defending LGBTQ prisoners, as well as herself as a correctional professional. Jespersen is represented by Medina Orthwein, LLP, Oakland. William J. Rold

CALIFORNIA – The New York Daily News reported (Aug. 31), that Los Angeles Superior Court Judge Gregory Keosian issued a tentative ruling in a lawsuit by “fitness guru” Richard Simmons against the National Enquirer, which had reported in a 2016 cover story titled “Richard Simmons: He’s Now a Woman,” that Simmons had undergone “shocking sex surgery” as part of gender transition. Simmons, who denies the truth of the story, filed a tort action against the Enquirer. However, Judge Keosian noted, Simmons had failed to show that he suffered any economic losses as a result of the Enquirer’s story, and such a showing of actual damages is necessary unless the challenged statement is defamatory per se. Without such damages, wrote the judge, “misidentification of a person as transgender is not actionable defamation.” Continued Keosian, “The court does not mean to imply in its holding that the difficulties and bigotry facing transgender people is minimal or nonexistent. To the contrary, the court has reviewed the evidence submitted by Simmons regarding the deplorable statistics relating to transgender people.” He suggested that “even if there is a sizable portion of the population who would view being transgender as negative,” the court should not “directly or indirectly, give effect to those prejudices. Keosian heard arguments on August 30 and promised a ruling on pending motions shortly. Simmons, who describes himself as “an avid supporter of the LGBTQ community,” said he sued because he found this false story to be an invasion of his privacy and that it “cheaply and crassly commercialized and sensationalized an issue that ought to be treated with respect and sanity.” At the heart of the case is a battle over whether society’s views have evolved to the point where a false imputation that somebody has transitioned should be presumed to be harmful to their reputation without evidence of any financial harm. Looking comparatively, courts in many jurisdictions traditionally treated a false imputation that somebody engaged in gay sex or was gay as per se defamatory, but over the past few decades courts in many common law jurisdictions have found that changed societal acceptance for gay people has undermined the rationale for such a rule. Whether social attitudes about transgender people have reached that point is, in this case, a matter of heated debate, but it appears that the judge is headed towards dismissing Simmons’ claim.

CALIFORNIA – U.S. Magistrate Judge Maria-Elena James granted a motion by the City of San Francisco and the San Francisco Public Library to dismiss a Section 1983 action brought by Jenna Meyer, a transgender woman, alleging a violation of her constitution rights by one of the library’s janitors, identified in the complaint as Defendant Doe 1 and in the opinion as Ms. Escobar, who allegedly accosted Meyer in the women’s restroom in the library, accused her of trying to steal a roll of toilet paper, touched her arm and demanded to search her handbag. Meyer v. San Francisco Public Library, 2017 U.S. Dist. LEXIS 128121, 2017 WL 3453364 (N.D. Calif., Aug. 11, 2017). Meyer sought a finding of municipal liability based on an alleged failure to train library staff how to interact appropriately with members of the public, and, citing 42 USC Sec. 1983, asserted that her right to equal treatment was violated inasmuch as the janitor did not similarly seek to search the handbags of other women in the restroom. She asserted that she was well-dressed, wearing valuable jewelry and holding a purse worth $60,000, so that, quoting from the judge’s summary of the complaint, “any reasonable person would have known that someone dressed like Plaintiff was not likely to steal ‘a cheap roll of single ply industrial grade toilet paper.’” Thus, reasoned Meyer, she must have been singled out because she is a transgender woman. She also sought damages for intentional infliction of emotional distress under California law. The suit was begun in San Francisco Superior Court and removed by defendants to the federal court. Judge James found that the complaint failed to allege facts that would support municipal liability, finding that a bar allegation of failure to train without any detail to back it up was insufficient to hold the municipal employer liable and, furthermore, that a single incident would not be sufficient to establish a municipal policy. However, James rejected the defendants’ alternative ground for dismissal, an argument under the state’s Anti-SLAPP law, rejecting the claim that the lawsuit was an attempt to stifle the freedom of speech of the offending janitor. Curiously, the complaint premised the underlying discrimination allegation as one of sexual orientation rather than gender identity (both of
which are covered under the state’s anti-discrimination laws), and appeared to conflate at various times the basis for the charge. Judge James, insisting that she knew the difference between the two, analyzed the claim as one for gender identity discrimination, noting that the complaint described plaintiff as “quite obviously a transsexual male to female person” and offered no allegation regarding the plaintiff’s sexual orientation. Meyer is represented by San Francisco attorney Donald E. Bloom.

CALIFORNIA – The 4th District Court of Appeal has revived several claims asserted by an employee of the state’s Department of Parks and Recreation, including that she had suffered retaliation because of her participation as a witness during the investigation of a sexual orientation discrimination claim brought by a co-worker. *Light v. California Department of Parks and Recreation*, 2017 Cal. App. LEXIS 688, 2017 WL 3393079 (Aug. 8, 2017). The entire story as laid out by Judge Judith McConnell in her opinion for the appeals court is too lengthy for inclusion here. Suffice to say that the trial judge erred in granting summary judgment to the employer, because Melony Light’s factual allegations, in the view of the court of appeal, were sufficient to sustain a claim that she had suffered retaliation for meeting with a Human Rights Office investigator to discuss her co-worker’s complaint and then refusing to reveal to her supervisor what she had said to the investigator, after the supervisor allegedly instructed her and other co-workers that it was their duty as part of the “team” to lie, if necessary, to protect the supervisor and her manager from the discrimination charge. Actually, the details alleged by Light are shocking to read, including an account of a meeting of supervisors with staff that degenerated into a bull session defaming the (absent) lesbian employee.

Despite a finding by investigators that the supervisors in the office where Light was employed had created a “culture of retaliation,” the trial judge, San Diego Superior Court Judge Richard E.L. Strauss, had granted summary judgment to the employer and various named defendants. From the allegations recounted by Judge McConnell in this opinion, this seems to have been a case of “supervisors from hell.” Indeed, Light’s allegations include that she was summoned to a supervisor’s office, kept there against her will, and alternatively sweet-talked and berated to try to get her to reveal what she had said to investigators, and that her refusal to do so led them to infer the worst and to attempt to eliminate her job entirely. Juicy reading, indeed.

DISTRICT OF COLUMBIA – U.S. District Judge Royce C. Lamberth ruled on July 28 that the response by the Federal Bureau of Investigation and the Justice Department to a Freedom of Information Act (FOIA) request submitted by the Mattachine Society of Washington, D.C., in January 2013, was inadequate to fulfill FOIA requirements, and granted partial summary judgment to the plaintiff, mandating that the FBI and DOJ undertake a more expansive search for documents about the devising and implementation of President Dwight Eisenhower’s Executive Order 10450, signed in 1953. *Mattachine Society of Washington, D.C. v. United States Department of Justice*, 2017 U.S. Dist. LEXIS 118894, 2017 WL 3251552 (D.D.C., July 28, 2017). This was the controversial order that allowed the FBI and the Civil Service Commission to attempt to purge the federal bureaucracy of gay people, through the assertion that “sexual perverts” were a security risk, vulnerable to blackmail and subversion by Communist agents. The Order established a “Sex Deviate Program” whose implementation was initially overseen by Warren E. Burger, then an official of DOJ, subsequently a federal court of appeals judge in Washington and, by appointment of Richard Nixon, Chief Justice of the United States. Historians have asserted that thousands of federal employees were discharged under this program. Mattachine requested any documents regarding the Order, the program it established, or Warren Burger in his role as Civil Division Chief overseeing its implementation. The government claimed to have surfaced 1132 pages of documents in response to this request, of which it released 552 pages to Mattachine and claimed the remaining must be withheld under one or more of the statutory exemptions from disclosure. The exemptions are intended to shield personal information of individuals and to protect confidential sources and meet national security concerns. In this action, Mattachine alleged that the government had failed to conduct a search of sufficient scope and breadth, and Judge Lamberth agreed. While upholding the decisions to withhold certain documents after reviewing them in camera, he agreed that the search should have used a broader array of search terms, and found incredible the government’s claim that there were no documents relating to Warren Burger’s role with respect to the EC. The standard for review on a FOIA request is whether the government has made a good faith attempt to comply with the request. In this case, amazingly, they did not use “sexual perversion” as a search term even though that term appears in the Executive Order itself as grounds for dismissing employees. Further, it didn’t use a host of terms that have appeared in documents generated by government agencies to send to individuals, which have found their ways into archives and published historical and biographical works, such as “queer,” “homo,” “dyke” and so forth. The government claimed that such a search would be unduly burdensome, but Lamberth concluded that this had not been shown.
Furthermore, Judge Lamberth wrote, “the FBI completely failed to search for any documents related to Warren E. Burger in its initial response to the request. The government claims that it had “searched all documents containing all permutations of Warren E. Burger’s name” but that “there is not a single responsive document amongst the results.” That is, the government claimed that even though Burger was in charge of implementing the program, his name did not appear on any document related in any way to EO 10450 or the Sex Deviate Program that he was charged with overseeing. “Respectfully,” wrote Lamberth, “this strains credibility. It is suspicious at best, and malicious at worst, for the FBI to assert in one paragraph that the review of 5,500 documents would be burdensome, and in the next claim to have conducted a review of every document related to any permutation of the name Warren E. Burger – Chief Justice of the United States from 1969 to 1986, D.C. Circuit Judge from 1956 to 1969, and Chief of the Civil Division of the Justice Department from 1953 to 1956. This absurd dichotomy stretches credibility further, as the FBI claims that the review of that search did not yield a single responsive document. The Court finds it nearly impossible to believe that a search for every permutation of the name of the man who was charged with carrying out EO 10450, a robust federal mandate that built upon an established FBI initiative, yielded zero responsive documents. As to the documents withheld to protect the privacy of individuals, Lamberth suggested that the government could come up with a method of coding the documents by replacing names with alphanumeric markers so that entire documents need not be withheld, but rather produced with the identity of individuals concealed. This might be less possible with documents referring to confidential sources from particular foreign countries. In any event, the DOJ and FBI now have their marching orders to undertake a much more extensive search, so that Mattachine can progress in its project to document fully the impact of EO 10450 on the lives of LGBT people during the roughly 40-year period that the Program was in effect. (By the early 1990s, judicial decisions in LGBT rights cases had progressed to the point where enforcing the Eisenhower ban became increasingly risky from a liability point of view. Later in that decade, President Clinton issued an EO protecting gay applicants and employees from sexual orientation discrimination, effectively ending the program for once and all.

FLORIDA – U.S. District Judge Timothy J. Corrigan rejected a request for a preliminary injunction to require St. Johns County School Board to let transgender student Drew Adams to use the boys’ rooms at Nease High School while his Title IX case proceeds. The case, filed on June 26, is pending in the Middle District of Florida. Adams hoped to win an order that would make it possible for him to use appropriate restrooms when the fall semester began. Corrigan denied the motion on August 11, but, “noting the seriousness and importance of the case,” according to the St. Augustine Record (Aug. 11), he said he would expedite the case, which is being tried without a jury, to be tried as soon as possible, maybe in December. Corrigan suggested from the bench that he could not find “irreparable” harm from denial of the preliminary injunction, in light of how long Adams waited to file his lawsuit after the controversy over his restroom use arose. He is represented by Lambda Legal.

HAWAII – In Morris v. Verizon Federal, Inc., 2017 U.S. Dist. LEXIS 122422, 2017 WL 3379176 (D. Hawaii, Aug. 3, 2017), Chief U.S. District Judge J. Michael Seabright denied the employer’s motion for summary judgment on a lesbian employee’s Title VII hostile environment claim. The plaintiff was the only female employee on her work crew, splicing cable and installing equipment, and most of her allegations concern anti-lesbian comments or comments that she found offensive because of her sexual orientation by co-workers and supervisors. Interestingly, the employer did not argue in its motion that the claim was not actionable because the evidence related to sexual orientation. Rather, litigation of the motion proceeded as a sex discrimination claim, and the court concluded that the plaintiff’s affidavit and deposition testimony were sufficient to withstand the motion for summary judgment. “At this stage,” wrote Judge Seabright, “the court must weigh the evidence in favor of the nonmoving party. And, weighing Plaintiff’s Declaration in Plaintiff’s favor, and considering the totality of the evidence, a reasonable fact-finder could find that repeatedly being called ‘bitch,’ ‘gay,’ ‘dyke,’ and ‘faggot’ by ‘fellow employees and managers’ over a two-year period, in addition to the more specific instances of harassment set forth above, created a sufficiently hostile work environment to violate Title VII.” In a footnote, the judge commented, “The court recognizes, in relation to some co-worker harassment, that Verizon took adequate steps (at least at times) as a corrective measure. Nonetheless, there is evidence – viewed in the light most favorable to Plaintiff – that Plaintiff’s supervisors also created a hostile work environment for Plaintiff. Thus, under a totality of the circumstances, a reasonable woman could perceive Plaintiff’s environment as sufficiently abusive.” A substantial part of the opinion was devoted to the plaintiff’s Americans with Disabilities Act claim, deriving from her treatment after she took medical leave for various work-related injuries. The court found that the employer’s failure to offer her a light-duty assignment when her doctors released her to work on that basis did not violate the ADA as discrimination
or retaliation, because Verizon credibly alleged that it had no light-duty work available for her in light of its work flow and staffing needs and she was not qualified for the office work that was available. However, the court found that a live issue remained as to whether Verizon was acting in good faith when it responded to her doctor’s release by increasing the lifting requirement for her job, thus delaying her resumption of employment. Osian Morris is represented by G. Todd Withy, of Honolulu.

ILLINOIS – Before you file your Title VII sex and sexual orientation discrimination claim in federal court, be sure you have an EEOC right-to-sue letter to attach. In Johns v. Continental Tire of the Americas, 2017 U.S. Dist. LEXIS 128901, 2017 WL 3478832 (S.D. Ill. Aug. 14, 2017), plaintiff Arlinda Johns had a compelling story to tell about sustained harassment by co-workers because of her sexuality, race, and gender. She complained to management and got nowhere, being told that she should figure out how to get along with her co-workers. Finally, she was fed up, and responded to a note from a co-worker left on her work bike stating “we don’t want you here” with a reply note, stating “You’ll be dead before I leave.” This was turned in to the company, which deemed it a threat and fired her. Johns filed a discrimination charge with the Illinois Department of Human Rights, which sent a copy of the charge to the local EEOC office for “dual filing” purposes. She received a right-to-sue letter from the Illinois agency and filed her complaint pro se in federal court, alleging a violation of Title VII. The employer moved to dismiss, on the ground that she had not yet received a right-to-sue letter from the EEOC. The court – and this was probably a clerk acting reflexively – granted the motion. Subsequently Johns filed a new complaint after receiving her EEOC letter, and the employer moved to strike various allegations on grounds that the of failure to exhaust administrative remedies, picking up on date discrepancies regarding the time period under investigations by the agencies. The employer argued some of the allegations of earlier incidents could not be actionable, because the “relation back” theory works only for amended complaints, not new complaints. Judge Nancy J. Rosenstengel, asserting she wouldn’t have dismissed the first complaint had she known these potential consequences, confessed error and decided to treat the second complaint as an amended complaint and swept in the earlier factual allegations. The employer argued that the sexual orientation allegations could not be pursued under Title VII, because there was no box to check on the standard Title VII pro se complaint form for sexual orientation claims. It seems Johns had also checked the “Other” box and typed in sexual orientation on the form, so Rosenstengel dismissed the employer’s argument as “disingenuous at best.” Illinois law covers sexual orientation claims, and the state agency had certainly investigated those claims in response to Johns’ filing with them. More importantly, the employer was on notice from the earliest point that sexual orientation claims were part of this case. Ultimately, Judge Rosenstengel exercised her discretion to construe the pro se complaint broadly, rejected the employer’s motions, and directed the clerk to reopen the earlier case that had been dismissed and consolidate it with the new case.

ILLINOIS – U.S. District Judge Robert M. Dow, Jr., denied a summary judgement motion by the employer of a bus dispatcher who alleged in a Title VII case that her female supervisor had subjected her to sexual comments and touching. In support of its motion, the employer pointed out that the supervisor was heterosexual and married to a man, but the court asserted that a jury could find that the supervisor’s remarks about having sex with a woman and repeatedly touching her subordinate’s breasts and crotch were motivated by sexual desire, one of the bases for finding Title VII liability in a same-sex harassment case under the Supreme Court’s Oncale ruling. The court also rejected the employer’s argument that the conduct alleged by the plaintiff was insufficiently offensive, severe or pervasive to sustain a hostile work environment claim. The August 16 ruling in Watkins v. Illinois Central Bus LLC, 2017 WL 3521422 (N.D. Ill. Aug. 16, 2017).

KENTUCKY – U.S. District Judge David Bunning has ordered the state of Kentucky to bear attorneys’ fees and costs incurred the plaintiff who sued Kim Davis, the Rowan County Clerk, challenging her refusal to issue marriage licenses to same sex couples after the Obergefell decision. Miller v. Davis, 2017 U.S. Dist. LEXIS 113637, 2017 WL 3122657 (E.D. Ky. July 21, 2017). A magistrate judge had recommended against awarding attorney fees, finding that the plaintiffs were not “prevailing parties” because they achieved only a preliminary injunction, which was vacated by order of the 6th Circuit after the state modified the marriage license statute, making the case moot. Bunning
disagreed, finding that under 6th Circuit precedents, a preliminary injunction that leads to a permanent change in the legal status of the parties can merit a fee award, even if it is later vacated, and that’s what happened in this case. (Incidentally, pursuant to the preliminary injunction and the subsequent jailing of Davis for contempt, her staff did issue marriage licenses to the plaintiffs, so in that sense they achieved what they were seeking personally in the lawsuit.) Bunning also found that Rowan was acting for the state government when she refused to issue licenses based on her religious beliefs, because she was an elected official acting pursuant to her understanding of state law. He said that her actions could not be charged to Rowan County, which played no role in supervising her execution of her duties as an independently elected official, and because she was acting in her official capacity, they fees could not be charged to her. The total awarded comes to almost $225,000, so possibly the state will seek review from the 6th Circuit. The underlying case is Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015), appeal dismissed, 667 Fed. Appx. 537 (6th Cir. 2016). In the course of this litigation, the U.S. Supreme Court denied a motion by Davis to stay the district court’s preliminary injunction after the 6th Circuit refused to stay it.

MINNESOTA – Minnesota Lawyer (Aug. 18) reports that Nova Classical Academy, a charter school in St. Paul, has settled a discrimination claim brought by the parents of a transgender girl and agreed to change its policies so that transgender children will be dealt with consistent with their gender identity. “During the 2015-2016 school year, H. consistently expressed the desire to transition socially by choosing the name and pronouns by which she wanted to be referred and by wearing Nova’s girls’ school uniform,” the article reports. The parents claimed the school failed to protect H. from “persistent gender-based bullying and hostility,” and denied her ability “to undergo a gender transition at Nova in a safe and timely way,” according to the complaint they filed with the St. Paul Human Rights Commission. The settlement includes a payment of $120,000 to the parents, David and Hannah Edwards, to settle their discrimination claim. The parents removed their child from the school, whose liability insurance policy will cover $100,000 of the settlement. H. is doing “pretty good” and will enter second grade in her new school in the fall, reported father David Edwards.

NEW HAMPSHIRE – Yet another sexual minority plaintiff with plausible discrimination claim who elected to proceed pro se was defeated by filing requirements in Lath v. Oak Brook Condominium Owners’ Association, 2017 U.S. Dist. LEXIS 125788, 2017 DNH 150, 2017 WL 3444774 (D.N.H., Aug. 8, 2017). Sanjay Lath, a unit owner at Oak Brook, alleges in his complaint that on June 8, 2014, “Defendant Warren Mills [another unit owner who was president of the condo association’s board of directors] assaulted Lath, by forcing his way into Lath’s residence, and shouting obscenities at Lath, calling him a ‘faggot’ and ‘sand nigger.’ Such actions of Mills were motivated because of Lath’s sexual orientation as a bisexual man, and Lath’s national origin and race.” Lath filed his federal complaint on November 13, 2016, more than two years after the incident in question, alleging a violation of the anti-discrimination provisions of the federal Fair Housing Act (FHA). The FHA has a two-year statute of limitations for filing complaints with the Department of Housing and Urban Development (HUD). Lath never filed a complaint with the federal agency. Rather, he filed a complaint with the New Hampshire Human Rights Commission (HRC) shortly after June 8, 2014, which he alleges, “has a work sharing agreement with EEOC.” (The reference to EEOC is odd, since that agency has no jurisdiction over housing discrimination claims, being the Equal EMPLOYMENT Opportunity Commission.) “A timely filing of a charge with the appropriate administrative agency tolls the statute of limitations,” argued Lath, in opposition to the motion for summary judgment, continuing, “Shortly after the unprejudicial dismissal of Lath’s claim by the [New Hampshire] Superior Court, Lath immediately filed the suit with the Federal Court in October 2016,” U.S. District Judge Landya McCafferty found that filing with a state agency was not sufficient to toll the statute of limitations for a federal claim. The usual procedure is to have the state agency forward a copy of the complaint to the appropriate federal agency, in this case HUD’s Office of Civil Rights, in order to toll the statute of limitations on the federal claim. Apparently, nobody at the HRC thought to do this, and Lath didn’t know to ask. In this case, the first time Lath sought to invoke the FHA in a federal forum was his filing of the complaint in the U.S. District Court, which was insufficient due to the statute of limitations and administrative exhaustion requirements. The judge would not employ the doctrine of “equitable tolling” to give Lath a pass, since that doctrine refers to situations involving actual barriers to a timely filing, not plaintiff ignorance. Cases like this are heartbreaking to read, but there it is . . . The federal anti-discrimination laws are encumbered with procedural landmines for the unwary, which is why somebody with a potential discrimination complaint should be advised to seek advice of counsel immediately, or at least put in the necessary time on-line to determine the procedural steps they must take to seek adjudication of their claim. This writer would apportion some of the blame in this case to the state agency for not automatically forwarding Lath’s
complaint to its federal counterpart in order to preserve his potential federal claim. Judge McCafferty was nominated to the district court in 2013 by President Obama.

NEW YORK – A five-judge panel of the N.Y. Appellate Division, 1st Department, divided 3-2 on the question whether a lesbian employment discrimination plaintiff should be allowed to file an amended complaint adding a count of sexual orientation discrimination under New York State and City law (which would appear barred by the statute of limitations), on the theory that the count related back to the allegations of the originally filed complaint, which cited just sex and disability as grounds of discrimination. O’Halloran v. Metropolitan Transportation Authority, 2017 WL 3594921, 2017 N.Y. App. Div. LEXIS 6204, 2017 NY Slip Op 06237 (August 22, 2017). A majority of the panel, including out lesbian Justice Rosalyn Richter, agreed with Presiding Justice Rolando Acosta’s opinion that Manhattan Supreme Court Justice Manuel J. Mendez made the correct call in allowing the amendment, but out lesbian Justice Marcy L. Kahn disagreed, in her dissenting opinion joined by Justice Peter Tom. Margaret O’Halloran complained that she was passed over for promotions for which she was qualified and was then subjected to discriminatory treatment. Her original complaint, filed November 25, 2013, relating to events from 2011, alleging sex and disability discrimination. After she was deposed, she moved to amend her complaint to add a sexual orientation discrimination claim arising from the same events, but necessarily including new allegations, such as that she was a lesbian and known to be such by the decision-makers involved. By then, the statute of limitations had run, but Justice Mendez found that the defendants failed to “overcome the heavy presumption of validity in favor of permitting the amendment” and that defendants would not be prejudiced because the same events and occurrences were at issue. Justice Acosta devoted much of his opinion to explaining why the dissent was, in the view of the majority, incorrect in its application of the relation-back doctrine. (He noted in a footnote the 7th Circuit’s recent holding that Title VII’s sex discrimination ban includes sexual orientation.) Justice Kahn asserted in dissent that the relation-back exception did not apply in this case, and that plaintiff’s new claims, as pleaded in the amended complaint, failed to state causes of action. On the former point, her concern was that the original complaint did not give defendants notice of factual issues that would have to be resolved relating to the new cause of action (as shown by defendant’s request for a new deposition of the plaintiff after the amendment was granted), and that “the linchpin of the relation-back exception is universally recognized to be the defendant’s receipt of notice, within the applicable limitations period, of the factual basis for any new claim.” Justice Kahn asserted that the original complaint “contained no factual allegations as to any transactions or occurrences attributed by plaintiff to discrimination on the basis of sexual orientation,” and that her filings with administrative agencies prior to filing suit (within city government and with the EEOC) never raised this claim. She also stated concern that “by seeking to bring plaintiff’s claim of sexual orientation discrimination within her original claim for sex and gender discrimination under the State and City HRLs, the majority effectively reads the words ‘sexual orientation’ out of both of those statutes. Unlike Title IX of the Educational Amendments Act of 1972 and Title VII of the Civil Rights Act of 1964, the State and City HRLs expressly protect individuals from discrimination on the basis of sexual orientation as well as on the basis of their sex or gender.” Thus, she argued, there was no cause to “broadly” construe the state laws to cover sexual orientation; they already do. When the plaintiff filed her internal discrimination complaint with the agency, she did not check the “sexual orientation” box on the intake form, and her “first mention of sexual orientation...
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Discrimination is in the proposed amended complaint are far as appears from the record before the court, so there was no notice to defendants prior to the expiration of the statute of limitations that she was asserting such a claim in this case, based on new allegations in addition to those in her original complaint. To Justice Kahn, this was about an obvious failure to comply with the notice requirements under the statutes.

New York – Garvey v. Shoppingtown Mall, 2017 U.S. Dist. LEXIS 133862, 2017 WL 3602025 (N.D.N.Y., August 22, 2017), is the kind of opinion that makes the reader’s heart sink. Shaun Garvey, a gay man, alleges that he was fired from his job as a project manager for some work being done by his employer (an outside contractor) at Shoppingtown Mall in Dewitt, New York, when the mall owner threatened not to renew the contract unless Garvey was fired. Garvey alleges that the defendants “harassed, insulted and threatened Plaintiff, and Plaintiff was called a ‘sissy’ and told that he was not welcome at the mall.” He claims that he was singled out for this treatment because he is gay. He sues under Title VII, pro se. This is where the heart sinks. Garvey was employed in New York State, whose Human Rights Law forbids sexual orientation employment discrimination. He files a federal suit, without invoking New York Law as a supplementary claim, presumably relying solely on the federal question jurisdiction of the court, since there is no indication that there is diversity of parties here. He tries to invoke Title VII against the shopping mall and its corporate owner, which are not his employers, although he might try to make some sort of “joint employer” claim (although the court does not raise this as an issue). This is a fairly complicated case for a lay person to take on pro se, especially in the 2nd Circuit where adverse controlling precedents reject ordinary sexual orientation discrimination claims under Title VII. While it is true that the Circuit has scheduled en banc review in Zarda v. Altitude Express, a case raising the Title VII interpretive issue, which is widely expected to result in a reversal of the bad precedents either later this year or early next year, this case was filed in September 2016 when that development was not yet on the horizon. It is possible that had Garvey filed suit in state court under the NY Human Rights Law, he might survive a motion to dismiss, but in federal court the decision is whether the district judge will join with the handful of adventurous ones in other districts in the 2nd Circuit who have bucked circuit precedent and refused to dismiss sexual orientation claims under Title VII with an eye to recent developments at the EEOC and in other courts. (So far, only the 7th Circuit has accepted the argument that sexual orientation claims, as such, are actionable under Title VII, but a cert petition will be filed shortly from an 11th Circuit ruling to the contrary.) In Garvey’s case, a magistrate judge recommended dismissing without prejudice, to allow re-pleading as a sex-stereotyping claim. Rather than file a response to the magistrate’s recommendation, Garvey submitted a proposed amended complaint. But, as described by District Judge Mae A. D’Agostino, the amended complaint failed to allege facts that would support the kind of sex-stereotyping claim that would be actionable within the 2nd Circuit, instead providing more argument that Title VII should cover sexual orientation claims, and, ignoring advice from the magistrate’s report, failed to re-allege the facts from his first complaint. Without mentioning the pending en banc or the opinions from other courts alluded to above, the judge invoked the current 2nd Circuit precedents, observing that it is “well settled” in the 2nd Circuit that sexual orientation claims are not actionable under Title VII. (Failure by her clerk to uncover the pending developments and suggest that she suspend ruling on this motion for a few months to see what happens? Surely, they’ve heard about Zarda in the northern reaches of New York, as the case drew big headlines when the Justice Department filed an amicus brief opposing the position taken by the EEOC in its amicus brief.) Thus, the amended complaint was dismissed with prejudice, and what sounds like a potentially meritorious case dies, unless some angel swoops in to help Garvey draft a motion for reconsideration bringing all the pending developments in the 2nd Circuit to the judge’s attention.

New York – The 2nd Circuit’s en banc oral argument in Zarda v. Altitude Express, in which the court will address whether to recognize sexual orientation discrimination claims as actionable under Title VII’s ban on sex discrimination, is scheduled for 2:00-3:00 pm on Tuesday, September 26, in the U.S. Courthouse at 40 Foley Square (17th Floor, Room 1703), in lower Manhattan. The court has allocated the hour-long argument in 10 minute segments to counsel for the Estate of Donald Zarda, the EEOC, Lambda Legal, Altitude Express, the U.S. Department of Justice, and Adam K. Mortara, who filed an amicus brief in the case on the side of Altitude Express (and whose amicus brief closely channeled the dissenting opinion on this issue in the 7th Circuit). It is particularly noteworthy that attorneys will be arguing opposite sides of the question from the EEOC and the DOJ.

New York – A confrontation between a lesbian couple and some male NYPD officers on July 11, 2015, led to a lawsuit by the women with claims of false arrest, malicious prosecution, excessive force, assault and battery, intentional infliction of emotional distress, and bias-based profiling. Dorceant v.
For several years now, more interesting by the moment. The writer was assuming Dorceant was in uniform. Was he, perhaps, going undercover in a swimsuit? It was July 11, after all, on a steamy night in Brooklyn?) Aquino shouted out to the cabby to call for police reinforcements, and co-defendants Officer Freddy Cantillo and Officer John Triano arrived on the scene. “In the course of restraining and arresting Dorceant, these officers slammed her to the ground, held her legs, and placed a knee on her back.” (Both at the same time? Details, Judge Ross, we want details!) Both women were handcuffed and marched to the nearby 63rd Precinct station house for booking. Allman was released quickly, returned to the scene and paid the cabby, who was patiently waiting to see what would happen. Dorceant was charged with assault, resisting arrest, menacing, and harassment. (Remember, this all started, she says, when Aquino bumped into her . . . ) The grand jury refused to indict her. (What, a rebellious grand jury???) And the lawsuit followed. There were additional defendants who were dismissed from the case by agreement. Judge Ross refused to grant summary judgment to the police officers on the false arrest charge, finding disputed facts as to whether there was probable cause to arrest these women. Who started the fight is the big question, to be resolved at trial (unless the City wises up and offers enough money to settle the case). Summary judgment was granted to defendants on the malicious prosecution claim. Police don’t prosecute, the district attorney does, and, after all, the jury didn’t indict. As to excessive force, summary judgment was not sought on behalf of Aquino, just for the later-arriving officers who took down Dorceant. (Is Aquino conceding that grabbing somebody by their hair is excessive force?) Defendants argued that the degree of force the two officers used to restrain her was not unconstitutional. “In this case,” wrote Judge Ross, “Officers Cantillo and Triano arrived at the scene to find a physical fight between Dorceant and Officer Aquino. The force used was not ‘gratuitous,’ but was no more than necessary to subdue and arrest an individual engaged in a physical confrontation. For this reason, summary judgment is granted with respect to plaintiffs’ excessive force claims and state law assault and battery claims against Cantillo and Triano.” Ross found that plaintiffs failed to address the motion for summary judgment on their negligent infliction of emotional distress claim, so the judge considered it to be abandoned. As to bias-based profiling, asserting that they were arrested for being lesbians, in violation of N.Y. Admin. Code Sec. 14-151, Judge Ross concluded that this would turn on whether defendants had probable cause to make the arrest, as to which there remained factual disputes to resolve, so summary judgment was not granted. This means that the case continues on plaintiffs’ claims of false arrest, excessive force by Aquino, and bias-profiling. The plaintiffs are represented by Benjamin Christopher Zeman of Moore Zeman Womble LLP (Brooklyn). Why are NYC police officers calling lesbians “dykes”? We don’t want the NYPD to be “language police,” but on the other hand appropriate training about not engaging in offensive name calling at members of the public could pay off in terms of avoiding payouts to settle lawsuits . . . .

NEW YORK – For several years now we have ceased to include in Law Notes relatively routine rulings by federal courts affirming decisions by the Social Security Administration that particular applicants for disability benefits due to HIV/AIDS are not “disabled” within the meaning of the statute. The rulings are very fact-specific and rarely include any sort of new legal analysis that would be of interest to our readers. We do report on occasional court rulings remanding disability determinations for
reconsideration or ordering outright the award of benefits, as these results are newsworthy in light of the overall trend to deny benefits in light of the ability of people living with HIV who are responding to state-of-the-art retroviral therapy to participate in the workforce. However, we make an exception to our recent practice for Stone v. Commissioner of Social Security, 2017 U.S. Dist. LEXIS 128948 (E.D.N.Y., Aug. 14, 2017), because the detailed opinion by District Judge Sandra L. Townes discusses the plaintiff’s medical history and the Administrative Law Judge’s conduct of the hearing and subsequent written opinion denying benefits in such informative detail that we thought it useful to bring the opinion to the attention of anyone who might find it beneficial to review such a ruling. The case, rather unusually, involves an individual who was diagnosed in 1989 as HIV-positive, but was “in denial” about the diagnosis and did not seek HIV-specific treatment until 2011, after some bouts of pneumonia and other physical developments seem to have alarmed him out of his “denial.” Once he was placed on state-of-the-art retroviral therapy, his condition improved substantially. He filed his claim for benefits before this successful treatment, but medical records and expert testimony showed that by the time of the ALJ hearing, his HIV infection could be characterized as “asymptomatic”, his T-cell count was up, his viral load was very low, and it was not difficult for the ALJ to determine that he was not disabled from working. In appealing to the court, the plaintiff cherry-picked the medical expert’s testimony unsuccessfully, and failed to persuade the court that the ALJ’s opinion must be rejected because no vocational expert was called to testify at the ALJ hearing. The court found that the medical findings were adequate to show that the plaintiff was not disabled, so it was not necessary to have a vocational expert testify, such testimony being relevant when a benefits claimant did have significant mental or physical limitations, requiring that “she must be evaluated on an individual basis rather than by a mechanical application of the grid rules . . . Here, however, the ALJ’s RFC rested on ample record evidence,” wrote Townes. “Indeed, none of the Plaintiff’s treating physicians suggested he had any notable limitations.”

NEW YORK – U.S. District Judge Nicholas G. Garaufis has rejected an attempt by a gay African-American man who was beaten up in Brooklyn by several individuals identified as Hasidic Jews associated with Williamsburg Safety Patrol, Inc., to hold the city, WSP and some individual defendants liable for constitutional torts against him, in Patterson v. City of New York, 2017 U.S. Dist. LEXIS 126279, 2017 WL 3432718 (E.D.N.Y., Aug. 9, 2017). The judge granted all motions to dismiss, although certain defendants have not appeared in the case yet. The incidents giving rise to this lawsuit did result in some prosecutions of individual assailants of Taj Patterson. A police officer who Patterson alleged was responsible for a decision not to follow up on his complaints as a result of alleged intervention by representatives of the Hasidic community had “disciplinary charges brought against him and he lost ten days’ vacation in a negotiated disposition of the disciplinary matter,” and although criminal cases were dismissed against some of the defendants, two “pled guilty to misdemeanor unlawful imprisonment for their roles in the matter,” and one was “convicted of gang assault in the second degree and unlawful imprisonment.” In other words, Patterson did not imagine what happened to land him in the hospital. He was beaten up by a group of men who appeared by their dress to be Hassidic Jews, who yelled racist and homophobic statements at him until police, summoned by bystanders, broke up the melee and had Patterson transported to the hospital for treatment of his serious injuries. Some of the men, part of a private anti-crime patrol organized by the Hasidic community, claimed that Patterson was acting suspiciously in “their neighborhood” and attacked him. Patterson, represented by Amy Robinson and Andrew Brian Stoll of Stoll, Glickman & Bellina, a Brooklyn law firm, sought to extend constitutional responsibility to the non-governmental defendants by alleging close ties between the 90th precinct and the WSP, including providing WSP with financial assistance and equipment, and showing favoritism to the extent of not pressing criminal charges against Hasidic Jews at the behest of WSP and other Hasidic community representatives. Patterson alleged that representatives of the Hasidic anti-crime patrols had privileged access to the 90th Precinct headquarters and the police tolerated their misconduct toward “suspects.” The judge concluded that Patterson’s attempt to impose constitutional liability on the city, WSP and various individuals could not go forward, summarizing his holding as follows: “The Amended Complaint describes a network of inappropriate ties between the NYPD, Orthodox Jewish communities, and community policing organizations. If these allegations are true, it would appear that certain NYPD officials have woven preferential treatment into the fabric of policing operations, producing disarmingly powerful private policing organizations that operate without formal training or supervision. Worse still, the police may be looking the other way when members of those organizations engage in criminal activity. Such behavior would merit immediate attention from policymakers, and may well support civil liability against the individuals involved. In this action, however, no such civil liability will lie against the moving defendants. Plaintiff’s allegations tell a troubling tale, but the facts of Plaintiff’s case make a poor vehicle for certain claims, and the
allegations in the Amended Complaint fail to meet the required elements of others. Plaintiff has failed to plausibly establish that the assault constituted ‘state action,’ and has therefore failed to establish a Fourth Amendment violation by the WSP Individual Defendants. Plaintiff alleges that various individuals acted with discriminatory intent, but muddles his Equal Protection claims by conflating discrimination in favor of Orthodox Jews with discrimination against Plaintiff on the basis of his race or sexuality. Plaintiff offers generalized accounts of preferential treatment, but offers neither concrete examples to substantiate those claims, nor particularized allegations that provide a clear connection to this case. Thus, even if Plaintiff’s allegations are true, they are insufficient as a matter of law to sustain his claims against the Municipal Defendants or WSP Individual Defendants Braver and Herskovic. Accordingly, the court dismisses with prejudice all claims asserted against the moving defendants.” In other words, the judge says that even if, as seems possible, plaintiff’s allegations are true, the court shouldn’t get involved in the larger problem in the context of this individual case. The opinion should be very troubling to the Mayor, the City Council, the Brooklyn District Attorney’s Office, and the command level of the NYPD. Patterson’s allegations, apparently to be published in Fed.Supp.3d, restate what is conventional wisdom on the street in Brooklyn and among journalists covering crime stories in the borough, and suggest that politicians afraid of the political power of the Hasidic community are “looking the other way.” This is strikingly similar to the recurring complaints that the state and city governments are “looking the other way” rather than seriously pursuing complaints by former Yeshiva students that many Jewish religious day schools in New York do not fulfill the requirements under New York State law and regulations to provide the required minimum of secular curriculum to their students, particularly in the ultra-Orthodox and Hasidic communities centered in Brooklyn. While Patterson’s lawsuit may not be the appropriate legal vehicle to pursue these issues in an ideal world, in a world where fearful politicians (as well as elected officials from the communities involved) refuse to follow up on these issues, a lawsuit might have been the best way to expose inappropriate practices to the light of day and impose appropriate reforms. Perhaps the solution would be appointment of a special investigator to hold hearings and present recommendations to the City Council and the Mayor, as there is no indication that the NYPD is pursuing any sort of systemic solution to the problems raised by Patterson’s complaint.

NEW YORK – In a complex ruling dealing with the employer’s summary judgment motion against an 11-count discrimination, retaliation and equal pay complaint brought by a lesbian employee against Sirius XM Radio, Inc., U.S. District Judge Colleen McMahon sorted through the various causes of action, granting judgment on some, but finding as to others that material fact disputes were left to be resolved and plaintiff had alleged facts sufficient to keep her claims alive. DeLuca v. Sirius XM Radio, Inc., 2017 U.S. Dist. LEXIS 127278, 2017 WL 3171038 (S.D.N.Y., Aug. 7, 2017). DeLuca has been employed since early 2001 as an “imaging producer,” whose responsibilities involve “creating most of the non-music audio for a radio station, including jingles and promotional clips.” In this complaint, filed after exhausting required administrative remedies, she complained that she was paid less than male counterparts, hadn’t received an annual pay increase since 2009 (unlike male counterparts, hadn’t received an annual pay increase since 2009 (unlike male counterparts), was deprived of overtime pay due to her, lost her higher-profile assignments after she complained about her pay, and was denied a request to transfer to the day shift after having worked for many years on the night shift, some as a manager. She also claimed she was subjected to various forms of harassment and discrimination because of her gender and sexual orientation. She credibly alleged that her supervisor used derogatory terms for gay people, a bit ironic in that one of the manager to whom the supervisor reported is openly gay. It seems that for much of her time working for the company, she was the only woman employed in her job classification, and one of only two openly gay employees, the other being a man (who was compensated at a rate higher than hers). In sorting through the factual allegations and various causes of action, Judge McMahon found that the plaintiff’s sex-discrimination claims were significantly stronger than her sexual orientation discrimination claims when it came to direct discrimination, but that on the issue of hostile environment her strongest claim, strong enough to survive the motion, was under the New York City Human Rights Ordinance. The judge found that her allegations failed to meet the “severe or pervasive” test required for hostile environment claims under Title VII and the NY State Human Rights Law, but the New York city council included a provision in the city law casting a much wider net with less demanding pleading requirements for hostile environment claims. The judge noted recent developments in the 2nd Circuit suggesting potential openness to sexual orientation claims under Title VII, but this case was filed long enough ago that counsel had decided to assert the sexual orientation claims only under state and local law. Thus, the court did not have to rule on their potential viability under Title VII. Although the court granted summary judgment to the employer on some of the claims, many survived on the ground that they required fact finding on material issues as to which disputes remain. One of the issues left on the table is whether DeLuca’s job qualified
is exempt from overtime requirements, due to her relatively high compensation and the amount of creativity required for her job. The employer argues for the professional exemption, but the court found the issue requires resolution of disputed facts about the scope and content of DeLuca’s job responsibilities. DeLuca is represented by Scott Anthony Lucas and Andrew Ross Sack of Mr. Lucas’s firm, and Steven Mitchell Sack. Usually the denial of summary judgment in employment discrimination cases leads to settlement negotiations.

NEW YORK – In Purcell v. New York Institute of Technology-College of Osteopathic Medicine, 2017 U.S. Dist. LEXIS 124432 (E.D.N.Y., Aug. 4, 2017), U.S. Magistrate Judge A. Kathleen Tomlinson responded to District Judge Azrack’s referral of defendant’s motion to dismiss a lawsuit brought under the Americans with Disabilities Act, Title IX, and the New York State Human Rights Law against NYIT by gay former student John Purcell, who alleges that he suffered discrimination because of disabilities and sexual orientation during his career as a student, leading to his failure of clinical placements during his fourth year and his ultimate dismissal from the College, denying him the opportunity to retake the fourth year curriculum in order to earn the necessary credits to graduate. The complicated question raised by the school’s dismissial motion was whether the entire case should be dismissed because Article 78 of the New York Civil Practice Law & Rules is the exclusive vehicle for challenging academic decisions to dismiss students from state educational institutions, or whether at least part of the case could continue in federal court on the various federal and state statutory causes of action asserted in the complaint. Judge Tomlinson found that the portions of the complaint related to the circumstances under which Purcell was dismissed as a student or otherwise subjected to academic disciplinary proceedings by the school could be brought only under Article 78, and recommended dismissing those. However, she found that various allegations regarding discrimination occurring earlier in Purcell’s academic career remained actionable, and as NYIT’s motion did not address the substance of those claims or deny the factual allegations related to them, those portions of the case should be allowed to proceed to discovery. She wrote, “Plaintiff’s claims of discrimination alleged to have occurred on or after May 22, 2013 – the date of the initial disciplinary hearing – should have been brought, if at all, in an Article 78 proceeding since these alleged discriminatory acts are directly related to the academic or disciplinary determinations made by NYIT, or to the procedures followed in reaching those determinations . . . However, unlike Plaintiff’s allegations of discrimination which are intricately linked to the disciplinary determination, those claims which arose prior to the inception of the disciplinary action, may be brought in a separate proceeding since such claims would naturally ‘relate to nonacademic matters’.” Indeed, the incidents of alleged discrimination which took place during Plaintiff’s second year of medical school – the 2010-2011 academic year – have no temporal nexus to the disciplinary proceedings and resulting decision to dismiss Plaintiff from NYIT which occurred more than two years later. Thus, since these allegations are not properly characterized as a direct challenge to NYIT’s ultimate decision to dismiss Plaintiff, a plenary action is the appropriate forum to pursue such claims.” NYIT had raised for the first time in its reply brief on the dismissal motion the argument that the discrimination claims were time-barred, but Judge Tomlinson found that 2nd Circuit practice was to refuse to entertain such claims if they were not raised in the motion itself. Purcell is represented by Stewart Lee Karlin and Daniel Edward Dugan of the Law Offices of Stewart Lee Karlin, New York City.

NEW YORK – Jacqueline Kretzmon, a lesbian who is a lieutenant in the Erie County Sheriff’s Department who was assigned to Jail Management Division of the Erie County Holding Center, settled a sex and sexual orientation claim that she brought against the county under the New York State Human Rights Law, entering into a settlement agreement with the County Sheriff, one term of which was that the Sheriff would guarantee for the duration of his tenure that Lt. Kretzmon and Michael Reardon, then holding the position of Chief, would not be assigned to positions placing them in a direct chain of command with each other, and that if Reardon was removed from his position and exercised his bumping rights into a position that would “cause him to be in working proximity of Lt. Kretzmon, the sheriff would keep the two outside of each other’s chain of command.” The sheriff agreed to advise “any incoming elected sheriff of the existence of this agreement,” but the agreement was otherwise “secret and confidential.” Of particular significance is that Reardon himself was not advised of its terms. Subsequently Reardon was transferred by the county to the Holding Center, in a position where he was in proximity with Kretzmon and ultimately, as she charged, in a position where he had authority over her. Her lawyer wrote to the County Attorney to complain about violation of the agreement. This led to a chain of events, set out at length in an opinion by U.S. Magistrate Judge H. Kenneth Schroeder, Jr., who was assigned by Judge Richard J. Arcara to rule on pretrial matters and hear and report upon dispositive motions. Lt. Kretzmon claimed numerous violations of the settlement agreement, as well as retaliation against her for having
sued the county for discrimination and for her continuing complaints about new incidents, in violation of the New York State Human Rights Law. There is not room here to detail all of the allegations, but suffice to say that Magistrate Schroeder’s Report, Recommendation and Order appears to “split the baby” by granting summary judgment to Kretzmon on her claim that the settlement agreement was violated (and was enforceable as a contract), while granting summary judgment to defendants on the retaliation claim, based on the Magistrate Judge’s conclusion that plaintiff had failed to show that the employer’s misconduct, etc., was retaliatory. Kretzmon v. Erie County, 2017 U.S. Dist. LEXIS 19117 (W.D.N.Y., July 27, 2017). Kretzman is represented by Charles L. Miller, II, Lindy Korn, and Richard Joseph Perry, Jr., of the Law Office of Lindy Korn, PLLC, in Buffalo.

NEW YORK – Anyone interested in reading a lengthy, dense recitation of facts underlying a discrimination suit brought by a lesbian adjunct faculty member against New York University after her contract was terminated can dig in to U.S. District Judge Gregory H. Woods’ opinion granting summary judgment against plaintiff on all the pending federal claims and declining to exercise jurisdiction over supplementary state law claims in Russell v. New York University, 2017 U.S. Dist. LEXIS 111209, 2017 WL 3049534 (S.D.N.Y., July 17, 2017). Somebody in Judge Woods’ chambers, a clerk or law student intern most likely, had the time-consuming task of sorting through a thick pile of pleadings and deposition records to compile a coherent chronological account of the saga of Professor Suzan M. Russell, who became caught up in faculty email wars and became a victim of a colleague whom she didn't even know who decided to direct different kinds of materials her way through the internet and the university’s email system from external computers that could not be traced by the University’s IT people. At times the opinion reads like a detective novel, as Dr. Russell and University personnel tried to figure out what was going on. The opinion recounts frequent and extensive communication between Russell, fellow faculty members, administrators, IT staff, the NYPD and the district attorney’s office. Part of her complaint to University officials was that an email had effectively “outed” her as a lesbian, although she had not publicized her private life at the University. Ultimately, she sent emails to one faculty member whom she suspected (apparently wrongly) of being her internet persecutor, leading to her discharge when University administrators decided she had been harassing another faculty member based on the tone and content of the email. Her amended complaint that was the subject of Judge Woods’ July 17 ruling alleged claims against the University for hostile work environment, discrimination, and retaliation under Title VII, Title IX, the Age Discrimination in Employment Act, the NY State Human Rights Law, the New York City Human Rights Law, and the universal add-on from the New York City Human Rights Law, and the universal add-on from Johnson v. New York University, 1982 U.S. Dist. LEXIS 19117, 1982 WL 14704 (E.D.N.Y., Jan 24, 1982). Russell’s NYSHRL and NYCHRL claims against the University for hostile environment created by co-workers requires a showing of employer negligence under Title VII, the court concluded that the University’s efforts did not fail that standard. As to Title IX, there is controversy among federal courts about whether Title IX extends to employee discrimination complaints against educational institutions, many taking the position that the statute was intended to protect students and that faculty and other employees can use Title VII for their sex discrimination claims. In any event, the courts use the same methodology to analyze such claims under both statutes, so the analysis leading to summary judgement under Title VII extended to Title IX. The court concluded that Russell had failed to create a triable issue of fact on her claims of discrimination under Title VII or ADEA, and also found the lack of specific factual allegations that would raise a triable claim of retaliation against her for engaging in protected activity. As to the state and local law claims, the judge wrote, “As the Supreme Court has explained (and countless courts have repeated), ’needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Accordingly, and because the Court finds that no exceptional circumstances exist here, the Court declines to exercise supplemental jurisdiction over Dr. Russell’s NYSHRL and NYCHRL...
North Carolina – The legislature’s repeal of H.B. 2, coupled with the passage of H.B. 142, did not really cure the constitutional and federal statutory violations attacked in Carcano v. McCrory, a lawsuit brought jointly by ACLU and Lambda Legal with cooperating attorneys from Jenner & Block LLP, so they have filed a Fourth Amended Complaint in the case, which is now styled as Carcano v. Cooper, No. 1:16-CV-00236-TDS-JEP (M.D.N.C., filed July 21, 2017), substituting Governor Roy Cooper, a Democrat, for his predecessor, whose defeat for re-election was widely attributed to public unhappiness with the enactment of H.B. 2 and its aftermath. Although the repeal of the old law removed the actual bathroom provisions from the North Carolina statute books, the new law disempowered government entities and local governments from preventing gender identity discrimination or, for that matter, sexual orientation discrimination. Indeed, the complaint quotes legislators stating that H.B. 142 was not really a repeal of H.B.’s bathroom provisions. The new complaint alleges: “H.B. 142 passed through the General Assembly precisely because it effectively continued, rather than ended, H.B. 2’s discrimination against LGBT individuals. Like H.B. 2, H.B. 142’s targeting of the entire LGBT population disfavored treatment and further singling out of transgender individuals is not incidental, but rather is an intentional feature of H.B. 142 that ensured its passage.” The case is pending before District Judge Thomas D. Schroeder.

Ohio – In Doe v. Board of Education, 2017 U.S. Dist. LEXIS 133199, 2017 WL 3588727 (S.D. Ohio, Aug. 21, 2017), a dispute concerning a transgender girl’s attempt to be able to use the girl’s restroom at Highland Elementary School (transgender kids are coming out younger and younger!), U.S. District Judge Algenon L. Marbley granted in part and denied in part third-party plaintiff Doe’s motion to strike numerous affirmative defenses pled by the Board of Education’s lawyers in response to the plaintiff’s third-party complaint. This is a short but complicated opinion, recounting a strange sort of lawsuit. It seems that, given the arguments and litigation swirling about the country beginning a few years ago concerning transgender students’ demands to be recognized by schools as the gender with which they identify for all purposes, the Highland school reacted to attempts by an 11-year old transgender girl to get restroom access by taking the proactive step of filing a lawsuit against the U.S. Departments of Education and Justice, seeking an injunction against those agencies trying to enforce Title IX against the school board’s policy of “segregating student bathrooms by biological sex.” The student, represented by the National Center for Lesbian Rights (NCLR), local counsel John Richard Harrison and Linda M. Italiano Gorczynski of Hickman & Lowder, Cleveland, and cooperating attorneys from the New York office of Debevoise & Plimpton LLP, sought to intervene as a third-party plaintiff. Judge Marbley granted her motion and she filed a third party complaint, asserting her rights under the 14th Amendment and Title IX and seeking a preliminary injunction. She sought to get the court to order Highland Elementary School to “treat her as a girl and treat her the same as other girls, including using her female name and female pronouns and permitting Jane [Doe] to use the same restroom as other girls at Highland Elementary School during the coming school year. On September 26, 2016, the court denied Highland’s motion for a preliminary injunction against the government departments, and granted Doe’s motion for a preliminary injunction against Highland. Highland appealed both rulings to the 6th Circuit and, writes Judge Marbley, “dozens of states and the District of Columbia weighed in via amicus briefs.” Highland answered Doe’s complaint and asserted a panoply of affirmative defenses, many of which Doe moved to strike, and this August 21 opinion responds to her motion. But the judge notes that meanwhile the election of Trump and his administration’s withdrawal of the Obama Administration’s interpretation of Title IX obviously made any injunctive relief for Highland against the federal government unnecessary, since the Trump Administration is not going to affirmatively attempt to enforce Title IX against Highland, having effectively retreated from the field in its substitute “Dear Colleague” letter. Thus, Highland moved to dismiss the government agencies from the case. However, what remains is Doe’s lawsuit against Highland. The court found that most of the affirmative defenses Doe was challenging were clearly defective or incomplete, failing to allege facts in support of conclusory statements of law, misstating facts, and responding to claims that weren’t even asserted in the complaint. The level of professional incompetence, or at least inattentiveness, on display appears to be stunning. (Need we mention that among listed counsel for the School Board is Alliance Defending Freedom (ADF), and might we speculate that ADF provided a boilerplate list of affirmative defenses without taking the trouble to determine which were responsive to the complaint and which were not? Or, alternatively, that ADF supplied a list to the School Board’s local counsel who just reproduced the list without annotating the defenses with factual assertions specific to the individual case? We
will not list counsel’s names here, but anybody who is curious can look them up!) Furthermore, Doe’s counsel having pointed out the factual deficiencies in the affirmative defenses, Marbly wrote, “Highland’s attempt to add facts in its response brief is unavailing – the proper vehicle for Highland to add factual support to its affirmative defenses is in a motion to amend its pleading.” As to several affirmative defenses that Doe characterized as “mere boilerplate” or “facially without merit” and asked that they be stricken with prejudice because they cannot “succeed under any circumstances,” Marbly opined that only a handful that were “insufficient as a matter of law” should be stricken with prejudice; as to the rest, they would be stricken but Highland would be allowed to file an amended answer to attempt to meet the pleading requirements. At the heart of Highland’s difficulties may be its lawyers’ belief that they did not have to meet the factual plausibility requirements specified by the Supreme Court for civil pleadings in pleading their affirmative defenses, but Marbly explained that several district courts in the 6th Circuit have ruled otherwise and “because the Sixth Circuit has not weighed in with a contrary opinion, the Court holds that Highland’s affirmative defenses must meet the ‘plausibility’ pleading standards contained in Twombly and Iqbal.” Although those Supreme Court cases directly applied to what plaintiffs must plead factually to state a complaint, the court concluded that anybody asserting a legal claim, whether in a complaint or an affirmative defense in an answer, should have to meet the same pleading standard.

OHIO – In the weird world of gay discrimination claims under Title VII, U.S. District Judge Walter H. Rice’s opinion in Grimsley v. American Showa, Inc., 2017 U.S. Dist. LEXIS 133350, 2017 WL 3605440 (S.D. Ohio, Aug. 21, 2017), takes the cake (the rice cake? Sorry . . . ). Anyway, Edward Grimsley, “a Caucasian, homosexual male in a committed relationship with an African-American male,” alleged that he suffered retaliation in violation of Title VII and Ohio’s discrimination law, as well as direct discrimination, because he is a gay white man with a partner who is an African-American man and was discharged after he complained to the company about discrimination against him. He alleged that when a co-worker found out and spread the word that he was gay and living with a man of a different race, he began receiving adverse treatment by his employer, an industrial manufacturer in Blanchester, Ohio. Indeed, one supervisor removed his authority over another man because she thought he could not be “objective” about a male subordinate, and she became “hostile” when he questioned the change in his authority. He complained to management and asked for a transfer to a different assignment, but instead they fired him a week later. He complained to the EEOC and got a right-to-sue letter. The employer moved to dismiss the complaint, arguing that sexual orientation discrimination is not actionable under Title VII and, derivatively, that complaining about sexual orientation discrimination is not protected under the anti-retaliation provisions of Title VII or Ohio state law. Furthermore, argued the employer, Grimsley had falsified his job credentials on his employment application, stating that he had graduated community college when he actually had not earned enough credits for a degree before dropping out. (He was applying for a position that did not require a college degree, and he received excellent performance reviews until his run-in with the supervisor.) Anyway, after noting that in other parts of the country, some courts have started to accept sexual orientation claims under Title VII, Judge Rice said he was bound to reject the claim, because the 6th Circuit has not yet changed course on this issue and has several decisions rejecting sexual orientation discrimination claims, as such, under Title VII. Although the 6th was a pioneer circuit in allowing gender identity discrimination claims under Title VII, it had used the sex stereotyping theory, finding that transgender people who transition are certainly defying sex stereotypes and are suffering discrimination because of that defiance. But as to gay plaintiffs, the 6th Circuit won’t entertain their discrimination claims unless they can show that their conduct is gender-nonconforming “with respect to observable mannerisms, lack of masculine appearance, or behavior.” Not being heterosexual or having a same-sex partner doesn’t count. Mincing about, lisping, and wearing “effeminate” clothing might do win some protection? As to the retaliation claims, however, Rice noted that here the race of Grimsley’s partner does provide a basis for rejecting, at least in part, the employer’s motion to dismiss those claims, since there is precedent for finding that discriminating against an employee because of the race of his or her partner is race discrimination. (Hold on, but discrimination against an employee because of the sex of his or her partner isn’t sex discrimination? Logic?) Grimsley should have pleaded on his direct discrimination claim that he suffered discrimination because his partner is African-American, not because his partner is a man? What’s going on here? 6th Circuit, get your act together. As to the employer’s argument that the retaliation claim must fail because Grimsley falsified his educational credentials on his application, Judge Rice pointed out that the timing of the discharge soon after Grimsley complained about the discrimination suggested that the educational credentials were a pretext for discrimination. This might end up being a case where the educational credentials are totally irrelevant, because they were not advertised as necessary for the job, and thus clearly pretextual for race discrimination.
discrimination. In any event, Grimsley’s retaliation claims survive the motion to dismiss, for now.

**PENNSYLVANIA –** The blog JD Supra (2017 WLNR 21784601) reported on July 17 that a U.S. District Court judge in the Eastern District of Pennsylvania had denied a motion by school officials to dismiss a Title IX claim filed by her parents on behalf of a female student at Bangor Area School District claiming she was subjected to harassment and bullying by other students who perceived her as failing to comply with female gender norms. She was called “slut” and “lesbian” when she played football with the male students. She reported the harassment to a guidance counselor and her fourth grade teacher, and subsequently spoke about the problem at an assembly attended by teachers and administrators. Things got worse over the years, until finally her parents decided to move to another state. The case is Bittendender v. Bangor Area School District, Case No. 15-6465 (E.D. Pa.). As of this writing, the court’s decision denying the school district’s dismissal motion has not been reported on Westlaw or Lexis. As summarized by the blog, “The court concluded that S.B. alleged adequate facts to demonstrate that the harassment suffered was of a sexual nature. The allege verbal harassment was premised upon her sexual orientation and gender with comments regularly targeting her because she did not conform to female gender stereotypes and because the harassers believed she was lesbian. In these circumstances, sexuality was the crux of the harassment that lead to repeated comments such as ‘slut,’ ‘lesbian,’ ‘gay,’ and ‘you have a disease because you’re a lesbian.’” The case was described as part of a trend in the federal courts to allow claims under Title IX where the plaintiff was subjected to mistreatment or discrimination because of perceived nonconformity with gender stereotypes, and that the claim would not be defeated by evidence that the motivation of the harassers was specifically anti-gay.

**PENNSYLVANIA –** U.S. District Judge Thomas N. O’Neill, Jr., denied a motion to dismiss a Title VII discrimination and retaliation claim asserted by a gay former employee of a Pennsylvania nursing home, finding that although the plaintiff did not specify sex stereotype theory in his complaint, the court found his factual pleadings sufficient to meet the standard under 3rd Circuit precedent. Doe v. WM Operating, LLC, 2017 U.S. Dist. LEXIS 123979, 2017 WL 3390195 (E.D. Pa., Aug. 7, 2017). Frank “Doe” began working as an activities director at Meadowview Rehabilitation and Nursing Center in May 2015. In February 2016, the Center hired John Chapman, who became Doe’s supervisor. Two co-workers warned Doe not to “act gay” around Chapman, one of them telling him to “turn down the gay.” But Chapman soon discovered Doe was gay and “repeatedly mocked [him] by referring to him by the female name, ‘Frances,’ instead of [plaintiff’s] real name, ‘Frank,’ with a high-pitched, effeminate intonation,” and persisted in doing so despite Doe’s requests that he stop it. In May, 2016, Chapman asked Doe privately whether he thought Chapman did not like him. Doe “responded that he believed Mr. Chapman had a problem with gay people in general. Mr. Chapman raised his hand in the air, dropped it in his lap and said, ‘Frances!’ in a high-pitched, dramatic fashion.” “After this conversation,” writes Judge O’Neill, “Chapman did not stop mocking plaintiff by calling him ‘Frances,’” and did so in front of his co-workers to embarrass him. On September 22, 2016, Chapman told plaintiff that he had seen him sleeping during a staff meeting the day before, and fired him.” Doe says this was an “exaggerated and completely fabricated reason” that was a pretext, and that the firing was a departure from the employer’s policy of progressive discipline, involving verbal warnings, written warnings, and then suspension prior to a termination. Doe points out that he was qualified for the position and that there had been no complaints about his performance. He filed a Title VII charge with the EEOC and then sued upon receipt of his right-to-sue letter. There is an issue about his identification of the appropriate defendant, since various corporate names appeared on his paycheck and W-2, so he listed every name he could find in hopes of suing the correct one. Ruling against the motion to dismiss the Title VII claims, Judge O’Neill acknowledged the employer’s argument that the 3rd Circuit has rejected sexual orientation discrimination claims, as such, under Title VII, but he found that the factual allegations were sufficient to meet the criteria in the 3rd Circuit’s decision in Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (2009). In Prowel, the 3rd Circuit recognized that a gay plaintiff who can plausibly allege a sex-stereotyping case can survive a motion to dismiss, even though the plaintiff’s sexual orientation was obviously a factor in the discharge, since Title VII allows for the possibility of multiple factors, and if one of the factors qualifies as a “protected category,” the case can go forward. “Plaintiff has sufficiently alleged that he was discriminated against because Chapman perceived that he did not conform to Chapman’s expectations of what is masculine,” wrote the judge. “Although plaintiff does not allege that he actually acted effeminately, the absence of such an allegation does not doom his claim. Rather, he must merely show that he was perceived to be a member of a protected category. Plaintiff’s complaint sufficiently alleges that Chapman perceived him to be effeminate,” so his claim of hostile work environment and wrongful discharge survives, as does his retaliation claim, since O’Neill was
willing, for purposes of ruling on the motion, to accept the contention that Doe’s repeated requests to Chapman to stop calling him “Frances” was “opposition to unlawful conduct” and contributed to the decision to discharge him. Doe included supplementary claims under several local anti-discrimination ordinances, reflecting some confusion about which municipality’s law would apply. In Pennsylvania, where the state law does not include sexual orientation, dozens of local ordinances have been passed in recent years including that category. The court determined that the nursing center is very near a county line, creating some confusion, and decided that determining which local ordinance might apply could await discovery, and similarly as to sorting out which of the various corporate entities should be considered Doe’s employer.

Although Doe had missed the statute of limitations for asserting a claim under one of the local ordinances, O’Neill was willing to find equitable tolling, due to Doe’s good faith attempts to determine in which jurisdiction the nursing center was located. However, although the center’s holding company has a New York mail address, the court dismissed a supplementary claim under the New York Human Rights Law, finding that none of the alleged discriminatory activity took place in New York. Doe is represented by Philadelphia attorney Justin F. Robinette. Judge O’Neill was nominated to the court in 1983 by President Ronald Reagan. Throughout the opinion, he seemed to be bending over backwards to help Doe stay in the

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**Pennsylvania** – The Superior Court of Pennsylvania (an intermediate appellate court) has affirmed the decision of the Bedford County Court of Common Pleas to terminate a gay 16-year-old boy’s dependency status and place him in the legal and physical custody of his paternal grandmother, who lives in Arizona. *In the Interest of N.S.*, 2017 Pa. Super. Unpub. LEXIS 2938, 2017 WL 3263795 (Aug. 1, 2017). Bedford County Children and Youth Services filed an application for emergency protective custody of N.S., referred to throughout the court’s opinion as “The Child,” after a case worker visited the Child’s home “due to a family conflict” between the Child’s mother and his stepfather, involving a physical assault. They placed the Child with his maternal grandparents, who live in an adjacent house, but this was not a long-term solution, as the grandparents have strong religious objections to homosexuality. Mother testified that her mother had given the Child “a list of Bible verses, from what I understand, about being stoned to death for being gay,” and there was testimony that maternal grandmother told the Child, “you’re not going to heaven because your gay. You’re going to hell.” A reunification meeting between mother and child was deemed a “success” by the social worker because both parties agreed that they could not live together and tensions did not escalate to the point of having to terminate the meeting prematurely. The social workers and the court deemed placement with the maternal grandparents objectionable not only because of their hostility to homosexuality but because their home was too close to Mother, towards whom the Child expressed great antipathy. The Child had been sent to Arizona to spend the Christmas holiday with his biological father’s parents, and came back all smiles and relaxed, expressing a strong preference to live with them, and the court received telephonic testimony that the grandparents were eager to take the Child in for the remainder of his minority. In affirming this arrangement and rejecting the mother’s argument that sending the Child out of state was contrary to the goal of reunifying him with his parent, the court found it highly unlikely that this 16-year-old would want to resume living with his

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**Pennsylvania** – Lambda Legal announced the successful settlement of its lawsuit against the Pine-Richland School District on behalf of three transgender students who had been denied the right to use appropriate restroom facilities. The Consent Judgment in *Evancho v. Pine-Richland School District*, Case 2:16-cv-01537 (W.D. Pa.) was submitted to District Judge Mark R. Hornak by the parties on August 1. The court had previously issued a preliminary injunction to allow the students to use the restrooms while the case was pending. As part of the settlement, the District agreed to entry of a permanent injunction so that it cannot unilaterally revert to the challenged policy in the future.

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**South Carolina** – The first lawsuit in the U.S. on behalf of an intersex infant who was subjected to genital surgery with the permission of a state agency that was custodian of the child has been settled. M.C. was born with ambiguous genitalia and his parents signed over custody to the state, not wishing to raise him. While he was in state custody awaiting possible adoption, state officials granted a surgeon’s request to perform surgery to alter M.C.’s ambiguous genitals to create a vagina when the child was 16 months old. M.C. was subsequently adopted by Pam and Mark Crawford, and as he grew up he came to identify as a boy, deeply regretting that his male genitals had been removed without his consent. (These plastic surgery operations performed on intersex infants frequently result in a simulated vagina that lacks the necessary nerve tissue to provide...
normal physical sensation, and frequent follow-up surgery to make adjustments as the child grows may create an aura of mystery as some parents go to great lengths to keep the truth from the child.) M.C.’s adoptive parents filed suit on his behalf in federal court against the Medical University of South Carolina, where the procedure was performed, the South Carolina Department of Social Services, which gave permission for the surgery, and the Greenville Hospital System, which had referred M.C. to the MUSC surgeons. They also filed separate state law actions on M.C.’s behalf. The federal case was assigned to District Judge David C. Norton, who denied enough of the defendants’ initial motion to dismiss on grounds of immunity to allow the case to go forward on a due process claim. M.C. v. Aaronson, 2013 WL 11521881 (U.S. Dist. Ct., D. So. Car. 2013), but the 4th Circuit reversed the immunity ruling in M.C. v. Amrhein, 598 F. Appx 143 (4th Cir. 2015) (not selected for publication in F.3d). Subsequently, Greenville Hospital settled its way out of the state litigation in 2016 for $20,000, according to a report published online by lgbtqnation.com (July 31), and during July the Medical University and the State Agency agreed to a settlement of $440,000. One theory of the case was that performing such surgery on an infant who is not old enough to comprehend the issues and give informed consent has deprived the infant of a fundamental human right of self-determination without due process. There is much argument about whether parents should be able to give consent to such operations on behalf of very young infants, and there was much argument in the immunity cases about whether the state officials could give the health care institutions effective consent. The 4th Circuit mentioned in passing that defendants attempted to offer evidence that the child’s birth mother had consented, but that court refused to considerate because it was not part of the record before the district court. The

4th Circuit instructed the district court to dismiss the federal case on immunity grounds. The article does not give details about (or even mention) the state court claims and proceedings, which were referred to vaguely in a footnote by the 4th Circuit, but one speculates that they were deemed sufficiently viable by defendants to justify a substantial settlement amount.

**SOUTH CAROLINA** – In a lead opinion issued on August 2, Acting Justice Costa Pleicones explained for the majority of the sharply divided Supreme Court of South Carolina why a local trial judge erred by applying “neutral principles of law” to decide a dispute over the ownership of local church properties that was being contested between the Episcopal Church a/k/a The Protestant Episcopal Church in the United States of America and the Episcopal Church in South Carolina affiliated with the national body, on the one hand, and the Protestant Episcopal Church in the Diocese of South Caroline (known in this case as the disassociated diocese), and its trustees and associated individual parishes. Protestant Episcopal Church v. Episcopal Church, 2017 S.C. LEXIS 116, 2017 WL 3274123. This is one of numerous cases around the country in which state and local church bodies decided to “disassociate” themselves from the national church in response to the national church’s decision to ordain gay and lesbian ministers and higher level clergy, including most notably to select the first openly gay bishop of the church. There followed disputes about who owned the church real and personal property, the national body insisting that it was the owner, and the local churches seeking to claim continued ownership and possession of the buildings, furnishings, and ritual objects that they considered to be theirs. Justice Pleicones provides a detailed history of the church, the schism, and case law concerning ownership of church property under the governing documents of the national body, and explains why deciding this case by reference to state property and contract law without regard to ecclesiastical law violates the 1st Amendment requirement for federal courts to abstain from deciding essentially ecclesiastical issues. “I conclude that the present property and church governance disputes are not appropriate for resolution in the civil courts,” wrote Justice Pleicones, in the introductory portion of his opinion, “and would reverse the order to the extent it purports to resolve these questions.” Justice Pleicones asserted that the proper forum to decide these issues was the internal forum of the The Episcopal Church (TEC, the national body), which in effect means conceding the case to the TEC based on its interpretation of the relationship and property ownership structure within the denomination. In a concurring opinion, Justice Kaye G. Hearn states: “Based on our doctrine of deference to ecclesiastical authority, the Appellants represent the true Lower Diocese of the Protestant Episcopal Church in South Carolina and are entitled to all property, including Camp Saint Christopher and the emblems, seals, and trademarks associated with the National Church.” Several other justices wrote opinions concurring in part and dissenting in part, and there were some outright dissents. For example, Acting Justice Jean Toal wrote: “This is a very difficult dispute in which the trial court was asked by the plaintiffs to declare the status of title to church property. Just as the litigants in this matter are in disagreement about the legal issues raised in this case, so too our Court is sharply divided in our opinions about this matter. These divisions are the result of sincerely held views about the law, but we are united in our deep respect for each other’s views and the sincerity which informs our opinions. The various writings are powerfully written and deeply researched. I am regretful that I cannot join my
colleagues in the majority whose legal ability I respect so highly. Therefore, I respectfully dissent. With regard to the question of who owns the disputed real and personal property, I would hold that the plaintiffs are the title owners in fee simple absolute to this property under South Carolina law and would affirm the decision of the trial court. With regard to the question of whether the defendants infringed on the plaintiffs’ service marks, I would narrowly affirm the trial court under state law and defer to the federal court to answer any issues in this matter in which federal copyright and trademark law may be applicable.”

Given the sharp division and the implicit and explicit First Amendment issues, perhaps this is a dispute that will rise to the level of the Supreme Court of the United States. Devotees of the subject should have a feast working through the various opinions.

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TENNESSEE – The San Francisco Chronicle reported on July 22 that Davidson County Chancellor Ellen Hobbs Lyle dismissed a lawsuit brought by four married lesbian couples who are expected children, challenging a recently enacted state law providing that words used in statutes be given their “natural and ordinary meaning.” Proponents of the law had sought to deter courts from construing words such as “mother” and “father” in gender-neutral terms in cases involving LGBT family law issues. But the state’s attorney general pointed out that there is already on the books a separate law that provides that gender-specific words be interpreted as inclusive of both genders as appropriate, and that courts would likely follow that more specific directive. Lyle ruled that the plaintiffs had not proved that their rights were violated. If they encounter difficulties having the co-parent listed on a birth certificate, they now have a court order which can support their argument that the co-parent should be treated the same as the husband of a woman who gives birth to a child. Actually, what would be more useful to them in such a situation is the Supreme Court’s June 26 decision in Pavan v. Smith, 137 S. Ct. 2075, holding that Arkansas could not refuse to list same-sex spouses on birth certificates in reliance on gendered statutory language.

TEXAS—Granting the employer’s motion for summary judgment in a Title VII hostile environment sexual harassment case brought by a heterosexual male employee based on the misconduct of a bisexual male supervisor, U.S. District Judge Sidney A. Fitzwater ruled in Chin v. Crete Carrier Corporation, 2017 WL 3434293, 2017 U.S. Dist. LEXIS 126606 (N.D. Tex. Aug. 10, 2017), that the supervisor’s conduct was not sufficiently severe or pervasive to affect the plaintiff’s terms and conditions of employment. After reading the judge’s summary of plaintiff Ray Chin’s factual allegations, we were surprised by this result, which might be attributed to the confluence of a conservative judge (appointed by Ronald Reagan) and the “suck it up” attitude of many federal trial judges to people who complain about being harassed at work. Roy Chin was assigned for training to David Theis, requiring that he ride with Theis in the same truck cab and stay at the same motels during his training period. The court details Chin’s allegations concerning Theis’s outrageous behavior, including “by exposing himself while urinating into a jug within the confines of a truck cab, making unspecified conduct that males observe when suing public restrooms. When Theis stated that he is bisexual and made homosexual advances, and offering to participate in a sexual threesome with Chin and Theis’s girlfriend – did not involve actual physical contact with Chin. One male’s urinating and wearing briefs in the presence of another male is conduct that shares similarities with conduct that males observe when suing public restrooms. When Theis stated that he is bisexual and made homosexual advances, Chin immediately rebuffed them, and there is no evidence that Theis persisted. The suggested threesome never occurred. Chin’s exposure to what he thought was child pornography [on Theis’s iPad] was apparently not intentional and was not repeated.”

Fitzwater concluded that a jury could find that this conduct occurred, it could not find from the totality of the circumstances that Theis’s statements and actions affected a “term, condition or privilege of employment,” that is, that the sexual harassment was sufficiently severe or pervasive so as to alter the conditions of Chin’s employment and create an abusive working environment.”

Chin’s exposure to what he thought was child pornography [on Theis’s iPad] was apparently not intentional and was not repeated.”

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Fitzwater pointed out that all the incidents occurred “sporadically on four days over a five-day period” and that “even the most serious conduct – Theis’s exposing his private parts while urinating into a jug within the confines of a truck cab, making unspecified advances, and offering to participate in a sexual threesome with Chin and Theis’s girlfriend – did not involve actual physical contact with Chin. One male’s urinating and wearing briefs in the presence of another male is conduct that shares similarities with conduct that males observe when suing public restrooms. When Theis stated that he is bisexual and made homosexual advances, Chin immediately rebuffed them, and there is no evidence that Theis persisted. The suggested threesome never occurred. Chin’s exposure to what he thought was child pornography [on Theis’s iPad] was apparently not intentional and was not repeated.”

Fitzwater concluded that a jury could not find that Chin was subjected to a sexually hostile work environment. Thus, the court granted the employer’s motion for summary judgment on the Title VII claim.
TEXAS – Lambda Legal, with pro bono assistance from attorneys at Morgan Lewis & Bockius LLP and local counsel Stefanie R. Moll in Houston, has filed suit against the City of Houston on behalf of three city employees and their same-sex spouses, seeking a federal court declaration that pursuant to Obergefell and Pavan rulings by the Supreme Court, city employees with same-sex spouses are entitled to the same spousal benefits as all other married city employees. The complaint in Freeman v. Turner, Case 4:17-cv-02448 (S.D. Texas, filed Aug. 10, 2017), intends to shortcut the proceedings pending in the state courts. In June, the Texas Supreme Court issued a wrongheaded decision, channeling U.S. Supreme Court Justice Neil Gorsuch’s dissent in Pavan v. Smith, taking the position (contrary to the majority of the Supreme Court in that case) that the U.S. Supreme Court decisions do not necessarily settle the question of what rights same-sex marriages are entitled to have. Since this is a clear misreading of the federal precedents, the Texas Supreme Court’s remand of that case for further proceedings in the trial court to let anti-gay plaintiffs try to convince that court that a Texas city may lawfully decide to provide such benefits only to different-sex spouses is a massive waste of time, threatening the health and safety of many people. Lambda’s complaint included a request that the court issue a preliminary injunction while the case is pending, in effect cancelling out the injunction against equal benefits that the local trial court had issued at the instance of the anti-gay plaintiffs who attacked the city’s attempt to extend such benefits voluntarily. That injunction was lifted by order of the intermediate court of appeals, whose decision was reversed in June by the state’s ultra-conservative Supreme Court.

TEXAS – A female fashion model suffered dismissal of her defamation complaint against Facebook.com and its founder Mark Zuckerberg in a ruling by U.S. District Judge Melina Harmon in La’Tiejira v. Facebook, Inc., 2017 U.S. Dist. LEXIS 125246 (S.D. Tex., Aug. 8, 2017). Applying Texas law and the Communications Decency Act (CDA) Section 203, Judge Harmon found that defendants appropriately moved to dispose of plaintiff’s complaint that Facebook took too long to remove an offense and possibly defamatory statement that a third party had posted on her Facebook page, asserting, among other things, that she was really a man. Earlier in her career, Paree La’Tiejira (a/k/a Lady Paree), had sued a company in state court in Indiana for publishing statements that she was actually a transgender woman. That case resulted in a court finding, after hearing expert testimony from doctors who examined the plaintiff, that she had never undergone any gender transition procedures and was a woman with “normal gynecological exams” and had actually once been pregnant, although she suffered a miscarriage. Thus, any statement that La’Tiejira was a transgender woman had been proven false in that litigation, which was concluded in 2010. However, on March 19, 2016, an individual identified as “Kyle Anders” posted a diatribe on La’Tiejira’s Facebook page (quoted in full in the court’s opinion), asserting in crazed and offensive language that La’Tiejira was really a man and stating, among other things, that “you men make me sick with all this crazy homo transtranny shit grow up accept what God made you that is that you’re a man accept it and move the hell on yeah yeah yeah so what . . . .” This continues in similar vein at great length. The poster, whoever he may be, is severely grammatically and punctuationally challenged. La’Tiejira immediately posted a response, telling the person to stay off her page and calling him “a complete idiot.” “That same day,” wrote Judge Harmon, “Plaintiff employed Facebook’s procedures for deleting the post on her page because she did not like what it said, because someone was harassing or bullying her, and because such speech should not be allowed on Facebook because it is spam.” However, the post remained on her page for six months, and was not removed until several weeks after she filed this lawsuit, premising federal jurisdiction on diversity of citizenship. She asserted, among other things, that the court must give full faith and credit to the judgment by the state court in Indiana that she is a woman and thus the posted statement is false. In support of its motion to dismiss, Facebook presented the court with a string of citations to other cases in which federal courts, relying on the publisher immunity provisions of the CDA, had dismissed actions against Facebook for failing to delete posts that the plaintiffs claimed had defamed them. As prior courts have found, Judge Harmon reiterated the congressional intent to shield providers of interactive services on-line from liability for statements posted on their websites by third parties. Interestingly, La’Tiejira had not immediately moved to obtain from Facebook the identity of “Kyle Anders,” also named as a defendant, although she probably would have done so had this case advanced to discovery. The failure of “Kyle Anders” to be served with the complaint led to “his” dismissal from the case. The Texas Anti-SLAPP statute authorizes defendants to file dismissal motions within 60 days of being sued, mandating that trial courts dismiss the case upon finding that the lawsuit was instituted to chill First Amendment rights unless the plaintiff submits evidence as to the bona fides of her complaint. Judge Harmon found that the requirements of the Texas statute were met by Facebook here, as were all the requirements for CDA immunity. “Accordingly,” she wrote, “the Facebook Defendants’ anti-SLAPP motion under the TCPA has shown that La’Tiejira’s claims are based on, related to or in
response to the Facebook Defendants’ exercise of its rights of First Amendment rights. (sic) The burden of proof then shifted to La’Tiejira to establish by clear and specific evidence a prima facie case for each essential element of its claims, but Plaintiff has not submitted any evidence. Even if she had, she is immune from these claims (sic) under the CDA by its valid defense under Sec. 203.” The drafter of that ultimate sentence of the opinion needs to learn to proofread his or her work! Translation: The anti-SLAPP statute requires dismissal because the plaintiff’s claims are based on the defendants’ exercise of First Amendment rights, which the plaintiff can’t overcome because her claim is barred under Sec. 203 of the CDA. Thus, it is irrelevant to Facebook’s possible liability that the statements are false and, arguably, defamatory. (Actually, there is not much case law yet about whether a false statement that somebody is transgender is defamatory, and it would have been interesting had the court opined on that subject, but in the nature of this case, such an opinion was not necessary and the plaintiff’s “full faith and credit” allegation was essentially irrelevant to the outcome, since the possible liability of “Kyle Anders” was not part of the ruling on this motion.) Plaintiff’s counsel are Debra V. Jennings and Jimmie L. J. Brown, Jr., both of Missouri City, Texas. Facebook wins dismissal, but doesn’t emerge from this episode looking good. After all, why should it take six months for Facebook to respond to a request to take down an obviously offensive (ungrammatical) and potentially defamatory third-party post from a member’s page?

VIRGINIA – Another pro se plaintiff strikes out and suffers dismissal of her employment discrimination case due to jurisdictional and pleading deficiencies in Barr v. Virginia Alcohol Beverage Control, 2017 U.S. Dist. LEXIS 119136 (E.D. Va., July 28, 2017). Lesley Barr, an African-American lesbian, worked as an hourly sales associate in Virginia ABC’s Store 187 in Richmond beginning on Oct. 4, 2010. She was discharged on March 18, 2016, for having abused “discretionary breaks during working hours.” Her defense to this was that it was “conduct that every employee at Store 187 engaged in on a daily basis,” but no one else was fired or disciplined for it. She filed a discrimination charge with the EEOC, alleging discrimination because of sexual orientation, gender and race, and received a right-to-sue letter, which she followed up by filing her federal court case just before the 90-day period expired. In her complaint, she alleged retaliation, race discrimination, gender discrimination, sexual orientation discrimination, and hostile work environment, all under Title VII; wage discrimination and retaliation in violation of the Equal Pay Act; violations of 42 USC 1983, 1985(3) and 1986; violation of the 14th Amendment due process clause (because she was fired without a warning or a hearing); and a common law claim of intentional infliction of emotional distress. District Judge Henry E. Hudson dismissed the sexual orientation claim “with prejudice,” noting that the 4th Circuit does not recognize sexual orientation claims under Title VII. The rest of the Title VII claims were dismissed “without prejudice” due to pleading deficiencies. Judge Hudson found that Barr had failed to allege facts sufficient to meet the McDonnell Douglas pleading standards in the absence of any direct evidence of discriminatory intent. Her complaint was a generalized recitation of various gripes, but with alleging facts from which any inference could be drawn that the employer discharged her because of her gender or race. The retaliation claim suffered dismissal on jurisdictional grounds, as she had not said anything about a retaliation claim in her charge to the EEOC, and thus had not met the exhaustion requirement as to that claim. As to hostile environment, her only allegation related to that was about a co-worker who she claims gave her “inappropriate looks” and “made comments under her breath about Plaintiff’s sexual orientation” – not good enough for a statutory hostile environment claim, even if the 4th Circuit did recognize sexual orientation as a prohibited ground for discrimination. Her complaint did not specify anything specific about any male comparator who was paid more than her for doing equal work, thus killing her EPA claim, as to which she also failed to allege facts that would suggest retaliation. Nothing in her factual allegations logically supported the other 42 USC claims, and as to due process, the court opined that as an at-will employee not covered by the state’s grievance procedure for civil service workers, she was not entitled to any due process before being discharged. A total wipe-out. One suspects that with competent counsel she might have been able to put together a complaint that would survive a motion to dismiss, but based on the court’s recitation of her factual allegations, this is hardly certain. Perhaps an equal protection claim? That would be a more certain way to survive a motion to dismiss on a sexual orientation claim, if she had enough specific factual allegations to show that her sexual orientation was a factor in her discharge.

WEST VIRGINIA – In Whitman v. Ruby Tuesday, Inc., and Montgomery, 2017 WL 3402962, 2017 U.S. Dist. LEXIS 124715 (N.D. W. Va., Aug. 8, 2017), U.S. District Judge Irene M. Keeley ruled that Valerie Whitman’s discrimination and tort claims filed in state court against her employer and a local manager under state statutory and common law and removed to federal court by the employer should be remanded back to state court. Whitman is a lesbian who was employed as an assistant manager
at the employer’s Clarksburg restaurant for just under three months beginning in October 2016, after a training period in one of the employer’s other locations. The restaurant manager, Joe Montgomery, who knew Whitman was a lesbian, shunned her, refused to speak to her, and made “derogatory and degrading comments” regarding her sexuality “that were frequent, severe, physically threatening and humiliating.” Whitman reported the hostile work environment to the company’s general manager, which led to a meeting but no resolution of her complaints, and the hostile environment worsened, including sexual harassment by other male employees as well as Montgomery. She was ultimately fired based on a claim that she had “cursed at another employee and had made that employee cry.” Sounds like pretext to us, in light of her allegations and the failure of the employer seriously to address them.

Whitman’s complaint alleged three counts under the West Virginia Human Rights Act and a tort claim against her employer and Montgomery. After the company removed the case to federal court under diversity jurisdiction (as the company Ruby Tuesday, Inc. a multistate restaurant chain, is a citizen of a different state for purposes of diversity), Whitman moved to remand the case back to state court, pointing out that she and Montgomery are both West Virginians, so there is not complete diversity between plaintiff and all defendants as required by the federal diversity jurisdiction statute. The company claimed Whitman had fraudulently added Montgomery as a defendant solely for the purpose of defeating diversity and that, in any event, he had not been served with process prior to the filing of its removal petition. Judge Keeley held a hearing on the subject and rejected the employer’s arguments, finding that “Whitman had sufficiently alleged that Montgomery not only had knowledge of the harassment, discrimination, and hostile work environment, but also had failed to do anything about it and was personally responsible for many of the wrongful actions directed at Whitman. Consequently, [the court] concluded that there was at least a ‘glimmer of hope’ that Whitman could succeed on one or more of her claims against Montgomery. Therefore, [the court] found that Montgomery had not been fraudulently joined and it lacked subject matter jurisdiction to hear this case.” As to the issue of service of process, the court found that the employer was relying on an inapplicable federal statutory provision, the “forum defendant rule,” stating that “it does not extinguish the requirement of 28 USC sec. 1332 that the parties must be diverse from one another. Here they are not. Accordingly, the fact that Montgomery was not served prior to removal does not permit the Court to exercise jurisdiction in this case.” The case illustrates one of the bothersome anomalies of the interrelationship of employment discrimination law and diversity jurisdiction. Many employees who desire to litigate their discrimination claims against their employers in the local courts under state anti-discrimination laws find their claims removed to federal court on diversity grounds, even though they are employed in the same state where they live, because their multi-state employer is incorporated or headquartered in a different state. Employers prefer to be in federal court, where the Supreme Court’s civil pleading requirements make it much more difficult for employees to survive motions to dismiss or summary judgments, and where studies show that the trial judges are much less receptive to employment discrimination claims than are state court judges (who are less likely, as a statistical matter, to be drawn heavily from the ranks of corporate defense attorneys and federal prosecutors). But there seems to be little justification, as a matter of policy, for requiring an employee who wish to pursue solely state law claims against the local establishment of their employer, to be involuntarily removed to federal court. A desired reform would be for Congress to modify the diversity jurisdiction statute to deal with the reality that our economy has drastically changed since the earlier times when the statute was written, and that employees should be able to litigate state law claims against their employer in a state court when the workplace in which they were employed is in the state where they live. In this case, evidently, it was possible for the employee to go beyond the corporate employer and to join a local manager as an individual co-defendant, but state law does not always afford that opportunity.

CRIMINAL LITIGATION NOTES

U.S. COURT OF APPEALS, D.C. CIRCUIT — In United States v. Laureys, 2017 WL 3389267, 2017 U.S. App. LEXIS 14540 (D.C. Cir., Aug. 8, 2017), the court reversed and remanded the jury conviction of Brandon Laureys on a charge of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct. The case arose from an online encounter between the defendant and an undercover detective posing as a nine-year-old girl, with whom, wrote Circuit Judge Judith W. Rogers, “Laureys enthusiastically envisioned sexual encounters.” In his first appeal of the sentence, Laureys argued that there was insufficient evidence of his intent to violate the law. The court rejected that argument, see 653 F.3d 27 (D.C. Cir. 2011), but remanded for further consideration of his claim of ineffective assistance of counsel, which the district court also rejected, leading to the present appeal. In this ruling, the court concluded that the trial counsel’s failure to obtain relevant expert mental health testimony was constitutionally deficient, reversed the conviction, and granted Laureys a new trial. Attorneys
S. Rebecca Brodey and L. Barrett Boss, both of Washington, D.C., were appointed by the court to represent Laureys on this appeal. The court found that Laureys had been prejudiced by his trial attorney’s decision to present all of his hopes on one mental health expert who had not been particularly receptive to the diminished capacity defense that the attorney decided to present, and by ignoring other ways an expert could have assisted the defense in arguing that Laureys was fantasizing and not intending to engage a minor in actual sexual activity. Wrote Rogers, “The record amply demonstrates that what trial counsel was seeking was an internet compulsivity diagnosis that trial counsel had arrived at through his own online research, which would support a defense of diminished capacity. As Laureys contends, and as Dr. Berlin testified on remand, trial counsel led Dr. Berlin to believe that counsel was interested in establishing only this diminished capacity defense. When Dr. Berlin did not ‘come . . . to the conclusion that the trial counsel had hoped he would come to,’ Dr. Berlin bowed out of the proceeding altogether, leaving Laureys without the benefit of clinical testimony that Dr. Berlin could have offered, which, as trial counsel acknowledged on remand, would have informed the jury’s assessment of the fantasy-only defense and helped buttress Laureys’ own testimony. The government insists that if there had been a valid diminished capacity defense as envisioned by trial counsel, it would have been ‘much more powerful than the credibility-based “fantasy” defense’ ultimately relied upon at trial. Even assuming the government is correct, it somewhat misses the point. Trial counsel focused Dr. Berlin on an invalid diminished capacity defense to the exclusion of all other possible defenses.” More to the point, trial counsel “unreasonably failed to secure a different mental health expert when it became doubtful that Dr. Berlin would testify.” The court concluded that it was unreasonable for defense counsel to rely solely on an expert whose testimony would not help the defendant’s case, rather than seek out own whose testimony would. “In these circumstances,” said the court, “a prudent attorney would at a minimum have sought an alternative source” of expert testimony. And the court found that there was “no question that Laureys’s defense, and his own testimony, would have been significantly bolstered by expert testimony regarding fantasy chat and, more specifically, the existence of a subculture of men who meet first online and then offline for sex with one another spurred on by child sex fantasies, such that a ‘reasonable probability’ of a different outcome at trial exists.” The court continued, “The government nonetheless maintains that Laureys suffered no prejudice because he would have offered his own lurid, confused testimony regardless of whether a mental health expert also testified.” While the court conceded this might be true, it speculated that had counsel obtained another expert to testify, it is “reasonable to expect that trial counsel would have limited Laureys’ damaging testimony to the extent Dr. Berlin had already testified on those topics.” The court noted that the trial judge had actually “expressed doubt about Laureys’ intent in traveling to D.C.” to keep an assignation with the faux child that led to his arrest, so “the significance of Dr. Berlin’s perspective cannot be underestimated” in determining whether counsel’s failings prejudiced Laureys’ defense. There is plenty of useful discussion in this opinion for the information of counsel in the position of defending men arrested in internet sex-sting operations.

**CALIFORNIA** – Why did the California 4th District Court of Appeal designate as “not to be published in official reports” its decision in *People v. Fisher*, 2017 WL 3484206, 2017 Cal. App. Unpub. LEXIS 5603 (Aug. 16, 2017), upholding the conviction of a man who gave a blow-job to a sleeping friend without getting his consent? (They were not lovers, just “chums,” you see . . . .) The appeals court rejected all of the defendant’s challenges to the trial judge’s rulings on motions as well as his argument about unprofessional representation by his defense counsel. Among other things, Fisher argued his counsel was ineffective for failing to retain a DNA consultant, who “could have informed her that DNA taken from Steven was not tested to determine whether it came from saliva,” or was “secondarily transferred” from “shaking hands or sharing clothes and the like.” While it was true that defense counsel made some errors, said the court, “To establish prejudice, Fisher has to show there is a reasonable probability that, but for counsel’s unprofessional error, the result of the proceeding would have been different. He has to show prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of counsel’s errors and omissions. It is not reasonably probable that the jury would have reached a different result, even if Marks [defense counsel] had brought out that the samples were not tested for saliva. Fisher’s defense failed because Steven testified that when he awakened, he saw Fisher’s mouth on his penis – and the jury believed him. Evidence that the samples were not tested for saliva is not inconsistent with such a determination. Moreover, the DNA expert testified that the significant *quantity* of Fisher’s DNA on Steven’s penis and scrotum could not have come from secondary transfer – in other words, the most likely source of DNA on Steven’s penis was Fisher’s saliva. Evidence that the samples were not tested for saliva is also not inconsistent with that determination.” OK, this explanation convinces us that Fisher’s DNA didn’t get where it was recovered by him shaking hands with Steven! Was the decision not to publish
due to judicial embarrassment at the words “penis” and “scrotum” appearing in connection with the words “mouth” and “saliva”? Then designating the opinion as not be officially published seems pointless, since anyone looking in an electronic legal database for “scrotum cases” will find this one, which popped up the day it was released by the court in our Westlaw search. (And, no, we don’t use “scrotum” as a search term. This showed up on our search because the court recounts a conversation between the men: “After returning to their hotel, Steven searched the internet for a prostitute while Fisher rested in his own bed. Fisher said, ‘You better not jack off.’ Steven thought this was a ‘weird’ thing to say, and it ‘came out of left field.’” He asked Fisher if he was gay; Fisher said he was not. Steven told Fisher he would be uncomfortable sharing a room if Fisher was gay. At about 4 a.m., Steven brought a prostitute named Asia to the room. Fisher was asleep. As Steven and Asia were having sex, Fisher woke up, got out of his bed, and walked near Steven, who pushed him away. Fisher returned to his own bed. After about 20 minutes, Asia left. Steven smoked some marijuana. About 15 minutes later, Fisher awakened and poured himself and Steven some rum. Fisher drank his, but Steven did not drink much because he was ‘already high’ from the marijuana and did not like rum.” The men both went to sleep. “About an hour or two later, Steven awakened to see Fisher orally copulating Steven’s penis.” Fisher went back to bed when Steven got up, stunned and unable to process what had happened. He dressed, gathered his belongings, left the room, drove away, called his sister, and followed her advice to call 911, when he reported that he was the victim of an “attempted rape.” The police got involved and the result is “unofficially reported” history. We wonder if the trial judge took the precaution of excluding minors from the courtroom during Steven’s testimony?)

**CALIFORNIA** – Rickelldrick? That’s a new name for us. In *People v. Rickelldrick T. White*, 2017 WL 3765806 (Aug. 31, 2017), the California 2nd District Court of Appeal upheld the conviction of White on counts of sexual penetration by a foreign object and making criminal threats, arising from his sexual assault of a homeless man and subsequent verbal threats voiced to the victim after he had reported the assault to law enforcement, resulting in the arrest and prosecution of White. The victim, identified as Ronnie, had arrived in Santa Monica from Mississippi in June 2015 with only a suitcase and a backpack and no means of support, hoping to find work and catch some sleep out in the open in public places. He was sleeping in a public park when, “At approximately 4:00 a.m., Ronnie awoke and felt defendant ‘holding’ and ‘grasping’ him while anally penetrating him with ‘something long and hard.’” Ronnie’s belt was unbuckled and his jeans and underwear had been pulled down around his thighs, but Ronnie could not tell what was penetrating him because defendant was behind him. When Ronnie realized what was happening, he immediately turned around; pushed defendant away; and screamed at defendant, demanding to know ‘what the hell . . . he was doing.’ Defendant stared at Ronnie but said nothing. Ronnie yelled at defendant to get him to leave, and when defendant did not comply, Ronnie pushed him until defendant got up and walked away quickly while making a motion with his hands to indicated Ronnie should be quiet,” wrote Justice Baker for the appeals court, summarizing the evidence. When daylight came, Ronnie went to a homeless outreach organization and “broke down,” telling the staff what had happened, and they called the police, who ultimately tracked down White. DNA testing confirmed that White had attempted to penetrate Ronnie anally. (Ronnie testified that after White had left, he cried “and used his shirt to wipe his behind ‘because it felt like there was lubrication on and felt nasty.’”) White posted bail and while his prosecution was pending he came upon Ronnie in the quiet room of the public library, called him a “bitch,” and subsequently confronted him outside the library. “Defendant removed his shirt, clenched his fists, and repeatedly threatened to ‘whoop [your] ass.’” Ronnie called the police and White backed away, saying “I’m going to kill you, bitch.” The trial judge consolidated the charges into one trial before a single jury, over the objection of the defense, which claimed that combining the charges in one case prejudiced the defendant. The jury convicted White on the sexual penetration and threat charges, but acquitted him on a separate charge of “witness dissuasion.” White was sentenced to eight years. He appealed the sentence, arguing that the trial court erred in having both charges tried before the same jury in the same proceeding. Rejecting the appeal, the court found that joinder of the charges was appropriate because “the offenses are connected together in their commission,” noting that “evidence of defendant’s sexual penetration of Ronnie with a foreign object would be cross-admissible in a trial on the criminal threats charge as motive evidence. The evidence was also cross-admissible to prove the sustained fear and intent elements of a criminal threats charge.” The court also found that the “sexual penetration evidence would also be cross-admissible in a trial on the criminal threats charge because the evidence is probative of (1) whether defendant made the statements about killing Ronnie and ‘whooping his ass’ with the specific intent that the statements should be taken as a threat, and (b) whether Ronnie was in sustained fear as a result of the threats.” Since the evidence was cross-admissible, the court concluded there was no prejudice to Williams in consolidating the two cases, and pointed out that the strength

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of the evidence in the two cases was “not dramatically different.” As to whether either of the charges were particularly likely to inflame the jury against White as to the other charge, the court stated agreement with the trial judge’s observation: “There is a different level perhaps of the emotional responses, but both are felonies and both serious situations.” The court found no violation of White’s due process rights. The court also rejected an argument that the trial judge erred in excluding from evidence an admission that Ronnie made to an investigating detective that he had “experimented with homosexuality” years before when he was much younger. He testified at trial that he was heterosexual, going to the issue whether the alleged sexual encounter was consensual as White tried to argue. The defense argued on appeal that the excluded evidence was relevant on the issue of consent. The trial judge held an evidentiary hearing outside the presence of the jury to deal with this point, establishing that Ronnie was 19 years old when he had anal sex with a man, and 34 at the time of trial, and had not had any other sexual encounters with men in the interim. Ronnie testified in that hearing that he was “not confused about his sexuality, nor had he thought about ‘experimenting again with homosexuality’ since age 19.” He said he was confused when he awakened “because I woke up with my pants down, being raped . . .” The trial court did not consider this information of sufficient probative value to be admissible, and the court of appeal back it up, finding no abuse of discretion. “That Ronnie had engaged in anal sex with a man on one occasion roughly 15 years prior to the sexual penetration offense does not contradict his testimony that he identified as a ‘straight’ man,” wrote the court. “Furthermore, even if defendant were correct that there is at least some tension between Ronnie’s testimony that he is straight and his acknowledgement that he had once been with a man years ago, the effort at impeachment can, at best, be considered collateral and thus well within the trial court’s discretion to exclude . . .”

**CALIFORNIA** – Affirming an anti-gay hate crime jury conviction that resulted in a sentence of 18 years and 8 months for defendant Jimmy Muhammad, the 4th District Court of Appeal rejected Muhammad’s argument that San Diego Superior Court Judge Eugenia A. Eyherabide should have granted defense counsel’s motion for acquittal on the hate crime charge as part of an oral motion for judgment of acquittal on all counts. *People v. Muhammad*, 2017 WL 3392128 (Aug. 8, 2017). Writing for the court of appeal, Justice Cynthia Aaron rejected Muhammad’s argument that the state did not present sufficient evidence that Muhammad’s anti-gay animus was a “substantial factor in his attack on Mr. Adams,” an openly gay man who was the victim. “We are not persuaded,” asserted Aaron. “Adams testified that he is ‘openly gay’ and that, on the day in question, Muhammad knew that Adams was gay. Muhammad began the encounter by calling Adams a ‘faggot’ and ‘faggoty boy.’ Shortly thereafter, Muhammad punched Adams in the face twice. According to Adams, while he was on his cell phone with 9-1-1, Muhammad yelled, ‘Don’t jack off to me, again,’ called Adams a ‘faggot,’ and then punched him in the face a third time, causing Adams to drop his phone. In addition, while Adams was on the phone with the 9-1-1 dispatcher, Muhammad kicked Adams in the back of his legs. The People played a recording of the 9-1-1 call for the jury, and Adams testified that Muhammad could be heard yelling ‘faggot’ on the recording. Adams’s testimony alone constitutes ample evidence sufficient to support a guilty verdict, and thus to support the trial court’s denial [of Muhammad’s motion],” citing a case holding that a victim’s testimony concerning antigay epithets and use of violence was sufficient to prove specific intent necessary to support finding that the defendant violated section 422.6, *In re M.S.*, 10 Cal.4th 698 (1995). Muhammad had argued that he had committed other acts of violence that day, and he was just on a rampage of violence due to his mental health issues that had nothing to do specifically with Adams’ sexual orientation. But there was corroborating evidence about the defendant’s homophobia from a police officer who testified that “Muhammad directed a series of anti-homosexual slurs toward him and his partner while they arrested Muhammad during a separate incident in 2012. According to Officer McCoole, Muhammad repeatedly referred to the officers as ‘faggots,’ and said that the officers ‘sucked each other’s dicks.’” Enough said.

**GEORGIA** – The Supreme Court of Georgia has affirmed the malice murder and arson convictions of Dominique Javonte Stuckey, a gay man who hacked his grandmother to death and then set fire to the body on March 29, 2009, to attempt to cover up the murder. Stuckey was fifteen years old at the time. He had been kicked out of the homes of several family members when he came out as gay, and ended up living in a basement room in his grandmother’s home. She did not approve of his homosexuality and was perturbed about his lifestyle, which included spending time in gay online chat rooms and social media and hooking up with men for sex. Stuckey feared his grandmother was going to kick him out as well, and conducted on-line research on how to murder somebody without getting caught. The evidence of his guilt was overwhelming, and the story he told the police was far-fetched and uncorroborated. His appeal, alleging ineffective assistance of counsel, focused on defense counsel’s agreement with the prosecution on the
admissibility of Stuckey’s MySpace account printout and counsel’s failure to object when some MySpace photos were admitted at trial, counsel’s failure to object to admission of photographs of the victim’s body, and failing to object to admission of photographs of his grandmother in life, posing with other family members. The Supreme Court rejected the appeal, finding that none of these issues proved ineffective assistance, the first three because objections would have been overruled, and the final one because it was unlikely that the jury seeing the photos affected the outcome of the trial, in light of the overwhelming evidence of guilt. This writer was a bit surprised reading the opinion that there was no mention of any expert testimony on the psychological issues of “coming out” in a hostile family environment for a teenage boy, at least in an attempt to ameliorate punishment. In this case, the jury imposed a life sentence for the murder and a consecutive term of 20 years for the arson. Stuckey v. State, 2017 WL 3468532 (Ga. Sup. Ct., August 14, 2017).

**INDIANA** – The Associated Press (Aug. 15) reported that a state trial court sentenced Jabreel Davis-Martin to the maximum 65 years in prison for the January 2016 murder of a gay Afghanistan war veteran, then-27-year-old Jodie Henderson, and three additional years for a probation violation. He was sentenced on August 15. According to the report, “Authorities said Davis-Martin attacked the South Bend veteran with a bar stool after being told by a third party that Henderson had romantic feelings for Davis-Martin . . . Witnesses have told police that Davis-Martin bragged about the incident afterward and used an anti-gay slur when referring to Henderson.” But he could not be charged with a hate crime because Indiana does not have a hate crime law.

**MARYLAND** – Montgomery County Circuit Court Judge Marielsa Bernard has imposed the maximum sentence for second-degree murder – 30 years in prison – on Keith C. Renier of Washington, D.C., for the murder of a Maryland transgender woman, Keyonna Blakenay, last year. Renier accompanied another man who had arranged to meet Blakenay for a date in Rockville, but the men intended to rob her. She was found dead of multiple stab wounds on April 16, 2016, in the Red Roof Inn where the assignation was to take place, and her room appeared to have been ransacked. A report in the Washington Post did not specify whether Blakenay was targeted for her gender identity, or was just a casualty of a murderous robbery. Her death is one of 27 reported murders of transgender people in the U.S. in 2016, the deadliest year on record for transgender people in the U.S. up to then. Legal Monitor Worldwide, 2017 WLNR 26123862 (Aug. 24).

**MINNESOTA** – A gay man arrested for driving while impaired, identified by the court as Z.H., was booked into the Anoka County jail on September 19, 2015, and was placed in a cell with Quentin Tyrone Williams, the defendant in State v. Williams, 2017 Minn. App. Unpub. LEXIS 718 (Minn. Ct. App., Aug. 28, 2017). Z.H. testified that he had never been in jail before and was fearful about what would happen to him. He claims that Williams quickly began expressing sexual interest in him, asking him if he was gay, ultimately getting Z.H. to perform fellatio on him. He later complained to prison authorities, and forensic evidence confirmed his statement that he had performed fellatio (through to ejaculation in his mouth) on Williams. Williams was charged with third-degree criminal sexual conduct (Minn.Stat.Sec.609.344,subd.1(c)(force or coercion). At trial, Z.H. contended that the sexual act was not truly consensual, and the prosecution offered “expert” testimony by a registered nurse who had examined Z.H., and who testified that she had no reason to doubt Z.H.’s allegations. She stated, “I think that the fear he had about going back into that . . . cell and the possibility of being assaulted again, I think that fear was – it came across as very real to me.” On cross-examination, she clarified that she did not “diagnose whether a sexual assault occurred or not . . . That’ a criminal determination, not a medical determination.” The defense attorney suggested that she was just relying what Z.H. had said to her, and she responded, “Um, because he told that his fear was real, because of the way that he told me, his demeanor at the time that he told me, um, year. I mean . . . it came across as real to me. That’s all I can tell you.” All the other testimony went to showing that the incidents of oral sex took place, none directly to going whether it was consensual. The jury had difficulty reaching a verdict, but ultimate resolved a reported deadlock in favor of convicting Williams, who was sentenced by the district court to 81 months on this offense. The Court of Appeals reversed the conviction and remanded for a new trial, finding that the “district court committed plain error affecting Williams’s substantial rights by admitting unnoticed expert testimony and impermissible vouching testimony.” The nurse should not have been asked whether she believed Z.H.’s story and why, as this was not something within her expertise, and ultimately some of her testimony fell into the category of vouching for the honesty of the complaining witness. Admission of this testimony “in the absence of some curative measure was plainly erroneous wrote Judge John Smith for the court. Since the entire case came down to whether Z.H. was telling the truth on the issue of coercion and consent, and the jury struggled with the evidence, reporting a deadlock at one point, wrote Judge Smith, “Williams’s argument concerning the deadlocked jury is
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persuasive given that the case turned on Z.H.’s truthfulness. [The nurse’s] testimony that she had no reason to doubt Z.H.’s story and that his fear of ‘being assaulted again’ appeared genuine likely affected the jury’s determination of whether Z.H. was truthful. There is a reasonable probability that the vouching testimony significantly affected the verdict.” However, the court rejected Williams’ argument that the verdict should be reversed without remand for a new trial, since it seemed that there was sufficient evidence from which a jury could reach a verdict for conviction in the absence of the objectionable evidence from the nurse.

NEW YORK – U.S. District Judge Margo Brodie imposed a six-month jail sentence on Jeffrey Hurant, the chief executive of Rentboy.com who pled guilty to a charge of violating the federal Travel Act and a money-laundering statute. The ‘Travel Act makes certain state crimes, including promoting prostitution, a federal offense if they are committed using instrumentalities of interstate commerce. At a sentencing hearing on August 2, the judge said she as “struggling” with the issue of sending Hurant to prison, acknowledging that as he ran the website, Hurant had done “good work” and “contributed to the LGBT community.” On the other hand, prosecutors argued that he knew that the operation was illegal. “What I have before me is almost two decades of committing a crime,” said the judge, “and Mr. Hurant knowing that he was committing a crime.” The government had asked for a sentence of 15-21 months, but ultimately argued that some jail time was necessary to deter others from committing the same crime. Since the feds shut down Rentboy.com, foreign-based escort websites have moved to fill the vacuum for American customers, effectively defeating the government’s efforts to drive escort advertising off the internet. Gay City News, Aug. 3.

VIRGINIA – U.S. District Judge M. Hannah Lauck rejected an attempt by a man who pled guilty to sodomy with minors in 2008 to use 42 U.S.C. sec. 1983 to avoid liability for court costs stemming from his prosecution for violating probation. Michael J.G. Saunders is arguing, as some others convicted of sodomy under Virginia laws have argued, that they could not be validly prosecuted, even though their conduct seems to fall outside the narrow compass described by the U.S. Supreme Court in Lawrence v. Texas, because the U.S. Court of Appeals for the 4th Circuit ruled in MacDonald v. Moose, 710 F.3d 154 (2013), that the Virginia sodomy law (which did not distinguish between consensual and nonconsensual, private or public, intergenerational or sex between adults) was facially unconstitutional. Virginia courts, including the state’s Supreme Court, continue to maintain that the sodomy law could be constitutionally used to prosecute people whose conduct did not fall within the Lawrence parameters (private, non-commercial, consensual sex between adults). The legislature eventually reformed the Virginia Penal Code to remove the old sodomy law, leaving in place a variety of other laws that capture the forms of unprotected “sodomy” under Lawrence. Courts have continued to resist the argument that prosecution under the old law can be considered void, now joined by Judge Lauck in Saunders v. Burns, 2017 U.S. Dist. LEXIS 116986 (E.D. Va., July 26).

CALIFORNIA – An HIV+ black transgender inmate was allowed to proceed against prison employment defendants by U.S. District Judge Roger T. Benitez in Jefferson v. Hollingsworth, 2017 U.S. Dist. LEXIS 124384, 2017 WL 33965416 (S.D. Calif., August 4, 2017). Trans Plaintiff James Leroye Jefferson, pro se, alleged that she was denied work, including a promotion to the prison bakery, because of her race, her HIV status, and her sexual orientation. The court found that this made no difference in the context of the appeal and vacatur. During thependency of her suit, Florida adopted a new set of standards for treatment of civilly-committed transgender patients, which are not specified in the opinion. The Circuit found that Hood’s demand for standards was moot, but the constitutionality of their application to her was not. Hence, the decision was vacated and the case remanded. Hood, who began pro se but now has counsel, was granted leave to amend her complaint. William J. Rold

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UNITED STATES COURT OF APPEALS – 11TH CIRCUIT – In a per curiam opinion the Eleventh Circuit (Judges William H. Pryor, Jr., Beverly Martin, and Robin S. Rosenbaum, presiding) vacated a decision of the Middle District of Florida, which had dismissed a civilly-committed transgender plaintiff’s civil rights claims in Hood v. Dep’t of Children & Families, 2017 U.S. App. LEXIS 13714, 2017 WL 3207126 (11th Cir., July 28, 2017). Ronald C. Hood, Jr., a/k/a Erika Denise Hood, was civilly committed as a dangerous sex offender following completion of her prison sentence, under Florida’s Sexually Violent Predators Act, Fla. Stat. §§ 394.910-394.913. Her requests for hormone and other gender dysphoria treatments were repeatedly denied. She sought the adoption of policies and the application of them to her consistent with her constitutional rights. [Note: Although the District Court applied “deliberate indifference” theory under the Eighth Amendment, the Eleventh Circuit correctly held that the appropriate standard was “professional judgment” under the Due Process Clause, since Hood was a civil detainee, citing Youngberg v. Romero, 457 U.S. 307, 322 (1982). The court found that this made no difference in the context of the appeal and vacatur.]
identity. Judge Benitez granted in forma pauperis status; and he directed service of process against defendants who supervised the prison job administration, the placement director, and the bakery supervisor, finding that that Jefferson stated plausible claims under the Equal Protection Clause and the Americans with Disabilities Act. Jefferson had medical clearance to work and had been assigned “to clothing” for three years, despite requests for work in food services. Judge Benitez found Jefferson stated claims of discriminatory refusal to hire her despite her qualifications sufficient under 42 U.S.C. § 1983 (as to race and transgender) and under the Americans with Disabilities Act (as to HIV), citing Bragdon v. Abbott, 524 U.S. 624, 641 (1998). Judge Benitez declined to appoint counsel at this point.

**GEORGIA** — Pro se gay inmate Daniel Cadle is given leave to replead by U.S. Magistrate Judge R. Stan Baker in Cadle v. Tatum, 2017 WL 3228123, 2017 U.S. Dist. LEXIS 119876 (S.D. Ga., July 31, 2017). Cadle alleged that he and his cellmate were assaulted by homophobic gang members after he was released from a Special Housing Unit and that they told him he would be killed if he reported it. He informed anyway, but he received continuing threats even after being moved to another dorm. He was told he could return to Special Housing if he needed safety. His lawsuit challenges the constitutionality of leaving him no option but disciplinary segregation for safety. Cadle also challenges conditions in segregation. Judge Baker makes no rulings, but he directs the Clerk to supply prisoner civil rights forms to Cadle to amend his complaint and provides general guidance on what states a claim and the prohibition of combining disparate causes of action in a single lawsuit. Judge Baker defers ruling on frivolity and denies appointment of counsel at this stage. William J. Rold

**KANSAS** — U.S. District Judge J. Thomas Marten rejected a motion filed under 28 U.S.C. Sec. 2255 by Natasha Harper, asking that her criminal conviction be vacated because the Obama Administration, in its waning days, allegedly adopted a policy permitting “the housing of biologically male preoperative transsexual prisoners with biologically female prisoners,” which she asserts operates as an ex post factor modification of the terms of her confinement, rendering her guilty plea involuntary. U.S. v. Harper, 2017 U.S. Dist. LEXIS 117691 (D. Kans., July 27, 2017). In a footnote, Judge Marten observes that the policy at issue, although announced a few days before the end of Obama’s term, has actually been in effect as part of a Bureau of Prison statement since August 2002, but dismisses the motion as a “second or successive Sec. 2255 motion,” which is not allowed. He commented, “Harper presents no reason to believe she will face any real or substantial actual danger from preoperative transsexual prisoners. She has also failed to cite any authority holding that prison transsexual policy is unconstitutional or violates the rights of other prisoners.”

**KENTUCKY** — Pro se inmate James Bradley Buckles sued for deliberate indifference to his serious medical needs for failure to treat his migraines and for denying him medication prescribed by specialists at the University of Louisville Hospital for his HIV. He also alleged delay in provision of medication to prevent exposure to hepatitis-C, also ordered by the HIV specialist; and he alleges that he was exposed in the interim. In screening Buckles v. Jensen, 2017 U.S. Dist. LEXIS 114890, 2017 WL 3139571 (W.D. Ky., July 24, 2017), Chief U.S. District Judge Joseph H. McKinley, Jr., allowed his claims to proceed in part. Judge McKinley dismissed official capacity claims against the jailer because there was no showing that he acted pursuant to county policy or practice in the denials sufficient to sustain a Monell claim, citing Kentucky v. Graham, 473 U.S. 159, 165 (1985); and Monell v. New York City Dep’t of Soc. Servs., 436 U.S. 658, 690 (1978). The jailer was not sued in his individual capacity. A supervising nurse was sued in both official and individual capacities. Judge McKinley dismissed claims against her in her official capacity. She is part of a term of contractual providers, Southern Health Partners, who deliver medical care at the jail. Under Sixth Circuit law, claims against contractual providers sued officially (and the corporate entity itself) are treated as Monell claims, requiring a showing of pattern and practice. Street v. Corr. Corp. of Am., 102 F.3d 810, 818 (6th Cir. 1996). Judge McKinley allowed Buckles’ claims against the nurse to proceed in her individual capacity. Perhaps counsel could establish that the county and Southern Health Partners had a policy or practice about following “outside” specialists’ medical orders that offended the constitution; but, as it stands now, Buckles will have no chance to show it. William J. Rold

**MASSACHUSETTS** — Transgender inmate Michelle Lynn Kosilek is back in court, arguing pro se that the Massachusetts Declaration of Rights should be interpreted to grant her sex reassignment surgery [SRS], in Kosilek v. McFarland, 2017 Mass. App. Unpub. LEXIS 780 (Mass App., August 8, 2017). She loses on grounds of res judicata in an unsigned memorandum order before Justices Joseph A. Trainer, Peter W. Agnes, Jr., and Eric Neyman. The U.S. Court of Appeals for the 1st Circuit ruled en banc (3/2) in 2014 that Kosilek’s Eighth Amendment rights were not violated by the State of Massachusetts when it denied SRS. That case, Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014), has been widely reported, including extensive analysis of majority and minority opinions in Law
Notes (January 2015 at pages 3-4). The state court here stated the *res judicata* rule as follows: “If a set of facts gives rise to a claim based on both State and Federal law, and the plaintiff brings the action in a Federal court which had ‘pendent’ jurisdiction to hear the State claim but the plaintiff declines to assert such State claim, he may not subsequently assert the State ground in a State court action,” quoting *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 450 (1982). The court recognized certain “narrow exceptions,” but it declined to apply them – noting that the federal court had jurisdiction, and the rule covers arguments that the state constitution should be interpreted more liberally when similar rights are addressed. “[I]t is appropriate for the rules of *res judicata* to compel the [claimant] to bring forward his state theories in the federal action,” quoting *Mancuso v. Kinchla*, 60 Mass. App. Ct. 558, 566 (2004). The take-away, particularly in the First Circuit, but worth considering everywhere: plead the state law claims, allowing an appeal. If they had investigated the rest of the incidents it would not have happened to me.” Judge Ball denied Edwards’ requests for subpoenas (twice), as well as a poorly drafted motion to compel that nevertheless indicated Edwards’ desire for more proof. (One wonders what the “discovery” was about; or whether Sim’s personnel file was even produced). It does not appear that any defendant testified live or by deposition or was subject to cross-examination. Judge Ball granted summary judgment on lack of personal involvement, since Edwards failed to produce a triable issue on the defendants’ knowledge or deliberate indifference to the risk posed to Edwards by Sims. Judge Ball similarly found no evidence of failures in supervision or training. Instead, without even exploring the firing of Sims, or deliberate indifference to the risk posed to Edwards by Sims. Edwards alleged that the officials knew of Sims’ propensities from previous assaults and information from other inmates, but he failed to produce evidence of same. Edwards’ affidavit said: “Sims was an openly-gay male who projected feminine characteristics and that . . . putting him to work in a general male prison . . . was like an accident waiting to happen.” He stated that these defendants’ actual knowledge of sexual harassment of other inmates by Sims was “longstanding and pervasive,” and that “circumstances suggested” that they had been “exposed to information concerning the risk.” A review of proceedings on PACER shows the following exchange between Judge Ball and Edwards at the Omnibus hearing: “THE COURT (referring to the Warden defendant): What specifically are you saying she had known of? EDWARDS: That man was going around the prison sexually assaulting other inmates and doing sexual things to them. THE COURT: Okay. Before this happened to you? EDWARDS: Before my incident. If they had investigated the rest of the incidents it would not have happened to me.” Judge Ball denied Edwards’ requests for subpoenas (twice), as well as a poorly drafted motion to compel that nevertheless indicated Edwards’ desire for more proof. (One wonders what the “discovery” was about; or whether Sim’s personnel file was even produced). It does not appear that any defendant testified live or by deposition or was subject to cross-examination. Judge Ball granted summary judgment on lack of personal involvement, since Edwards failed to produce a triable issue on the defendants’ knowledge or deliberate indifference to the risk posed to Edwards by Sims. Judge Ball similarly found no evidence of failures in supervision or training. Instead, without even exploring the firing of Sims, or what was exposed in those proceedings, Judge Ball determined that Edwards’ allegations were “unsubstantiated” and “conclusory,” citing *Little v. Liquid*
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Air Corp., 37 F.3d 1069, 1975 (5th Cir. 1994) (en banc). Following granting of summary judgment to the supervisors, Judge Ball directed the U. S. Marshall to find and serve Sims. This case appears to be another example of abuse of the Omnibus (a/k/a “Spears” hearing) allowed in the Fifth Circuit ostensibly to assist in screening claims for proceeding under the in forma pauperis statute or inmate grievances. The warden claimed that Myers failed to exhaust his administrative remedies under the Prison Litigation Reform Act – not for disposition on the merits. Here, the Spears hearing led the court to the smoking gun, if one existed, and the court refused to look. William J. Rold

MISSISSIPPI – Gay pro se inmate Christopher Alan Myers filed a civil rights case after being raped by gang members when his pleas for safer housing went unaddressed in Myers v. Management & Training Corp., 2017 U.S. Dist. LEXIS 120090 (S.D. Miss., July 31, 2017). U.S. Magistrate Judge F. Keith Ball, who has the case for all purposes, held a Spears hearing (5th Circuit procedure for limiting scope of prisoner cases and speeding resolution), following which he issued an Omnibus Order. Two defendants (of several) moved to dismiss. A nurse practitioner, to whom Myers complained about his safety and who notified a security lieutenant about the problem, was dismissed because Myers conceded that he was suing her for “not doing more” without specifying what she should have done or how she violated his rights. The fact that she should have “tried harder” is insufficient to establish “deliberate indifference to safety” under Williams v. Hampton, 797 F.3d 276 (5th Cir. 2015). Judge Ball denied the warden’s motion to dismiss by summary judgment. Myers explained that the warden had a policy of not enforcing prison rules requiring locking of cell doors at night, compliance with which would have prevented the sexual assault. The warden claimed that Myers failed to exhaust his administrative remedies under the Prisoner Litigation Reform Act [PLRA] because his grievance never specifically mentioned the locking of cell doors at night. Judge Ball found that Myers’ grievance, which mentioned fear for safety, theft of property, harassment by gang members, and a request to be moved, may have put officials on sufficient notice of unenforced lockdown procedures to satisfy exhaustion under the PLRA, 42 U.S.C. § 1997e(e), because it may have “alert[ed] prison officials to the problem of which the prisoner is complaining and provide[d] them with a fair opportunity to address it under Johnson v. Johnson, 385 F.3d 503, 516-17 (5th Cir. 2004).” The relevant question was “whether prison officials would have realized, under the circumstances, that the failure to lock the cells at night was a contributing component to the safety threat of which Plaintiff was complaining”; and this could not be answered on summary judgment. Judge Ball set a trial date in April of 2018, ordered production of the “actual policies and procedures concerning nightly lockdown,” and granted Myers use of subpoena power through the Clerk of Court. Judge Ball also allowed additional limited discovery and further dispositive motions in the eight months before the trial date. This is an example of how expedited proceedings can occur when a magistrate has full authority over a case and wants it to move. William J. Rold

NEW YORK – For those who cannot get enough of reading about exhaustion of administrative remedies under the Prisoner Litigation Reform Act [PLRA], 42 U.S.C. § 1997e, this nearly 8000-word treatise is a case for you. Transgender inmate Gregory Galberth suffered from a variety of mental illnesses, including depression and panic attacks, with a “GAF” [Global Assessment of Functioning under the DSM] in the 55-60 range – meaning moderate symptoms and moderate impairment of functioning. Pro se plaintiff Galberth was at Rikers Island (the New York City jail) for 16 days while awaiting transfer to state prison following sentencing. Earlier, U.S. District Judge Katherine Polk Failla dismissed most of Galberth’s claims on preliminary review, allowing discovery on exhaustion as to one defendant, in Galberth v. Washington, 2016 WL 1255738 (S.D.N.Y. Mar. 29, 2016). Now, in Galberth v. Washington, 2017 U.S. Dist. LEXIS 120595, 2017 WL 3278921 (S.D.N.Y., July 31, 2017), Judge Failla granted summary judgment on exhaustion grounds to the remaining defendant. Galberth admitted that no grievances were ever filed but tried to argue that exhaustion was excused because the New York City grievance system was not “available” under Ross v. Blake, 136 S. Ct. 1850, 1856-8 (2016), because of her mental illness. During the brief incarceration at the city jail, Galberth was seen by health staff 13 times in 16 days, making requests for a variety of complaints. The City also introduced evidence of her high functioning at her sentencing hearing the day before arriving at Rikers. Both of these facts actually worked against Galberth’s argument on exhaustion that mental health conditions prevented use of the grievance system. Judge Failla found that the three exceptions to exhaustion under Ross – (1) “dead end” with officers “unable or consistently unwilling to provide any relief”; (2) system “so opaque that it becomes, practically speaking, incapable of use”; or (3) “prison administrators thwart inmates from taking advantage of a grievance process” – did not apply to Galberth’s situation directly. Judge Failla found that Ross “did not opine on the specific question at the heart of this case: whether an inmate’s mental health condition can cause administrative-remedy unavailability. Nor is this Court aware of any court that has considered this precise question.” The Court found that Galberth’s mental illness was not sufficiently serious to prevent her from
using the grievance system, reserving the question of whether mental illness could make an otherwise “available” remedy so “opaque” to a particular mentally ill prisoner as to be unavailable under Ross. All of this is dicta, which Judge Failla discusses at length. Presenting historical and Second Circuit exceptions on “special circumstances” justifying non-exhaustion – some of which, such as Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004), were directly abrogated by Ross, 136 S. Ct. at 1856 – Judge Failla notes the potentially “far-reaching consequences for the mentally ill prison population” and the fear that “there may be situations in which a mentally ill prisoner is unable to satisfy the PLRA’s exhaustion requirement.” The opinion is noteworthy reading for counsel in evaluating cases involving a severely mentally ill prisoner client who has not exhausted under the PLRA. The New York City Office of Corporation Counsel appeared as an “Interested Party” in this case. William J. Rold

Pennsylvania – Transgender inmate Amanda Smith’s attempt to make a federal case out of her four days in a Pennsylvania county jail fails before U.S. Judge Susan E. Schwab, who recommends granting defendants summary judgment on all counts in Smith v. Snyder County Prison, 2017 U.S. Dist. LEXIS 111464 (M.D. Pa., July 17, 2017). Smith, who had completed her male-to-female transition, was transferred from another (presumably smaller) county jail to Snyder County’s jail because the other jail did not have facilities for women. She was assigned to women’s general population. Smith had been taking prescribed opiates and other medications prior to her incarceration. Tylenol III with codeine was substituted for her Oxycodone. Smith had an episode of loss of consciousness in the mess hall, and medical staff instituted an opioid withdrawal protocol, requiring observation, which jail officials administered by placing her in segregation. She received daily evaluation by medical staff, several types of medication, and a trip to a hospital emergency room after a second episode of passing out. There was a factual dispute as to whether she was actually observed every 30 minutes as medically ordered. She also claimed that her cell had a one-inch mattress on concrete, that it was cold, with a fan blowing “freezing air” into the room (in August), and that her shoes did not fit. Finally, Smith claimed that she was subjected to these conditions because she was transgender and that her placement in segregation was discriminatory based on her transgender status and her medical care could be managed without segregation. Judge Schwab found none of the claims presented a jury question. Smith received medical care consistent with the Eighth Amendment and failed to show a triable issue of deliberate indifference, particularly since she was sent to a hospital, which found no serious problems. Her cell conditions did not constitute cruel and unusual punishment, even if uncomfortable. The duration of her confinement (4 days overall; 3 days in segregation) also weakened any constitutional claims. Judge Schwab looked at her Equal Protection claim involving transgender discrimination, and found none was stated. Smith was treated as a woman, she did not show that placement in segregation after loss of consciousness was related to her transgender status and she could not frame an Equal Protection claim based on similarly situated trans- or cis-gender inmates regardless of whether the case was viewed as involving a protected class or a class of one. Finally, Judge Schwab found no Monell claim against the county because Smith showed no evidence of unconstitutional training or policy. There was also no evidence of any transphobic slur. In fact, there was evidence that Smith’s transgender status was not even known to jail decision-makers until after the decision was made to place her in segregation.

William J. Rold

Pennsylvania – In this writer’s experience, a remand from the Court of Appeals nearly always has a salutary effect on the district court’s future attention to the case. Law Notes (Summer 2017 at pages 271-2) reported the remand of Bracey v. Huntingdon, 2017 U.S. App. LEXIS 11438, 2017 WL 2787619 (3d Cir., June 27, 2017). That case reversed a narrow dismissal (on Rooker-Feldman grounds) of a civil rights case in which an inmate had his blood forcibly extracted for HIV and hepatitis-C tests per state court order. Now, in Bracey v. Huntingdon County, 2017 U.S. Dist. LEXIS 133821, 2017 WL 3601947 (M.D. Pa., August 22, 2017), U.S. District Judge William W. Caldwell considers the other grounds for dismissal proffered by the Magistrate Judge but not previously adopted by Judge Caldwell or considered by the Circuit. Pro se inmate Corey Bracey had a physical confrontation with correction officers in which he allegedly sustained lacerations. Correction officials, relying on a state statute applicable to non-voluntary HIV testing, forcibly had Bracey tested for both conditions. Bracey was “strapped down in a restraint chair while his blood was forcefully taken.” His state appeal was dismissed as moot because the tests had been performed. (This prompted the Rooker-Feldman argument – against federal courts over-ruling state courts on the same subject – which the Third Circuit rejected). On remand, Judge Caldwell considered whether the Fourth Amendment was violated by the forcible seizure of the blood and the Fourteenth Amendment was violated by the “malicious” abuse of civil process in misusing a state statute to deprive Bracey of procedural and substantive due process. Judge Caldwell found that the case was not barred by collateral estoppel, because the issues
were not identical; and it was not barred by Younger abstention, because the state court proceedings were concluded and there was nothing with which the federal court would be interfering. Finally, Judge Caldwell addressed qualified immunity, which had been raised by the magistrate judge sua sponte, upholding the defense because an element of malicious prosecution included that the plaintiff prevail in the underlying action—citing Kossler v. Crisanti, 564 F.3d 181, 186 (3d Cir. 2009)– which Bracey did not, because the Pennsylvania courts upheld the blood taking. Judge Caldwell found, however, that the civil rights claim was for abuse of process, not malicious prosecution; and there was no requirement that the plaintiff had prevailed in the underlying action—citing Adams v. Selhorst, 449 F. App’x 198, 201 n.2 (3d Cir.2011) (“In contrast to a section 1983 claim for malicious prosecution, a section 1983 claim for malicious abuse of process lies where prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law.”); and Martin v. Finley, 2017 U.S. Dist. LEXIS 21834, 2017 WL 626752, at *1 (M.D. Pa. Feb. 15, 2017) (a claim for abuse of process under Pennsylvania law does not require the plaintiff to prove that the underlying action terminated in his favor). Bracey is allowed to proceed at this time, because the dismissal was inappropriate, but defendants are free to replead the defense and attack the merits of the abuse of process claim “later in these proceedings.” William J. Rold

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**PENNSYLVANIA** – U.S. Magistrate Judge Cynthia Reed Eddy recommended dismissal of all claims with prejudice in pro se inmate Jason Kokinda’s civil rights case in Kokinda v. Pennsylvania Dep’t of Corrections, 2017 U.S. Dist. LEXIS 127169 (W.D. Pa., August 9, 2017). Kokinda, a frequent pro se litigator who was housed in the mental health block, claimed that officers were harassing him sexually, causing “severe psychological trauma.” He said a gay male officer “fixated” on his groin and shirtless chest. He also accused several female officers of trying to “groom” him sexually, including lacing his food with androgen and salt peter—something they were not doing to the “less desirable prisoners.” He admitted that he had “become delusional as a coping mechanism” and distrustful of anyone who did not accept his “hypothetical theory.” One could stop here, but the rest of the long opinion is useful reading for those who have clients with credible sexual harassment claims. Judge Eddy surveys Third Circuit law on personal involvement defenses to §1983 claims, as well as Eighth Amendment claims based on verbal abuse and “touching”—neither of which apparently occurred here, unless one accepts the adulterated food hypothesis. Judge Eddy even discusses more liberal formulations in other circuits—i.e., Beal v. Foster, 803 F.3d 356, 357-8 (7th Cir. 2015); and Jordan v. Gardner, 986 F.2d 1521, 1525-6 (9th Cir. 1993). She finds, however, that “the psychological trauma in those cases stemmed from either actual physical, sexually-intrusive contact or the imminent threat that the same would occur.” Finally, Judge Eddy found that the alleged “leering,” however “creepy” to Kokinda, did not rise to an Equal Protection violation because it was not disparate “treatment.” Judge Eddy found leave to replead would be futile. William J. Rold

**PENNSYLVANIA** – Pro se inmate Siddeeq Basil Henry was in disciplinary segregation for allegedly assaulting two corrections officers. In Henry v. Co#2 Gilara, 2017 U.S. Dist. LEXIS 125827, 2017 WL 3424863 (W.D. Pa., August 22, 2017). Henry sued primarily for contamination of his evening meal food with chewing tobacco, saliva, mucus, hair, and other unidentified detritus on four consecutive days, accompanied by remarks like: hope you like the “special sauce”; “that’s from my buddy you punched.” He was told “you are lucky that’s all you got after you assaulted staff.”
Henry also complained of homophobic slurs and verbal threats. U.S. Magistrate Judge Susan Paradise Baxter dismissed the *pro se* complaint for failure to state a claim on any theory. Compare Judge Baxter’s ordering of a trial in *Bruce v. Ennis*, adjacent case in this issue of *Law Notes*, where the plaintiff had counsel. Basically, Judge Baxter found that the Eighth Amendment was not violated by “contaminating [Henry’s] dinner tray for four consecutive days,” because it was only one meal a day and lasted only four days. It was not an “extreme deprivation,” under *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); and it “falls far short of the level of deprivation required” for an Eighth Amendment violation. “[T]he Eighth Amendment’s prohibition against cruel and unusual punishment is implicated” when prison officials systematically “den[y] a series of meals to an inmate over a span of weeks” quoting *Rodriguez v. Wetzel*, 2015 WL 1033842 at *11 (3d Cir. 2015). Officers also called Henry a series of “sexually themed insults”: “bitch,” “big faggot,” “you know you are gay so don’t act cool,” and “you know you like it rough.” A defendant asked him if he wanted them to ejaculate into his cup so he could drink it, or if he would enjoy copulating with farm animals. Defendants told co-workers that Henry “has AIDS because Henry is homosexual.” Judge Baxter found that the verbal abuse was not actionable, citing several district court cases from the Third Circuit. [This writer’s examination of Third Circuit decisions reveals almost no published precedent on the point, but several “non-precedent” decisions indicate that verbal abuse of a prisoner or “verbal abuse alone” (without elaboration) is not sufficient to state a claim.] Here, the verbal abuse of Henry was tied to physical acts of adulterating food. Some courts have recognized what could be called “verbal abuse plus” as actionable. *See Beal v. Foster*, 803 F.3d 356, 358-9 (7th Cir. 2015) (verbal abuse placing inmate at physical risk). Judge Baxter’s balkanization of the claims fails to recognize that Henry faced a concerted plan of harassment and retaliation for assaulting staff, and it all occurred on the same evening shift, but Judge Baxter dismissed allegations of conspiracy. One wonders what would satisfy Judge Baxter’s standard: feces? urine? vomit? denial of all food? on all shifts? for how many weeks? Where are the “evolving standards of decency that mark the progress of a maturing society,” the Supreme Court used to discuss in *Estelle v. Gamble*, 429 U.S. 97, 102 (1076), and *Trop v. Dulles*, 356 U.S. 86, 101 (1958)? Disciplinary segregation is as close as modern corrections gets to the dungeon. The court gave a green light to write into the punishment for staff assault the deprivation of food by contamination, accompanied by slurs and threats of retaliation. William J. Rold

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**SOUTH DAKOTA** – Eighth Circuit judges facing prisoner transgender cases continue to struggle with abysmal precedent set by the Court of Appeals in *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996), and *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988). Little better is *Reid v. Griffin*, 808 F.3d 1191, 1192 (8th Cir. 2015), but it at least recognized a medical judgment rule that allowed for treatment if it could be characterized as other than just a difference of opinion. Recent approaches in non-litigation and litigation have been discussed in *Law Notes* (September 2016 at pages 395-397) regarding Iowa (adopting progressive standards voluntarily) and Missouri (being sued by Lambda Legal). In *Caskey v. Leave*, 2017 U.S. Dist. LEXIS 117815, 2017 WL 3206316 (D.S.D., July 27, 2017), U.S. District Judge Karen E. Schreier allows *pro se* inmate Cody Ray Caskey leave to amend her complaint to allege her diagnosis and treatment orders not being followed beyond merely asserting denial of “hormone replacement therapy.” In *Reid*, there was no definitive diagnosis and Reid was not denied treatment “completely.” Judge Schreier compared the disparate analyses taken in Arkansas and Nebraska, respectively, in *Derx v. Kelley*, 2017 WL 2874627, at *4 (E.D. Ark. June 19, 2017), *report and recommendation adopted*, 2017 WL 2874314 (E.D. Ark. July 5, 2017) (granting summary judgment against transgender plaintiff), reported in *Law Notes* (Summer 2017 at page 273), and *Brown v. Dep’t of Health & Human Servs.*, 2017 WL 944191, at *4 (D. Neb. Mar. 9, 2017), reported in *Law Notes* (May 2017 at page 217) (transgender plaintiff allowed to proceed on allegations that she was “refused evaluation and treatment”). Caskey is allowed to replead because her complaint, while insufficient on its face, may “not contain all of the facts of the matter.” There has been little activity judicially in Minnesota or North Dakota, but the Missouri litigation with counsel raises the best prospect for building a record that could distinguish *Reid* and improve case law for transgender inmates in the Midwest and Great Plains. William J. Rold

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**TENNESSEE** – U.S. District Judge Aleta A. Trauger dismissed *pro se* inmate James D. Whitson’s lawsuit against officers for calling him a “homosexual” as failing to state a constitutional claim in *Whitson v. Jones*, 2017 U.S. Dist. LEXIS 113184 (M. D. Tenn., July 20, 2017). Judge Trauger writes that Whitson is “upset with the defendants referring to him as a homosexual.” The complaint, reviewed in PACER, is actually more specific. It says that defendants “went to my pod where I sleep and told everybody I sucked dick. This is not the first time ore [sic] the second time . . . .” He also wrote that he suffered significant psychological harm, aggravating his prior condition. Judge Trauger said that it “is well settled that mere words, no matter how offensive, threatening, or insulting, do not rise to the level of a constitution violation,”

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citing DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000); and older case law from the 1980s and 1990s. There is no mention of the fact that the Seventh Circuit has limited DeWalt where there is psychological harm or the creation of danger of assault from other inmates by the verbal abuse of staff. In Beal v. Foster, 803 F.3d 356, 357-58 (7th Cir. 2015), an inmate was found to have stated a claim against a guard who called him terms like “punk, fag, sissy and queer,” in the presence of other inmates, thereby “increas[ing] the likelihood of sexual assaults on him.” See also, Grothjan v. Rissman, 2017 U.S. Dist. LEXIS 93 (N.D. Ind., June 19, 2017), reported in Law Notes (Summer 2017 at page 176) (finding a claim actionable when verbal abuse places an inmate in danger of assault from other inmates). Judge Trauger proceeded to grant in forma pauperis before dismissing the case, to assess $350 to be paid from Whitson’s inmate account in installments so long as there was money, and to certify that any appeal would be frivolous. This was not a case of casual “outing” of someone as gay. Judge Trauger either missed the impact of a guard’s telling other inmates in the plaintiff’s multiple housing pod that “this one like to suck cock,” or worse, if true, didn’t care. It is at best a naïve reaction to a highly charged environment and the creation of clear and present danger of assault. William J. Rold

ILLINOIS – Two new laws were enacted. H.B. 1785 facilitates the process for amending gender markers on Illinois birth certificates for transgender and intersex people born in the state, dropping the express requirement for proof of sex reassignment surgery, substituting a more general requirement that somebody has had “clinically appropriate” treatment for gender transition. H.B. 1761 prohibits the use of the traditional “gay panic” defense in murder cases, firmly rejecting the proposition that somebody whose alleged panic at being propositioned by a person of the same sex can be used to justify or mitigate their murder of the individual. Illinois is the second state after California to ban the gay panic defense. Both measures were signed into law by Governor Bruce Rauner (a Republican moderate) on August 25.

MICHIGAN – The Michigan Civil Rights Commission is considering issuing a guidance interpreting the sex discrimination ban in state law to cover claims of gender identity or sexual orientation discrimination. A measure to add these terms to the state’s anti-discrimination has stalled in the legislature, despite the support of Republican Governor Rick Snyder. Equality Michigan asked the Commission to take this step, pointing to the growing body of federal court decisions construing sex discrimination laws to cover such claims. Public comment was opened on July 25, and the measure will be discussed at the Commission’s September board meeting. BloombergBNA Daily Labor Report, 144 DLR 9 (July 28, 2017). It

FLORIDA – The Lee County Commission voted unanimously on June 20 to approve an updated Lee County Policy and Procedure Manual banning all workplace discrimination. Legislative history indicates an intention by the commission to include protection against discrimination because of sexual orientation or gender identity, but the measure does not mention specific categories, to the disappointment of some lobbyists who were seeking express protection. The County Manager and County Attorney co-authored a letter that will be included in the personnel manual, indicating that discrimination “will not be tolerated in any form whatsoever,” to indicate that the general language is intended to be “over-inclusive.” The Banner (Bonita Springs), July 19.

LEGISLATIVE & ADMINISTRATIVE

HOUSE OF REPRESENTATIVES – It was sure to happen sooner or later. Rep. Pete Olson (R-Texas) has introduced a bill with three Republican co-sponsors, House Resolution 2796, which would provide that federal laws banning discrimination cannot be interpreted to apply to transgender people unless the law expressly refers to “gender identity” or “transgender status.” The bill is called the Civil Rights Uniformity Act of 2017. It undoubtedly provides a preview of the kind of legislation that can be expected if the U.S. Supreme Court rules that sex discrimination laws should be interpreted to apply to claims of discrimination because of gender identity or sexual orientation. Such measures might pass the House, as presently constituted, but one hopes that Senate Democrats will stick together and oppose such a measure.

SOCIAL SECURITY – Social Security Ruling 17-1p is titled “Reopening Based on Error on the Fact of the Evidence – Effect of a Decision by the Supreme Court of the United States Finding a Law That We Applied to Be Unconstitutional,” see 2017 No. 3 Current Soc. Sec. News 4. With Section 3 of DOMA struck down in Obergefell v. Hodges (the part of the decision pertaining to marriage recognition across state lines), the Social Security Administration opined that its usual res judicata rules should give way in situations where surviving same-sex spouses have previously been denied claims for spousal benefits under the Act. It notes that “Title XVI (SSI) claimants in same-sex marriages, however, are limited to the two-year cutoff in 20 C.F.R. Secs. 416.1488(b), 416.1489(a)(3).”
was reported that a group of outraged Republican state legislators sent a letter to the Commission opposing the proposal.

NEVADA – The Nevada Board of State Prison Commissioners has adopted a new policy on transgender inmates. Much of it seems enlightened, but one provision has immediately prompted the expression of “grave concerns” by the ACLU of Nevada: a policy against allowing transgender inmates to begin hormone therapy in prison. In reversion to an archaic policy that has been rejected in numerous court decisions involving other state Corrections Departments, Nevada is taking the position that unless a transgender inmate was already taking hormones by prescription prior to incarceration, they will not be able to initiate therapy while incarcerated. This clearly violates the 8th Amendment in light of numerous holdings that gender dysphoria is a serious medical condition and that those diagnosed with severe gender dysphoria while in prison are entitled to hormone therapy of the medical staff finds the treatment necessary. *Las Vegas Review-Journal*, Sept. 1.

NEW JERSEY – On July 21, Governor Chris Christie signed into law bills that would require the state’s Education Commissioner to issue guidelines for the protection of transgender students from discrimination and would require health insurance companies to include coverage for gender transition procedures in the policies they sell in New Jersey, according to press releases issued by Garden State Equality, which supported passage of the bills.

NEW YORK – The NY Department of Financial Services issued a letter to health insurers on August 16 instructing them to refrain from denying coverage for medical services based on gender stereotypes that deny necessary health care for transgender individuals. The problem is that even after transition and becoming identified with their preferred sex, transgender people may need medical services associated with their birth sex. There have been complaints that insurance claims were being denied because the insured now identified as male and was seeking coverage for a procedure associated solely with women, and vice versa. A spokesperson for the New York Health Plan Association commented, “Systems are set up so that if someone who identifies as female goes in for a prostate exam, it might get kicked out” by the computerized system, but should be corrected in the appeals process. The letter was intended to get insurers to make the necessary adjustments so that transgender people do not have to resort to the appeals system to get coverage for their legitimate health care needs. *Albany Times Union*, Aug. 17.

OHIO – Athens City Council members have approved an ordinance banning the performance of conversion therapy on minors in the city on August 21. The ban prohibits any “efforts to change sexual orientation or gender identity” and passed unanimously. It was passed in response to a petition to the city council with more than 500 signatures seeking an end to the practice. *University Wire*, Aug. 22.

RHODE ISLAND – Governor Gina Raimondo signed into law a measure banning health care providers from using conversion therapy on minors, reported the *Providence Journal* (July 20).

TEXAS – So-called “bathroom bills” that were pending in the special session of the Texas legislature, one of which was approved by the Senate, died when the House leadership refused to take up the measure before adjourning. Governor Greg Abbott, a proponent of the bill who is deathly afraid of being seen by a transgender man when relieving himself in the state capitol’s public restrooms (cooties, don’t you know?), admitted that as long as Republican House Speaker Joe Straus, an outspoken foe of the measures, retains his post, the measure is dead for the foreseeable future. *AP Online*, Aug. 16. Of course, if Abbott decides to call another special session to deal with the aftermath of Hurricane Harvey, anti-trans activists may well try to revive the proposals.

WEST VIRGINIA – The Parkersburg City Council voted 6-3 to defeat a proposed antidiscrimination ordinance that would have covered sexual orientation and gender identity discrimination claims. *AP State News* (Aug. 10). The mayor led the opposition, claiming that enactment could have “unintended consequences” for small businesses.

LAW & SOCIETY NOTES

SEX OFFENDER REGISTRIES CHALLENGED–Courts are increasingly finding constitutional problems with state and local laws imposing severe restrictions on the lives of convicted sex offenders who have served their sentences and wish to live and support themselves in civilian society. Two recent examples are *Commonwealth of Pennsylvania v. Muniz*, 2017 Pa. LEXIS 1682, 2017 WL 3173066 (Penn. Supreme Ct., July 19, 2017), and *Millard v. Rankin*, 2017 WL 3767796, 2017 U.S. Dist. LEXIS 140301 (D. Colo., Aug. 31, 2017). Given the severity of restrictions on where registered offenders can go, live and work, and reports of citizen vigilante action against them, court are increasingly skeptical of government
officials’ arguments that the measure are non-punitive and justified by high recidivism rates. (The arguments that severe restrictions and publicity about where sex offenders live are justified by high recidivism rates has been thoroughly disproven by studies showing that convicted sex offenders who have served their sentences actually have low rates of reoffending.) The Pennsylvania Supreme Court found that the state’s registration provisions constitute punishment despite the express statement by the legislature that its intent is non-punitive, and thus retroactive application of the provisions violates the ex post facto clause of the federal and state Constitutions. Senior U.S. District Judge Richard P. Matsch held in the Colorado case that both the 8th Amendment ban on cruel and unusual punishment and the 14th Amendment’s due process clause were offended by the Colorado Sex Offender Registration Act.

INTERNATIONAL NOTES

UNITED NATIONS – The Human Rights Committee of the United Nations, interpreting the International Covenant on Civil and Political Rights, to which Australia is signatory, issued a decision on August 3, 2017, finding that Australia is in violation of article 26 of the Covenant by not affording some mechanism under its law for an Australian citizen to have her overseas marriage to her former same-sex partner dissolved because the marriage is not recognized as such under Australian law. The case involves a former same-sex couple identified in the opinion as A and C, who lived together as a couples for ten years, first in the state of Victoria and then in the state of Queensland. They decided to have a child together. C became pregnant through donor insemination and bore their child in 2001. They intended to be equal parents, but at the time of birth the law did not allow the co-parent to be listed on the child’s birth certificate as a parent. Subsequent legal changes have resulted in both women being recognized as parents of the child. C was the primary income earner in the family and A was the primary homemaker. They had intertwined family finances, property ownership, etc. When Canada made same-sex marriage available in 2004, they travelled to Canada and became legally married, but soon tensions arose and A left the marital home on December 22, 2004, since which time they have been separated and C has solely performed parental duties. A does not contribute to the child’s support and, in fact, the women have lost touch with each other and C does not know her whereabouts. C would like to get the marriage dissolved, but cannot do so in Canada unless she establishes residency there for at least a year. Seeking a divorce in Australia is impossible under the current legal regime, which does not recognize the marriage. C deems this as intolerable, because any attempt for her to form a new legal partnership under Queensland law would be barred by her existing overseas marriage to A, and if she travels overseas and the issue should arise in a country that recognizes same-sex marriages, she would be deemed to be married to A. She has complained to the Committee that this situation violates her rights under article 26 by being a form of discrimination because of sexual orientation, and a majority of the Committee agrees with her argument (over some dissenting opinions). The Committee writes that under article 2(3)(a) of the Covenant, Australia is under an obligation to provide C with an effective remedy, which would require full reparation to individuals whose Covenant rights are violated. “Accordingly,” wrote the Committee, “the State party is obligated to provide [C] with full reparation for the discrimination suffered through the lack of access to divorce proceedings. The State party is also under an obligation to take steps to prevent similar violations in the future and to review its laws in accordance with the present Views.” The Committee asked Australia to provide, within 180 days, “information about the measure taken to give effect to the Committee’s views.” In effect, this would seem to place Australia under some sort of obligation to recognize same-sex marriages of its residents contracted overseas, at least to the extent of providing a mechanism for divorce. Interesting that this decision issues as Australia is embroiled in a process to determine whether to enact marriage equality (see story above). Seventeen members of the Committee participated in the consideration of this case, of which two dissented and one filed a concurring opinion. The title of the Committee’s opinion is “Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2216/2012,” adopted by the Committee at its 119th Session (6-29 March 2017), but released for distribution, as noted above, on August 3.

CANADA – Beginning August 31, Canadian passport holders had the option for identifying their gender on as M for male, F for female, or X for unspecified. This is meant to offer transgender individuals the option of more accurately describing their gender identity without being forced to identify as their birth gender, and will accommodate people who reject the gender binary and do not fully identify as either male or female. Canadian Minister of Refugees, Immigration and Citizenship Ahmed Hussen released a statement: “By introducing an ‘X’ gender designation in our government-issued documents, we are taking an important step towards advancing equality for all Canadians regardless of gender identity or expression.” Canada became the ninth country in the world to offer a third category for gender identification, following Australia, Bangladesh,
Germany, India, Malta, Nepal, New Zealand and Pakistan. *UPI NewsTrack, Aug. 26.* In the U.S., the State Department’s requirement that passport applicants designate themselves as either M or F is under legal challenge as a violation of the 5th Amendment Due Process Clause. * * * Canadian Supreme Court Justice Richard Wagner issued an order rejecting an application from some LGBTQ groups to participate in the argument of a case concerning the question whether Trinity Western University may not be denied accreditation by Canadian bar associations because of its anti-gay rules for students. Some groups on the other side of the case, such as Christian Legal Fellowship and National Coalition of Catholic School Trustees, had been granted permission to intervene. Such an uproar ensued that Chief Justice Beverley McLachlin surprised the parties by issuing a new order that extended the oral argument to two days and granted leave to intervene to all groups who had petitioned to participate, including the LGBT rights groups. The arguments will be held on November 30 and December 1. *Toronto Star, August 2.* Policy changes at Correctional Services Canada now allow inmates to transfer facilities based on their gender identity, reported *Postmedia News* (July 22), which noted that Fallon Aubee, a transgender inmate in British Columbia, had become the first to win a transfer to serve the remainder of her sentence for first-degree murder at a women’s prison. She had been fighting for the transfer for several years.

**CHINA (PEOPLE’S REPUBLIC OF CHINA – TAIWAN)** – Taipei City employees in same-sex relationships that are registered with the household registration office are now recognized as entitled to marriage and paternity leave by the city government. The city took action to ensure gay couples’ rights while the national legislature considers how to comply with the recent ruling by the nation’s Constitutional Court that same-sex couples are entitled to marry. The May 24 ruling by the court required the legislature to revise the marriage statute within two years. The Ministry of the Interior announced on July 2 that same-sex couples living in a city or county that did not offer some form of same-sex relationship registration are allowed to register their relations in other areas that provide for them. *China Post, July 19.*

**ENGLAND AND SCOTLAND** – Acknowledging improvements in the accuracy of testing donated blood for the presence of HIV, England and Scotland have further reduced the waiting period after having sex for gay men to donate blood. Both men who have sex with men and sex workers can now donate blood three months after their last sexual activity, with an acceptable level of confidence that the tests used to screen donated blood can accurately determine if the HIV is present. The Advisory Committee on the Safety of Blood determined that the previous waiting period of 12 months was much longer than necessary in light of current testing technology and knowledge about how quickly antibodies appear after a person becomes infected. *BBC News, July 23.* [The U.S. still adheres to the one-year rule.]

**FRANCE** – On July 20, France lifted a ban on embalming the bodies of HIV-infected people, which has been in effect since 1986, when the ban was introduced to protect embalmers from accidental exposure to HIV. *Agence France Presse English Wire, July 20.* The article reports that “there are no known cases in Europe of embalmers becoming infected by HIV in the course of their work.” The decree also affects the bodies of people who were infected with hepatitis.

**INDIA** – Justice N. Kirubakaran of the Madras High Court allowed a writ petition on Aug. 17 by R. Vishwa, a transgender man, seeking to compel state education authorities to change his school and college certificates so that they reflect his current gender status, which has changed from female to male. Vishwa went through sex-reassignment surgery after graduating from college, and the transition was made a matter of public record in the Official Gazette in September 2016, and subsequently in order government documents, but school authorities resisted his requests to issue new graduate certificates. The court ordered the authorities to issue the requested certificates within four weeks. The court sua sponte impleaded several government agencies and commented on the need to pass the Rights of Transgender Persons Bill, introduced in 2014 and still pending approval in the Parliament. *Bar & Bench* (India), August 17.
ISLE OF MAN – Queen Elizabeth has given royal assent to the Equality Act passed by the legislature on the Isle of Man. Provisions of the act, which prohibits discrimination in employment and public accommodations because of race, religion, sexual orientation, age, disability, and “gender reassignment,” will be phased in over a 24-month period. *tomtday.com* (July 21).

ISRAEL – The Supreme Court ruled on August 31 that a claim for recognition of same-sex marriages contracted outside the country was essentially not justiciable. The Court noted that under the Basic Law on Human Dignity and Liberty, which the petitioner, the Israeli Gay, Lesbian, Bisexual and Transgender Association, was relying on for their claim, specifically provides that it cannot be used to affect laws enacted prior to its adoption. Part of the compromises between civil and religious authority that were negotiated as part of the founding of the modern state gave the rabbinical courts the authority to determine who can marry in Israel and, said the Supreme Court, as it is not a rabbinical court, it has no authority under Israeli law to dictate marriage recognition. “Essentially, the petitioners are asking from the court to recognize same-sex marriage via legislation, despite the fact that they are not recognized by the Israeli law.” If this allocation authority is to be changed, said the Court, it must be done by the Knesset (Parliament), not the courts. The Court noted that although a few other countries had recognized same-sex marriage as a result of a court ruling (like the U.S.), in most countries it had been done through legislation. Thus, the Court sees it as a political and religious question, not a legal one. *Jerusalem Post*, Aug. 31.

KOREA – The Supreme Court rejected objections to allowing the registration of a gay rights advocacy group, Beyond the Rainbow Foundation, holding that the Ministry of Justice had the authority to allow such registration and overruling contrary decisions by some lower courts.

KUWAIT – *Gulf News* (Aug. 8) reported that Kuwait has deported 76 gay men in a crackdown on sexually oriented businesses, as part of a nationwide campaign to enforce the laws regulating the operation of massage parlors. The head of a “moral committee” said that the country has a “zero-tolerance policy towards any morally objectionable activities.” The article did not state where the men were being sent. One hopes to a more tolerant place.

MEXICO – The state of Michoacan enacted a bill that allows transgender people to change their birth certificate by filling out a form at the Civil Registry. The measure passed on July 13 by a vote of 22-1 with one abstention. A translation of the operative language states that “In no case will it be necessary to demonstrate any surgical intervention, therapies or other diagnosis or procedure for the recognition of gender identity.” Rex Wockner, who reports on LGBT legal developments on-line, monitors Mexican news sources and shares his findings with journalists interested in LGBT issues. * * * On August 2, the Supreme Court ruled that same-sex couples could marry in Puebla State. *Digital Journal*, Aug. 2. Out of the 32 states in Mexico at least a dozen and Mexico City now have marriage equality, although couples who want to undertake litigation against local authorities can obtain a court order to let them marry, and same-sex marriages lawfully contracted as recognized by the government throughout the country. * * * Rex Wockner reports that Mexico’s Nayarit State has changed its laws so that transgender people can get a new birth certificate upon request from the local Civil Registry offices without any need to show they have had medical treatment to transition.

NEPAL – *Pahichan.com* (July 25) reported from Kathmandu that the first same-sex marriage has been registered in Nepal, in Dadeldhura District. The report states that a same-sex couple (one identifies as a man and the other is “third gender”) successfully registered their marriage at Parshurama Municipality of Dadeldhura District. The Parliament is still considering legislation on the subject, but the local registry proceeded without statutory authorization, for what is probably the first officially registered same-sex marriage in South Asia. The happy couple are Monica Shahi and Ramesh Nath.

NORTHERN IRELAND – The Belfast High Court ruled on August 17 that the continued refusal of the Northern Ireland government to recognize same-sex marriages does not violate the legal rights of the couples (who married elsewhere, such as in Scotland, Britain, Wales or another country). Same-sex couples filed suit in an attempt to win a ruling that could pressure the Democratic Unionist Party (DUP), which has exercised its veto, to drop its opposition to pending same-sex marriage legislation, which has the support of a parliamentary majority. Justice O’Hara opined that refusal to allow or recognize same-sex marriage does not contravene a human right “because that right does not exist.” The judge said it was up to the government to decide the issue, and that international human rights standards do not yet mandate that governments allow same-sex couples to marry. This is a correct read on the most recent opinions by the European Court of Human Rights, which has ruled that signatory states have satisfied their human rights obligations by providing a civil status roughly equivalent to marriage for same-sex couples. Some activists have called
on U.K. Prime Minister Theresa May to take steps to impose marriage equality in Northern Ireland, in default of the formation of a new ruling coalition in the Northern Ireland legislature due to indecisive results in the last election. *Reuters*, Aug. 17.

**SINGAPORE** – The Registry of Marriage has voided several marriages in which one spouse went through sex reassignment. In the view of the Registry, since it recognized the legal status of the sex change, these had now become same-sex marriages, which are not allowed or recognized under the nation’s law. A spokesperson stated, “Singapore law does not recognize a marriage where both parties are of the same sex. At the point of marriage, a couple must be man and woman, and must want to be and remain as man and woman in the marriage.” Voiding of the marriage caused immediate loss of certain housing and benefits rights. *Straits Times*, July 18.

**SOUTH AFRICA** – The South Gauteng High Court ruled on Aug. 18 that Jon Qwelane, the former South African Ambassador to Uganda, must publish an apology to the gay community for a newspaper column he published in 2008 that the court found to constitute hate speech. Judge Dimpeletse Seun Moshidi declared the “offending statements” in Qwelane’s column “to be hurtful, inciting harm, propagating hatred as envisaged in Section 10 of the Promotion of Equality and Unfair Prevention of Discrimination Act of 2000. The applicant is ordered to tender to the LGBTIQ community an unconditional apology within 30 days, or another period as parties may agree upon. The apology shall be published in one edition of the Sunday Sun newspaper or publication of the same circulation as a Sunday newspaper in order to receive the same publicity as the offending statements. Proof of publication of such apology shall be furnished to this court immediately thereafter.” The court also taxed Qwelane with the costs of the long-running case, which was brought by the Human Rights Commission of South Africa in response to many complaints that were received about the column, which was titled “Call me names, but gay is not ok” and was accompanied by a cartoon that portrayed homosexuality as bestiality, according to *The Independent on Saturday* (South Africa), Aug. 19.

**TRISTAN DA CUNHA** – Tristan da Cunha (population 262), part of the British overseas territory of Saint Helena, Ascension & Tristan da Cunha, has joined the marriage equality bandwagon, reports journalist Rex Wockner on August 4. Ascension also has marriage equality, but Saint Helena is holding out.

**UGANDA** – The government moved to cancel a week of planned Gay Pride events on August 16. State Minister of Ethics and Integrity, Simon Lokodo, issued the directive, accusing the organizers of attempting to stage an illegal gathering aimed at recruitment, exhibition and promotion of homosexuality, according to an Aug. 21 report in *The Guardian*.

**VENUEZUELA** – A national crisis of shortage of medical supplies has hit people living with HIV particularly hard, reported *NBC News* in a feature story on August 25. NBC reported: “Since 2015, there have been sporadic shortage of these vital medicines all over Venezuela. But deliveries that were slow to arrive two years ago have now ground to a halt. Public hospitals have given up testing for HIV, and condom supplies have run out. Venezuela’s health system appears to be on the brink of collapse.” Twenty years ago, Venezuela was a model of state-of-the-art treatment for people who tested HIV-positive, but that “once-renowned program is now a distant memory for AIDS patients,” and the mortality rate has shot up. According to Positive Together, a non-governmental agency working with HIV and AIDS patients in Caracas, 85 percent of pharmacies in the capital have run out of medication, and 95% or more of the hospitals have no HIV-related medication in stock.

Said one observer, “If you’re sick and go to a hospital in Caracas, all you’ll get – if you’re lucky – is a bed and some saline solution. There is no hope left in Venezuela; it’s getting harder and harder every day.”
THE ACLU IMMIGRANTS’ RIGHTS PROJECT has posted an opening for a full-time staff attorney in either the New York or San Francisco office. They are asking for 3-8 years of litigation experience and admission to the bar in either New York or California and the usual high-level experiential credentials, with fluency in Spanish preferred because of the nature of much of the work and the clients represented. Applicants should send a letter of interest, a resume, a law school transcript, the names and telephone numbers of two references, and a legal writing sample to: hrjobsIRP@aclu.org, with Reference [IRP-01/IRP-20] in the subject line. Applications will be accepted until the position is filled, and applicants are requested to indicate where they learned about the job posting. ACLU is an equal opportunity employer, and emphasizes that it undertakes affirmative action strategies in its recruitment and employment efforts to assure that persons with disabilities have full opportunities for employment in all positions. Applicants with disabilities who may need accommodations in the application process should contact hrjobsinc6@aclu.org, a designated address for such inquiries.

LAMBDA LEGAL is accepting applications for a Senior Attorney (at least 10 years of legal experience) position in its Chicago/Midwest Regional Office. Since first announcing the opening, Lambda has broadened the search and will consider applications from people who are interested in one of its other offices (Atlanta, Chicago, Dallas, Los Angeles, New York, Washington D.C.). The full job announcement can be found at: https://www.lambdalegal.org/about-us/jobs/mro-senior-attorney.

DANA NESSEL, a lesbian who represented plaintiffs April DeBoer and Jayne Rowse in their marriage equality case that became part of Obergefell v. Hodges, has announced that she is a candidate for Attorney General of Michigan, an elected position.

PUBLICATIONS NOTED

1. Abrams, Kerry, and Brandon L. Garrett, Cumulative Constitutional Rights, 97 B.U. L. Rev. 1309 (July 2017) (explores the Supreme Court’s determination of constitutional claims by cumulating rights under different theories, as in Obergefell v. Hodges, the marriage equality case).
3. Brunson, Samuel D., and David J. Herzig, A Diachronic Approach to Bob Jones: Religious Tax Exemptions After Obergefell, 92 Ind. L.J. 1175 (Summer 2017) (calling for a legislative solution to the question whether religious institutions that discrimination against same-sex married couples must lose their tax exemptions pursuant to the Supreme Court’s Bob Jones doctrine).
6. Carpenter, Leonore F., The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality, 13 Stan. J. Civ. Rts. & Civ. Liberties 255 (June 2017) (examining the gap between formal legal equality and actual access to equal rights, the author proposes that the LGBT movement redirect significant resources to providing “routine” legal services for LGBT people, especially in such areas as family law, employment discrimination, and benefits entitlements).
Supreme Court based its marriage decisions in Obergefell and Windsor on protection of “dignity” as part of the liberty protected by the Due Process Clause, but has never spelled out what that means. This note speculates about the extent of protected dignity.

15. Greenberg, Julie A., Legal, Ethical, and Human Rights Considerations for Physicians Treating Children with Atypical or Ambiguous Genitalia, 41 Seminars in Preinatology, No. 4, P. 252.


17. Ho, Jeremiah A., Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination, 2017 Utah L. Rev. 463 (2017) (Marriage equality decisions took a backward step from the “dignity” jurisprudence of Lawrence v. Texas by rooting the marriage right in a “respectability” paradigm; a return to the equal dignity concept is necessary to realize the antidiscrimination goals of the LGBTQ movement).

18. Holtz, Amy Leah, Daddy or Donor? Uncertainty in California Law in the Wake of Jason P. v. Danielle S., 68 Hastings L.J. 869 (May 2017) (critique of court of appeal decision allowing a sperm donor who did not originally intend to be a parent to seek parental rights over the mother’s objection).


22. Leslie, Christopher R., Dissenting from History: The False Narrative of the Obergefell Dissents, 92 Ind. L.J. 1007 (Summer 2017) (sharp critique of the four dissenting opinions in Obergefell v. Hodges as misrepresenting history and legal precedents).

23. Mailard, Kevin, Other Mothers, 85 Fordham L. Rev. 2629 (May 2017) (“There is a robust body of scholarship and jurisprudence addressing psychological parents, assisted reproductive technology, surrogacy, and same-sex parents, which reinforces the primacy of heterosexual marriage and procreation. This tradition suggests a vulnerability of parental status involving the other parent. Now that legal parenthood can be approached in a number of ways, it is time to take a critical look at the pre-eminence of motherhood and gestation in the determination of parental status and fitness.”).


25. Mulligan, Lark, Dismantling Collateral Consequences: The Case for Abolishing Illinois’ Criminal Name-Change Restrictions, 66 DePaul L. Rev. 647 (Winter 2017) (Demonstrates how state law forbidding legal name-changes for a specified period of time for people who have been convicted of a crime creates significant difficulties for transgender people).

26. Nachbara, Thomas B., Rational Basis “Plus”, 32 Const. Comment. 449 (Summer 2017) (exploring the origins and scope of the form of judicial review deriving from the Supreme Court’s Moreno decision that the Supreme Court appears to be following in cases such as Lawrence v. Texas and Obergefell).

27. NeJaime, Douglas, The Family’s Constitution, 32 Const. Comment. 413 (Summer 2017) (reconceptualising the interrelationship of federal constitutional law and state domestic relations & family law in light of Obergefell and the issues flowing from it).

28. Nicolas, Peter, Backdating Marriage, 105 Cal. L. Rev. 395 (April 2017) (retroactive application of Obergefell; argues same-sex couples should be entitled to “back-date” their marriages to the date when they would have married had their jurisdiction allowed them to do so).

29. Patti, Camille, Hively v. Ivy Tech Community College, Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection, 26 Tulane J. L. & Sexuality 133 (2017) (Student case note originally framed as a critique of 7th Circuit panel decision in Hively converted in the editing process to incorporate the en banc decision and discuss grounds on which the Supreme Court should endorse the argument that Title VII covers sexual orientation discrimination).


32. Rooney, M. Frances, The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination, 15 Geo. J. L. & Pub. Pol’y ’737 (Summer 2017) (argument that the privileges or immunities clause of the 14th Amendment was intended to ban gender discrimination; consequently, one can make an “originalist” argument for a constitutional ban on gender discrimination without having to argue about whether the equal protection clause was intended by its framers to extend to sex discrimination).


34. Sankovych, Roman, Supremacy of Law or Religion: Congress’s Power to Amend the Constitution Bypassing Constraints of the Constitutional Process, 15 DePaul Bus. & Com. L.J. 185 (Spring 2017) (The...
Supreme Court’s *Hobby Lobby* decision should be reversed, because the federal Religious Freedom Restoration Act stands on shaky constitutional grounds as an attempt by Congress to rebalance the relative authority of religion and civil law that is part of the constitutional structure through ordinary legislation).

35. Schully, Charles, *A Journey “Delayed But Not Finished”: Granting *Auer* Deference to Regulatory Interpretations Guiding Transgender Rights in *G.G. ex rel Grimm v. Gloucester County School Board*, 26 Tulane J. L. & Sexuality 147 (2017) (argues that had the Supreme Court decided the case on the merits, it should have affirmed and applied *Auer* deference as the 4th Circuit had done).

36. Singer, Joseph William, *Property and Sovereignty Imbricated: Why Religion is Not an Excuse to Discriminate in Public Accommodations*, 18 Theoretical Inquiries L. 519 (July 2017) (theoretical discussion of an issue underlying the *Masterpiece Cakeshop* case that will be argued before the Supreme Court during its October 2017 Term).


