TRANSGENDER TRIUMPHS

Highest Courts in India and Australia Issue Groundbreaking Rulings
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In a historic decision, a two-judge bench of the Supreme Court of India, ruling on a petition brought by the National Legal Services Authority on behalf of members of the transgender community, has declared that among the human rights protected by the Indian Constitution are the rights of individuals to State recognition of their gender identity and sexual orientation, and to be free of official discrimination on these grounds. National Legal Services Authority v. Union of India, Writ Petitions (Civil) No. 400 of 2012 and No. 604 of 2013 (April 15, 2014). The original petitioner was joined by several others, resulting in a consolidated decision. Although the petition was brought specifically to gain redress from the outcast status of transgender people in India, the court’s expansive language appeared to take in as well, at least to some extent, the social inequities endured by gay people.

The court mentioned in passing the recent ruling in Koushal v. Naz Foundation, [2014 1 SCC 1], rejecting a constitutional challenge to Section 377 of the Indian Penal Code, which criminalizes gay sex, but said it was expressing no opinion on that issue “since we are in these cases concerned with an altogether different issue pertaining to the constitutional and other legal rights of the transgender community and their gender identity and sexual orientation.” A different panel of the court recently signaled willingness to examine a “curative petition” that had been filed by the government in the Naz Foundation case, so it is possible that a new opinion may issue on the sodomy law question. If it is consistent with the ruling in this case, it would be a reversal of the retrogressive opinion from the other panel.

Each of the judges sitting on this case—Justice K. S. Radhakrishnan and Justice A.K. Sikri—wrote an extended opinion, although Justice Radhakrishnan’s far longer opinion set forth historical background and a thorough review of the treatment of transgender and gender identity issues in the statutes and court rulings of other English-speaking countries. After reviewing the various forms of discrimination and exclusion that transgender people suffer in India, Justice Radhakrishnan wrote, “Discrimination faced by this group in our society is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc., have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity.”

Interestingly, the court came to this conclusion— that some individuals are entitled to be recognized under the law as other than male or female, or “third sex” — just shortly after Australia’s highest court came to the same conclusion, allowing an individual who identified as neither male nor female assigned at birth based on their genitals. The court quotes at length from the 2013 amendment enacted by Australia to address discrimination on the ground of sexual orientation, gender identity, or intersex status, and in passing regretted the lack of such legislation in India, leaving it to the courts to ensure that transgender individuals can enjoy full legal and social equality.

Perhaps the most fascinating part of Justice Radhakrishnan’s opinion is a brief review of the history of transgender people in India, where it seems they had a rather exalted status prior to the British colonial period, with its introduction of the sex-negative baggage of 19th century British imperial jurisprudence, leaving behind the unfortunate legacy of Section 377 that has lingered throughout the former British colonies. After finding that international
including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.” Furthermore, “Non-recognition of the identity of Hijras/Transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police.” The court concluded, “Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India.”

The court also found a violation of Articles 15 and 16, which enumerate forbidden grounds for discrimination, including “sex.” Without noting the source, the court then described a mode of analysis — sex stereotyping as sex discrimination — similar to that adopted by the U.S. Supreme Court in 1989 in the Hopkins case, which has since been embraced by the U.S. Equal Employment Opportunity Commission in its ruling that discrimination because of gender identity is a form of sex stereotyping contrary to the requirements of modern sex discrimination law. Indeed, going further beyond where the EEOC has gone, the court wrote, “State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights.”

“Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation, and, therefore, it will have to be protected under Article 19(a) of the Constitution of India,” wrote the judge. “A transgender’s personality could be expressed by the transgender’s behavior and presentation. State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, there, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the Transgender community under Article 19(1)(a) of the Constitution of India and State is bound to protect and recognize those rights.” The court also found protection for transgender rights in Article 21, an analogue of the U.S. Due Process Clause, which has been held to protect the dignity of the individual, just as the U.S. Supreme Court held last year in U.S. v. Windsor that the Due Process Clause of the U.S. 5th Amendment protects the dignity of married same-sex partners.

Finally, Justice Radhakrishnan focused on the “third gender” individuals who do not identify as male or female, asserting that the government must respect their gender identity as well and adapt policies and official forms to acknowledge the existence of third gender individuals. “Article 14 has used the expression ‘person’ and Article 15 has used the expression ‘citizen’ and ‘sex’; so also Article 16. Article 19 has also used the expression ‘citizen.’ Article 21 has used the expression ‘person’. All these expressions, which are ‘gender neutral’, evidently refer to human-beings. Hence, they take within their sweep Hijras/Transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one’s personal self, based on self identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.”

“We therefore conclude,” wrote Radhakrishnan, in a point on which Justice Sikri stated full agreement, “that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restrict or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.”

Justice Sikri’s opinion focused on the development of international human rights principles and their application to the question before the court, observing that “there is thus a universal recognition that human rights are rights that ‘belong’ to every person, and do not depend on the source, the court then described a mode of analysis — sex stereotyping as sex discrimination — similar to that adopted by the U.S. Supreme Court in 1989 in the Hopkins case, which has since been embraced by the U.S. Equal Employment Opportunity Commission in its ruling that discrimination because of gender identity is a form of sex stereotyping contrary to the requirements of modern sex discrimination law. Indeed, going further beyond where the EEOC has gone, the court wrote, “State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights.”

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the specifics of the individual or the relationships between the right-holder and the right-grantor.” Just as they are “not granted by the people, nor can they be taken away by them.” And, “If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination, dignity and freedom.”

After the two separate opinions, the justices joined in a declaration binding the State to recognize transgender and third gender individuals, to protect them from discrimination and take affirmative steps to improve their conditions and opportunities. Among other things, they directed the government to “provide them separate public toilets and other facilities.” There is a practical solution to the question frequently raised in gender identity discrimination debates – the restroom question. The Indian Supreme Court says we should abandon the shackles of binarism when it comes to public facilities. The court noted that the government had already established an Expert Committee “to make an in-depth study of the problems faced by the Transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with recommendations within three months of its constitution.” The Court stated that those recommendations should “be examined based on the legal declaration made in this Judgment and implemented within six months.”

The court singled out for particular commendation in its decision the “learned senior counsel” who presented the case for the Petitioner National Legal Services Authority, Shri Raju Ramachandran, and lead counsel for the other intervening parties, Shri Anand Grover, Shri T. Srinivasa Murthy, and Shri Sanjeev Bhatnagar. The court noted appearances of counsel for the government, who informed the court about steps the government was already taking to address the issue, which led to the court’s concluding deadline for implementation of such a process.

### Australia’s High Court Holds That a Person May Officially Have a “Non-Specific Gender” Designation

In an unanimous decision, Australia’s highest court held in *NSW Registrar of Births, Deaths and Marriages v. Norrie*, [2014] HCA 11 (April 2, 2014), that the Births, Deaths and Marriages Act of the State of New South Wales (NSW) should be construed as entitling a person to have their gender registered as “non-specific”.

The High Court of Australia’s reasoning was summed up in the first two paragraphs of its decision:

- Not all human beings can be classified by sex as either male or female [English and Australian authority cited]. The (Act) expressly recognizes that a person’s sex may be ambiguous. It also recognizes that a person’s sex may be sufficiently important to the individual concerned to warrant that person undergoing a sex affirmation procedure to assist that person “to be considered to be a member of the opposite sex”. When a person has undergone a sex affirmation procedure, … the Act empowers the Registrar to register a change of sex of the person upon an application by that person.

The question in this appeal is whether it was within the Registrar’s power to record in the Register that the sex of the respondent, Norrie, was, as she said in her application, “non-specific”. That question should be answered in the affirmative.

Norrie was born with male reproductive organs. She (her preferred pronoun) underwent a surgical procedure defined by the Act as a “sex affirmation procedure”. She considered the procedure did not resolve her sexual ambiguity and applied to the NSW Registrar of Births, Deaths and Marriages for her sex to be registered as “non-specific.” After initially approving Norrie’s application, the Registrar reversed the decision and re-issued a certificate stating Norrie’s sex was “not stated”. Norrie’s application for review of that decision was rejected on the grounds that the Act classified all people as either male or female and it was not open to the Registrar to register a sex as “non-specific”. Norrie appealed to the NSW Supreme Court which set aside the review decision as wrong in law. The Registrar appealed that decision to the High Court of Australia.

The High Court accepted that the Act recognizes only male and female as registrable classes of sex and rejected Norrie’s submission that it was within the Registrar’s powers to register someone’s sex as transgender or intersex. (The references in the Act to “transgender” are for the purpose of determining an application for change of registration of sex.) The Court went on, “(b)ut to accept that submission does not mean that the Act requires that this classification (of male or female) can apply, or is to be applied, to
everyone. And there is nothing in the Act which suggests that the Registrar is entitled, much less duty-bound, to register the classification of a person’s sex inaccurately as male or female having regard to the information which the Act requires to be provided by the applicant.” By defining a transgender person as someone “who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex”, the Act expressly recognized “ambiguities” and the existence of persons of “indeterminate sex”.

The Court observed that the Act did not suggest the Registrar’s functions extended to making moral or social judgments, to resolving medical questions or forming a view about the outcome of a sex affirmation procedure. The Court rejected the Registrar’s contention that registration as other than male or female would lead to unacceptable confusion. Under the NSW Interpretation Act, a reference to a gender is taken to be a reference “to every other gender”. The Births, Deaths and Marriages Act deems a person to be of the sex in which they are registered, but “subject to other NSW laws”. The effect is that inconsistent laws would prevail over that deeming provision, “so that an individual is not left in a “legal no-man’s land.” The chief, perhaps only, case where the sex of the parties to a relationship is significant is marriage under the Marriage Act – a federal, not a State, statute that specifies that marriage is a union between a man and a woman.

Accordingly, the original review decision was wrong in concluding that the Act is predicated on the assumption that “all people can be classified into two distinct and plainly identifiable sexes, male and female.”

The decision is accessible at www.austlii.edu.au/au/cases/cth/HCA/2014/11.html. –David Buchanan

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Federal Judge Strikes Down Ohio Marriage Recognition Ban as “Facially Unconstitutional”

U.S. District Judge Timothy S. Black, who ruled in December in Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), that Ohio’s ban on recognizing same-sex marriages from other states was unconstitutional in connection with recording marital status and surviving spouses on death certificates, expanded his ruling in the context of a second lawsuit brought by married same-sex couples seeking recognition for purposes of birth certificates. Henry v. Himes, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio, April 14, 2014). However, Judge Black didn’t restrict his ruling to that issue, instead finding that Ohio’s recognition ban was unconstitutional in all its applications. On April 16 Judge Black issued an order granting in part the defendants’ motion to stay his ruling pending appeal to the 6th Circuit; while the appeal is pending, the state is only required to recognize four same-sex marriages: the marriages of the plaintiff couples. As to them, Judge Black directed that the state issue birth certificates for their children naming both spouses as parents. See Henry v. Himes, 2014 U.S. Dist. LEXIS 52600 (S.D. Ohio, April 16, 2014) (ruling on motion for stay of injunction).

The plaintiffs, four same-sex couples represented by Alphonse Gerhardstein, Jacklyn Gonzales Martin and Jennifer Lynn Branch of Gerhardstein & Branch Co. LPA, were all married in other states. The three lesbian couples are Ohio residents, and each couple is expecting a child to be born in the next few months, conceived through donor insemination. For purposes of birth certificates, they want these births to be treated the same way Ohio treats other births to married couples where the wife becomes pregnant through donor insemination. In such cases, Ohio issues a birth certificate identifying the mother’s spouse as the child’s other legal parent, but the state’s Health Department, under the direction of named defendant Lance Himes, refuses such equal treatment, claiming that the state’s Marriage Amendment and marriage-recognition statutes prevent it. The fourth couple, two gay men in New York who adopted an Ohio-born child, want Ohio to follow its statutory procedure for issuing new birth certificates for children adopted in other states, which requires recording the names of both parents on the birth certificate. In this case, the men jointly adopted the child in a New York proceeding, and ask that Ohio recognize that adoption and their parental status.

Judge Black pointed out that Ohio used to follow the procedure requested by the male couple, Joseph Vitale and Robert Talmas. However, when the current Republican administration took office in January 2011, Governor John Kasich and Attorney General Mike DeWine ordered that the Health Department cease recognizing out-of-state same-sex marriages for this limited purposes, even though the same-sex couple and their child reside out of state and all that Ohio was being asked to do was to issue a substitute birth certificate for the child.

Unsurprisingly, Judge Black found that nothing has happened since his December decision to change his legal analysis. Indeed, he noted on the second page of his decision “ten out of ten federal rulings since the Supreme Court’s holding in United States v. Windsor — all declaring unconstitutional and enjoining similar bans in states across the country.” Furthermore, he wrote, “The pressing and clear nature of the ongoing constitutional violations embodied by these kinds of state laws is evidence by the fact that the Attorney General of the United States and eight state
attorneys general have refused to defend provisions similar to Ohio’s marriage recognition bans.”

This led Judge Black to a sweeping conclusion: “This court’s analysis in [its December ruling] controls here, and compels not only the conclusion that the marriage recognition ban is unconstitutional in the birth certificate context, but that it is facially unconstitutional and unenforceable in any context whatsoever.” Judge Black’s opinion is written in emphatic terms, and to drive home his key points, he issued a slip opinion where those points are in bold, underlined type.

He rooted his ruling in prior decisions by the United States Supreme Court, and seemed at times to be responding as much to arguments being raised by marriage equality opponents in lawsuits from other states as to the argument raised by Ohio’s attorneys. For example, quoting from a U.S. Supreme Court ruling, Hodgson v. Minnesota, 497 U.S. 417 (1990), “the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicted on legitimate state concerns other than disagreement with the choice the individual has made,” or, referring to several Supreme Court decisions, he wrote that “the fundamental right to marry is available even to those who have not traditionally been eligible to exercise that right.” He concluded that “the right to marriage is a fundamental right that is denied to same-sex couples in Ohio by the marriage recognition bans.” He found that denial of this right also affected the fundamental right to parental authority. “U. S. Supreme Court rulings, reflected in state laws, make clear that these parental rights are fundamental and may be curtailed only under exceptional circumstances,” he wrote.

While cases involving state abridgement of fundamental rights are usually analyzed using the “strict scrutiny” test, under which the challenged statute is presumed unconstitutional and the state has the burden of showing that the statute is necessary to achieve a legitimate and compelling state interest, Judge Black decided to treat this as a heightened scrutiny case, using a balancing approach between the interests of the plaintiffs and the state. He described the many burdens that denial of recognition places on married same-sex couples — and particularly those raising children, as in this case — and found that the Supreme Court’s decision last June in U.S. v. Windsor addresses the issue directly. In that case, Justice Anthony M. Kennedy described same-sex marriages being denied recognition under federal law as “second-tier” marriages, and wrote, “The differentiation demeans the couple, whose moral and sexual nature of the will of Ohio voters is particularly specious.” He also responded to the state’s argument that the Supreme Court in Windsor had recognized that regulation of domestic relations in the U.S. has traditionally been an exclusive function of the states by pointing out that such state regulation is “subject to constitutional guarantees.”

Thus, he found, the state’s refusal to recognize same-sex marriages performed elsewhere “violates the substantive due process rights of the parties to those marriages because it deprives them of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so.”

Judge Black also found an equal protection violation. He pointed out that 6th Circuit equal protection precedents involving gay litigants pre-dated Windsor, which required deciding anew whether sexual orientation discrimination should invoke heightened scrutiny. Referring back to his earlier decision, he found that heightened scrutiny was the correct approach, noting in passing the 9th Circuit’s conclusion on this point in its jury selection ruling in January. “Here,” he wrote, “Defendants’ discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State’s disapproval of their same-

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Federal Judge Grants TRO Ordering Indiana to Recognize a Same-Sex Marriage

M arriage Equality advocates in Indiana were very strategic in their litigation, holding off filing cases until after the legislature had adjourned, after kicking the question of a constitutional amendment against same-sex marriage down the road another two years by passing a version of the proposed amendment that differed from that approved in the last session. A bunch of new cases were filed earlier this year, and they have been consolidated before U.S. District Judge Richard L. Young in Indianapolis (S.D. Ind.), under the collective title of Baskin v. Bogan.

Things were proceeding as they do in these cases when suddenly an urgent need for a quick ruling arose. Niki Quasney and Amy Sandler, one of the plaintiff couples, formed an Illinois civil union in 2011 and married in Massachusetts in 2013. They have been together many years and are raising two young children together. Niki has been battling ovarian cancer since May 2009, going back and forth between active cancer and remission after treatments. On April 9, the cancer recurred from the most recent remission, and the prognosis was questionable. Plaintiffs’ counsel filed an emergency motion for a temporary restraining order, seeking to get recognition for the Quasney-Sandler marriage specifically to ensure that if Niki dies before the court can rule on the merits in this case, the state will be required to recognize Niki and Amy as married on Niki’s death certificate.

Judge Young proved receptive to this request, ruling from the bench at the end of a hearing on April 10 to issue the TRO, to last until May 8, by which time the court will hold a hearing on a motion for preliminary injunction. On April 18, Judge Young issued a written opinion explaining his ruling, see 2014 U.S. Dist. LEXIS 54036.

Young quickly rejected the state’s argument that plaintiffs could not seek a TRO because they had not yet suffered any Article III harm that could be remedied by a restraining order, pointing out that dignitary harm could be sufficient where a constitutional right was at stake. Furthermore, there were already tangible harms experienced by the plaintiffs. “The Plaintiffs here have shown cognizable injuries that a TRO can remedy,” wrote Judge Young, “because Niki drives across state lines to receive treatment from a hospital that will recognize her marriage, Niki and Amy have been denied a family fitness membership, and they suffer anxiety, sadness, and stress about the non-recognition of their marriage and what that means if and when Niki succumbs to her disease.”

Referring to the “dignity” of marriage that was at the heart of the Supreme Court’s decision last year in U.S. v. Windsor, Young wrote that “the deprivation of the dignity of a state-sanctioned marriage is a cognizable injury under Article III.”

As to the criteria for a temporary restraining order, Young was governed by 7th Circuit precedents, requiring him to find that the plaintiffs’ chance of success on the merits is “more than negligible.” He found this easily satisfied by reference to “the wave of recent cases finding that similar state statutes and state constitutional amendments violate...
the Equal Protection Clause and the Due Process Clause.” He found “particularly persuasive” two recent rulings from Ohio and Illinois involving couples where one member was suffering a fatal illness.

Turning to the state’s arguments, he rejected Indiana’s contention that all of these courts have misconstrued Windsor by imposing a federal constitutional analysis on the policy question of who can marry. Noting the Supreme Court’s citation of Loving v. Virginia, the 1967 Supreme Court decision striking down Virginia’s ban on interracial marriages, he wrote, “The Equal Protection Clause requires states to treat people equally under the law; if the state wishes to differentiate between people and make them unequal, then it must have at least a legitimate purpose.”

As to purpose, he rejected out of hand Indiana’s argument that the state’s concern in “ameliorating the consequences of unintended children” would serve to justify excluding same-sex couples from marrying. “This philosophy of marriage,” he wrote, “does not distinguish Indiana from the wave of recent cases finding similar statutes to be unconstitutional. Furthermore, he wrote, “The court finds that this cannot be the entire rationale underlying the traditional marriage. Additionally, this philosophy is problematic in that the state of Indiana generally recognizes marriages of individuals who cannot procreate. For example, Indiana recognizes the marriages of opposite-sex couples that occurred in Florida that are well past their procreative years. This philosophy does not apply to them, so under the state’s philosophy, their marriage should not be recognized here. Further, before recognizing an out-of-state marriage on a death certificate, the state of Indiana does not inquire whether the couple had the ability to procreate unintentionally.”

Foreshadowing his likely ruling on the merits when the court decides on summary judgment down the line, Young wrote, “The court finds there will likely be insufficient evidence of a legitimate state interest to justify the singling out of same-sex marriage couples for non-recognition. The court thus finds that Plaintiffs have at least some likelihood of success on the merits because the ‘principal effect’ of Indiana’s statute is to identify a subset of state-sanctioned marriages and make them unequal.”

The quoted words are from the Supreme Court’s opinion in Windsor.

Young also found that the restraining order was necessary because after-the-fact damages or alternative contractual arrangements would be insufficient to provide an adequate remedy for the harms the plaintiffs would suffer if their marriage is not recognized in the current circumstances. Indeed, they would suffer irreparable harm if the TRO is denied and Niki dies before the court can rule on the merits, and, wrote Young, “as this court and others have previously held, the state experiences no harm when it is prevented from enforcing an unconstitutional statute.” Thus, the court was willing to grant a temporary restraining order that would extend until the next hearing in this case.

Of course, this is narrow relief, focused on the Quasney-Sandler marriage. “Should Ms. Quasney pass away in Indiana,” wrote Young, “the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as ‘married’ and lists Plaintiff Amy Sandler as the ‘surviving spouse’.”

Despite the narrowness of this relief, limited to one couple, Young’s opinion communicates the likelihood that he will be ruling for the plaintiffs on the merits before very long, making Indiana the first state within the 7th Circuit to generate a ruling on marriage equality likely to go to the circuit court of appeals. Judge Young was to hold a hearing on May 2 on plaintiffs’ motion for summary judgment, as well as a renewed motion to extend the relief for Quasney and Sandler pending a ruling on the summary judgment motion.

Plaintiffs in this case are represented by Barbara J. Baird, an Indianapolis attorney, pro bono attorneys from the Chicago office of Kirkland & Ellis, and attorneys from the Chicago and Dallas offices of Lambda Legal. The defendants include several county clerks, the state Health Commissioner, and the state Attorney General, all sued in their official capacities.

Judge Young was appointed to the court by President Bill Clinton, and is the Chief Judge of the Southern District of Indiana.
Federal Judge Holds Sexual Orientation Discrimination Can Be Cognizable Sex Stereotyping Under Title VII

Following a decades-long trend of broadening what is protected by the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964, U.S. District Court Judge Colleen Kollar-Kotelly denied a motion to dismiss a gay man’s claim that a homophobic supervisor denied him promotions and created a hostile work environment, even though the gay man’s only gender non-conforming characteristic is his sexual orientation. TerVeer v. Billington, 2014 WL 1280301 (D.D.C. Mar. 31, 2014). Judge Kollar-Kotelly found that the plaintiff sufficiently pled a sex stereotyping claim, a form of Title VII sex discrimination first recognized as actionable by the Supreme Court in 1989.

Sex stereotyping is a form of Title VII sex discrimination first recognized as actionable by the Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Peter TerVeer was an auditor for the Library of Congress inspector general’s office. He became close friends with his devout Catholic supervisor, John Mech, and Mech’s family. In August 2009, Mech’s daughter found out that TerVeer is gay. From that point on, TerVeer alleges, Mech began hounding him constantly with lectures about the sinfulness of homosexuality and assigning enormous projects to him with little direction. After TerVeer complained about this treatment to Mech and Mech’s immediate supervisor, Nicholas Christopher, he received negative performance reviews and they denied him a pay raise. He began taking medical leave in the fall of 2011 and the inspector general advised him of employment termination in April 2012.

In August 2012 TerVeer filed a lawsuit with eight counts against the Librarian of Congress. The first three counts alleged violations of Title VII because of TerVeer’s sex, religion, and retaliation for confronting Mech about his discrimination. His fourth claim was an independent claim of constructive discharge. Finally, he also alleged constitutional due process and equal protection violations, as well as violations of the Library of Congress Act and Library of Congress policies and regulations. The Library of Congress moved to dismiss all eight counts.

The Library claimed TerVeer’s sex discrimination first recognized as actionable by the Supreme Court in 1989. Since federal employees may file an action in a federal court only after exhausting their administrative remedies of the federal agency employing them, the first section of analysis in Judge Kollar-Kotelly’s opinion concerns whether TerVeer did so. She dismissed his independent claim of constructive discharge on that ground, but found the Library waived an exhaustion defense as to TerVeer’s pay raise, before moving on to the Library’s arguments that TerVeer did not state a claim under Title VII.

The Library claimed TerVeer’s sex discrimination claim fell short of the relevant pleading standard because it did not indicate that his “supervisor’s conduct was motivated by judgments about plaintiff’s behavior, demeanor or appearance, and there are no facts to support an allegation that the employer was motivated by his view about Plaintiff’s conformity (or lack thereof) with sex stereotypes.”

In full, Judge Kollar-Kotelly responded matter-of-factly as follows. “Here, Plaintiff has alleged that he is ‘a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,’ that his ‘status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under Mech’s supervision or at the LOC,’ and that ‘his orientation as homosexual had removed him from Mech’s preconceived definition of male.’ As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth ‘a short and plain statement of the claim showing that the pleader is entitled to relief’ as required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies Defendant’s Motion to Dismiss Plaintiff’s sex discrimination claim (Count I) for failure to state a claim.”

Judge Kollar-Kotelly went on to also deny the Library’s request to dismiss TerVeer’s Title VII religious discrimination claim. The Library claimed that a 2009 Third Circuit case, Prowel v. Wise Business Forms, 579 F.3d 285 (3d Cir. 2009), holding that a man could not claim Title VII religious discrimination when he was really discriminated against because of his sexual orientation, controlled. Judge Kollar-Kotelly disagreed, writing that “Title VII seeks to protect employees not only from discrimination on the basis of their religious beliefs, but also from forced religious conformity or adverse treatment because they do ‘not hold or follow [their] employer’s religious beliefs.’” Based on Mech’s statements.
even before he knew TerVeer’s sexual orientation, and the direct way he later connected his disagreement with homosexuality by citing his Catholic beliefs, Judge Kollar-Kotelly found that TerVeer “sufficiently pled facts suggesting that the religious harassment he endured was not due exclusively to his homosexual status” and “a fact finder could infer . . . that religion (and not simply homosexuality) played a role in Defendant’s employment decision regarding Plaintiff and contributed to the hostility of the work environment.”

As to the other counts, Judge Kollar-Kotelly also refused to dismiss TerVeer’s retaliatory hostile work environment claim. She did, however dismiss his constitutional claims, because Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. She also dismissed the Library of Congress Act and regulations claims, finding that they do not create a private cause of action and seeing no application of other doctrines when TerVeer has a full remedy under a statutorily provided cause of action.

For whatever reason, this is not the first time that discrimination at the Library of Congress has led to a groundbreaking Title VII decision from the same federal district court. U.S. District Court Judge James Robertson earlier considered a transgender woman’s discrimination claim in a case brought by the ACLU. In 2008, Judge Robertson decided that Diane Schroer, a transsexual woman, could bring a claim under Title VII when the Library withdrew a job offer after she announced her intention to transition and begin presenting as a female before starting work. Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). That view was echoed in 2012 by the Equal Employment Opportunity Commission. Macy v. Holder, Appeal No. 0120120821 (Apr. 20, 2012). – Matthew Skinner

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

Alaska Supreme Court Confirms That Marriage Amendment Does Not Affect Right to Equal Benefits for Same-Sex Couples

The Alaska Supreme Court issued a unanimous decision on April 25, holding that same-sex couples living in Alaska are entitled to the same real estate tax break under state law that is given to married couples, and that nothing in Alaska’s marriage amendment, which provides that same-sex marriages are neither legal nor recognized in Alaska, would prevent that result. State of Alaska v. Schmidt, 2014 Alaska LEXIS 76, 2014 WL 1663367 (April 25, 2014). Ironically, a concurring justice observed that the court could have ruled for the plaintiff litigating equal benefits claims back in the 1970s and 1980s, court would dismiss them by saying that unmarried same-sex couples are similarly situated with unmarried different-sex couples, and since neither group was entitled to the benefits, there was no discrimination to evaluate. All unmarried employees were ineligible for benefits for their unmarried partner.

In 2005, however, the court rejected that reasoning in the ACLU decision, recognizing that the state’s ban on same-sex marriage created an inequality. Once one identified unmarried couples

The court saw the case as a straightforward application of its earlier decision.
amendment do not go further to forbid the state from extending rights of benefits of marriage to same-sex couples, and thus the state constitution’s equal protection requirement still applied to such benefits.

For purposes of the equal protection requirement of the state constitution, the state would have to provide some policy justification for premising this benefit, the property tax exemption, on marital status instead of treating committed same-sex couples the same as married couples.

Justice Eastaugh straightforwardly described the dispute: “The State of Alaska and the Municipality of Anchorage exempt from municipal property taxation $150,000 of the assessed value of the residence of an owner who is a senior citizen or disabled veteran. But the full value of

the exemption is potentially unavailable if a person who is not the owner’s spouse also occupies the residence. Contending that the exemption program violates their rights to equal protection and equal opportunities, three Anchorage same-sex couples in committed, long-term, intimate relationships sued the State and the Municipality. The superior court ruled for all three couples. The State and Municipality appeal.”

Using the analysis mentioned above, the court ruled in favor of two of the couples who owned their homes as tenants in common. In each case, one of the partners qualifies by virtue of age or disabled veteran status, but when they applied for the benefit they were told that as each occupied only 50% of the premises, they were entitled to exclude only the first $75,000 of assessed value because one partner was not qualified. Under this interpretation, married couples would enjoy the full benefit regardless whether one of the spouses was not individually qualified, because an implementing regulation limited the state’s reimbursement to the municipality for the lost tax revenue to the portion of the property occupied by the qualified tax-payer and his or her spouse. In his concurring opinion, Justice Daniel Winfree suggests that this is a misinterpretation of the regulation, and so long as the parties held their property as tenants in common, each had a 100% ownership interest so none of the exemption should be lost. But the court proceeded based on the facts alleged, because the couples had in fact been denied the full exemption by local tax authorities based on their interpretation of the statute and regulation.

Once having found that the policy as interpreted by local authorities and applied to the two couples was discriminatory, the court found that the governmental interests argued by the state and city were “legitimate” but that “the classification is not substantially related to those interests.” The court found that administrative cost savings “alone are not sufficient government objectives under our equal protection analysis,” as “the government can adequately protect its tax base and minimize cost without discriminating between similarly situated classes.” The state’s argument that it would consume administrative resources to determine whether same-sex couples qualified was unconvincing, since “the state allows married couples to establish eligibility for the exemption merely by making a sworn statement” and required no other proof of marital status. A similar sworn statement from a same-sex couple should thus be sufficient.

Finally, the state had argued that providing the exemption for married couples was intended to promote marriages of different-sex couples. The court could not see how denying the exemption to same-sex couples would promote such marriages. “The State has not explained how denying benefits to couples who cannot marry will promote marriage in couples who can,” wrote Eastaugh. “We assume, as the couples argue, that giving the full benefit only to married couples will not encourage same-sex domestic couples to leave their partnerships and enter into heterosexual relationships with an intention to marry.”

Thus, the court held that “the exemption program fails minimum scrutiny and violates these couples’ rights to equal protection.”

The third plaintiff couple, like the first two, included one partner who met the age requirement and the other who did not. The court found that the trial court erred by ruling in their favor, however because the man who qualified by age did not have an ownership interest in the property, which was solely owned by the younger partner. The exemption statute clearly makes the exemption available only to a senior or disabled veteran who owns the residential property on which they live. If these partners were married but living on property that the younger one had acquired prior to marriage and continued to own individually, they would not be entitled to the exemption, since the issue isn’t whether the qualified individual lives in the property but rather whether they have an ownership interest in it. Thus, the court saw no discrimination, once it applied its analysis to the situation of same-sex couples who jointly own their property.

The plaintiffs are represented by David Oesting and Roger Leishman of Davis Wright Tremaine LLP in Anchorage, and attorneys Thomas Stenson and Leslie Cooper appearing on behalf of the ACLU of Alaska Foundation.
Federal Court Dismisses Discrimination Suit by University Diversity Officer Who Signed Anti-Gay-Marriage Petition

The U.S. District Court for the District of Columbia has dismissed the suit brought by former Gallaudet University Chief Diversity Officer Angela McCaskill, alleging violations of the D.C. Human Rights Act (“DCHRA”), defamation and false light claims, and intentional and negligent emotional distress by the University against her, in McCaskill v. Gallaudet University, 2014 U.S. Dist. LEXIS 50934.

As the University’s Chief Diversity Officer, McCaskill was tasked with “promoting a diverse and inclusive college community.” After it was learned that she had signed a Petition that would have brought an anti-gay-marriage Maryland state constitutional amendment to the ballot, University administrators placed her on administrative leave and eventually demoted her. McCaskill alleged that she had endured a confrontational meeting with a co-worker and that the coworker and her partner had reported anonymously to PlanetDeafQueer.com, which published a story online, that the University did not punish the employee, and that McCaskill also received a letter from an anonymous employee who had written her “a nasty letter after it became public that she had signed the petition.” McCaskill noted mid-litigation that this letter included a racial epithet.

When the University failed to restore McCaskill’s former position after media attention died down, McCaskill brought the instant suit against both the University and her coworker and her coworker’s partner. She later dismissed the cases with respect to the coworker and her partner, and the court ruled that neither of these people were required parties to the action.

U.S. District Judge James E. Boasberg’s opinion rules on the University’s motion to dismiss. With respect to the DCHRA claims, Judge Boasberg stated that the DHRA procribes discriminatory practices based on an employee’s “race, color, religion, national origin, sex, age… or political affiliation.” Judge Boasberg held that while McCaskill’s demotion constituted adverse action, she was unable to allege that the University took action because of McCaskill’s membership in any protected group, noting that the fact that she signed the Petition because she was Christian did not mean her religion “somehow prompted her suspension or demotion,” and further held that she had failed to make “any coherent argument that her marital status or sexual orientation, as opposed to her views about other people’s home lives, prompted the University to Act.” Judge Boasberg further held that McCaskill’s argument regarding her “political affiliation” also failed because “political affiliation” has been construed narrowly to mean “the state of belong to or endorsing any political party.”

Regarding McCaskill’s retaliation claim, Judge Boasberg held that “expressing herself as a married, heterosexual, African-American, Christina woman/voter, who, through prayer and worship, searched for a means to enlighten Maryland voters on the issue of same-sex marriage in such a way to foster discourse, tolerance, and respect for the democratic process” was not a protected activity and instead appeared to be an attempt “to shoehorn a First Amendment” argument into her complaint.

Judge Boasberg held that McCaskill’s environment had existed.

As to her final DCHRA claim, claiming the University’s practice had “the effect or consequence of violating any of the provisions” of the DCHRA, Judge Boasberg held that case law on this provision of the DCHRA had been modeled after the federal disparate-impact doctrine and therefore required a person making the claim to demonstrate that more than one person was adversely affected and that therefore this provision excluded claims made involving “one-time decisions that affect only one person.”

McCaskill’s claims that the University should be held responsible for the coworker’s defamatory and misleading statements allegedly made to PlantDeafQueer.com centered on allegations that the PlanetDeafQueer.com article said she had signed an
“anti-gay marriage petition.” Judge Boasberg ruled that the article did not allege that McCaskill was anti-gay, but merely that she signed an anti-gay-marriage Petition, and that even calling McCaskill “anti-gay” constituted “a protected statement of opinion, rather than a false declaration of fact” which would not constitute a false or defamatory statement about her.

Judge Boasberg held that for a claim of intentional infliction of emotional distress, conduct is actionable only when it is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society,” and ruled that since McCaskill “alleges far less,” her claim failed to state a cause of action.

McCaskill’s negligence claim stated that the University had a duty to protect McCaskill from the conduct of its employees and that she had a “special relationship” with the University, which, as her employer, she claimed had a duty to protect her from voter intimidation. Judge Boasberg ruled that McCaskill’s situation was not similar to cases where a special situation was created because “the ability of one party to provide for his own protection has been limited in some way by his submission to the control of the other,” giving the example of a delivery company, which “might have a duty to protect its customers from assaults at the hands of an employee.” He further held that this was not the case of third-party crimes that involved almost exclusively acts of violence and held that “it is safe to assume that the voter-intimidation provision of the Maryland Election Code is not at the forefront of the minds of administrators of a D.C.-based university not actively involved in electioneering of any kind,” and dismissed McCaskill’s negligence claim.

Having found that McCaskill had failed to state a claim, the court accordingly dismissed Petitioner’s case in its entirety and without prejudice.

**7th Circuit Revives Gay Inmate’s Suit Against Official Who Rejected Protective Custody Request**


Jeremy M. Wright was initially placed in protective custody after he withdrew his affiliation from the “Latin Kings” gang and faced possible retaliation. Officials assigned him to the “all protective custody” facility at Pontiac, Illinois, where he remained for six years until he was placed in segregation for misconduct. Upon release from segregation, he requested continued protective custody at Pontiac because of his sexual orientation and his status as a former member of the Latin Kings. Officials could not find his gang record, so they transferred him to general population at another prison.

After being threatened several times over four days, Wright again sought protective custody, without success. Wright filed grievances and bounced between general population and protective custody. At one time he was denied protective custody on the “speculation” that he only wanted it “to continue a relationship” with another inmate. Eventually he had a hearing before Case Worker David Henrich, who remarked: “The Kings ain’t no sissies, they’ll stab your ass up dude for being homosexual.” Henrich nevertheless recommended that Wright be denied protective custody because of Wright’s “stature and size.”

After additional threats, Wright was finally returned to protective custody at Pontiac, whereupon he sued various defendants (Henrich and a warden, the head of the Illinois corrections department, and the chief of its administrative review committee) for injunctive relief and punitive damages under 42 U.S.C. § 1983 for violation of his civil rights, alleging that they were deliberately indifferent to his safety when they denied him protective custody. The district court ruled that defendants had not been deliberately indifferent and that, in any event, Wright was not entitled to an injunction since he was back in protective custody.

In a per curiam opinion, the court of appeals agreed that Wright could not obtain an injunction since there was no “ongoing” constitutional violation and that top-level administrators were not liable. It nevertheless remanded as to Henrich because there was a “genuine fact dispute over whether [he] intentionally exposed Wright to likely and severe violence.” “[A]s far as Henrich knew and expected, the warden would accept Henrich’s recommendation (as he did) and return Wright to the general population indefinitely, where he would live in fear and get stabbed,” wrote the court. This was sufficient evidence. “Even without an actual injury, the mere probability of the harm to which Henrich exposure Wright can be sufficient to create liability: The ‘heightened risk of future injury’ a prison official intentionally or with reckless indifference inflicts on an inmate ‘is itself actionable’” and allows a finding of liability under Farmer v. Brennan, 511 U.S. 825, 845-46 (1994), quoting Budd v. Motley, 711 F.3d 840, 843 (7th Cir. 2013) [other Seventh Circuit law summarized].

The court of appeals ended by noting that Wright could not receive compensatory damages for fear alone under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), but he could seek nominal or punitive damages if “reckless indifference” were shown, a test that “mirrors” the standard for Eighth Amendment liability on Wright’s underlying claim. – William J. Rold

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.
Prisoner’s Retaliation Claim for Revealing His HIV Status Survives Another Hurdle

Tyrone Rosado’s pro se civil rights case against a Rikers Island mental health worker who revealed his HIV status to other inmates was reported at length in Law Notes in January 2014 (pages 24-25). Both sides filed objections to United States Magistrate Frank Mass’ Report & Recommendation [R & R] that sustained some of Rosado’s claims and rejected others; and United States District Judge Paul G. Gardephe adopted the R & R in part and modified it in part in Rosado v. Herard, 2014 U.S. Dist. LEXIS 40172 (S.D.N.Y., March 25, 2014); and he adjudicated but rejected a new claim, based on a theory of “state-created danger.”

Rosado claimed that defendant Daphnee Herard violated his rights by denying his participation in group therapy because of his ethnicity and by telling other inmates that he has HIV. According to the Complaint, Rosado grieved Herard’s denial of “therapeutic group sessions” to “mainly Spanish speaking detainees” like himself whereupon she “stated out loud” that Rosado was “on the verge of dying” from HIV. Rosado said that he became a “target of gossip” and suffered anxiety and panic attacks.

The court dismissed claims under the Privacy Act, 5 U.S.C. § 552A(E)(9), because it does not provide for suits against individuals; and under HIPAA (the Health Insurance Portability and Accountability Act), 42 U.S.C. § 1320, et seq., because it has no private cause of action. The R & R recommended that Rosado’s claims under the Americans with Disabilities Act and the Rehabilitation Act be dismissed, except as they applied to injunctive relief against Herard in her official capacity. Judge Gardephe’s analysis was different, and he dismissed both claims in their entirety.

He observed that “neither Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials,” citing Harris v. Mills, 572 F.3d 66, 72-73 (2d Cir. 2009); and Garcia v. S.U.N.Y. Health Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir.2001). As to injunctive relief, Judge Gardephe found that both statutes required an allegation of disparate treatment “because of his disability” and that Rosado had failed adequately to plead that a disability caused his alleged discrimination. “Instead, he has pleaded facts demonstrating that he was denied access to therapeutic group sessions because of his ethnicity,” which is not actionable under these statutes. Because Rosado failed to state a claim under the statutes, Judge Gardephe found that he need not rule on whether damages could be levied against Herard in her official capacity, but a lengthy footnote marshals conflicting authority on this point from different judges in the Second Circuit.

While recognizing a prisoner’s right to privacy about medical information -- see Doe v. City of New York, 15 F.3d 264, 268 (2d Cir. 1994) -- Judge Gardephe found that Rosado waived such right by publicly revealing his HIV status in Florida. Essentially for the reasons in Judge Maas’ R & R (see Law Notes, January 2014 at pages 24-25), Judge Gardephe dismissed Rosado’s claims of violations of due process and of his right to be free of deliberate indifference to his serious health care needs.

The R & R recommended that Rosado’s claim of denial of Equal Protection based on Spanish ethnicity be dismissed for failure to plead facts demonstrating discriminatory intent. Judge Garphede found that allegations that only African American inmates (and not Spanish-speaking inmates) were allowed to attend group therapy were sufficient for pleading a denial of Equal Protection, since intent can be inferred where “there is no obvious medical or administrative reason for such a practice,” citing Phillips v. Girdich, 408 F.3d 124,129-30 (2d Cir. 2005); and LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991). “To state a claim under the Equal Protection clause, and survive a motion to dismiss, plaintiff need only allege discriminatory intent generally and facts from which such intent may be inferred.”

Judge Gardephe found that Rosado stated a claim of First Amendment retaliation despite his revealing his HIV status because “retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments” -- citing Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996). The pivotal question, whether the retaliation that occurred would “chill a person of ordinary firmness from continuing to engage in a protected activity,” cannot be resolved at the pleading stage but requires discovery of what was known at the jail about Rosado’s HIV status, the extent of the disclosure, and how Rosado was subsequently treated.

Rosado referred to a “state-created danger” claim in his objections to the R & R. Judge Gardephe found that this theory could be considered even though it was not raised before Magistrate Judge Maas, because Rosado is proceeding pro se. While the Supreme Court has found “no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests” -- see Deshaney...
Italian Tribunal Orders the Registration of a New York Same-Sex Marriage

On April 3, 2014, the Tribunal of Grosseto, in Tuscany, granted a petition filed by two Italian citizens of the same sex, Giuseppe Chigiotti and Stefano Bucci, who sought the inscription of their marriage, entered into in New York, in the public registry of civil status. The case is paramount and interesting, as in 2012 the Italian Supreme Court (Corte di Cassazione) had established that a foreign same-sex marriage could not be recognized nor inscribed in the public registry, because it is legally unenforceable. The name of the case is Chigiotti & Bucci v. Comune di Grosseto.

The case before the Supreme Court and the one examined by the Tribunal of Grosseto are identical. Two Italian citizens travelled to a foreign country that contemplates same-sex marriage — the Netherlands in the former case, New York in the latter — and then came back to Italian courts seeking recognition and inscription. Italy has not legislated on same-sex unions so far, while it has been quite a number of Italian same-sex couples decide to marry abroad. The aim of this litigation is to trigger a response by courts regarding the discrimination that same-sex couples married abroad suffer.

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Italian law provides that, for their marriage to be recognized and inscribed in Italy, Italians who marry abroad must fulfill the conditions established by Italian law. Even if the law does not expressly provide that the spouses must be of the opposite sex, the Constitutional Court has clarified in the past that this requirement is implicit, and derives from the tradition of the Italian legal system. The Tribunal of Grosseto ignored this holding and noticed that nowhere in the Civil Code does it explicitly state that spouses must be of opposite sex to enter into a valid civil marriage. As a result, according to the Tribunal a foreign marriage can be recognized in Italy, but only to the extent of inscription in the public registry. Inscription, as distinct from recognition and enforcement, has limited effects, such as to certify that the couple is in a stable and durable relationship, for instance in order to obtain the temporary custody of minors, that Italian case law has recently recognized.

It is difficult to predict if the case will positively move forward. The Public Prosecutor of Grosseto has announced that he will appeal the ruling, and the Court of Appeals of Florence, which will be seized with the appeal, showed not to be very open in the past in recognizing the rights of same-sex couples. However, once it reaches the Supreme Court, the Grosseto case may fall into a different panel, which could abstractly overrule the judgment of 2012 and finally grant the marriage inscription. Meanwhile, subsequently the municipality of Latina, in Lazio, has deliberated that foreign same-sex marriage between Italian citizens will be inscribed in the public registry; it is a political answer which casts a light on the issue, as the ruling of 2012 by the Supreme Court, remarkably, originated from Latina.

— Matteo M. Winkler

Matteo M. Winkler is a Professor at HEC Paris and a Member of the Bar in Italy

v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989) -- an exception to this principle — known as the “state-created danger”— provides for state liability for acts of private violence where state actors “in some way . . . assisted in creating or increasing the danger to the victim.” Dwares v. City of New York, 985 F.2d 94, 98-99 (2d Cir. 1993). A claim is stated under the state-created danger exception “where the defendant’s facilitation of a private attack amounts to affirmative conduct necessary to state a due process violation.” Since Rosado alleged no attack, however, his claim fails under this theory.

Judge Gardephe found that the R & R correctly resolved the issue of whether the Prison Litigation Reform Act precludes Rosado from claiming compensatory damages because he did not allege a physical injury — see PLRA, § 1997e(e). While the PLRA precludes prisoners from seeking damages for mental or emotional injury absent physical injury, Judge Gardephe found that it does not prevent declaratory or injunctive relief or damages for “intangible deprivations” of the constitutional rights themselves, citing Kerman v. City of N.Y., 374 F.3d 93, 125 (2d Cir. 2004). “Applying Kerman, courts in this Circuit have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest... [Such claims] involve the loss of such intangibles as liberty through a lack of due process and equal protection... outside of the physical harm requirement of the PLRA” (collecting cases). “Accordingly, Rosado’s claim for compensatory damages flowing from the loss of his liberty interests under the First Amendment and the Equal Protection Clause will proceed.”

Judge Gardephe retained supplemental jurisdiction of Rosado’s state law claims arising from the same events, and he rejected a qualified immunity defense because it was not raised before the Magistrate judge by defense counsel. He also rejected a mootness argument based on Rosado’s transfer to a different jail, because he continues to reside on Rikers Island.

— William J. Rold

The aim of this litigation is to trigger a response by courts regarding the discrimination that same-sex couples married abroad suffer.
Gay Inmate Wins Restraining Order for Protection against Assault/Harassment by Other Inmates


The pertinent events revolve around Toliver’s incarceration at Five Points Correctional Facility [“Five Points”], where all general population cells are double bunked. Toliver self-identifies as an “overt homosexual,” who uses “either a walker or a wheelchair to ambulate,” and whose “lifestyle” other inmates “cannot handle.” He had a succession of cellmates at Five Points, sometimes interrupted by periods in protective custody. What occurred would defy belief were it not recited at length in the R & R.

Toliver’s first Five Points cellmate, a member of the “BLOODS” gang, threatened Toliver, threw food and water on him, forced him to do his laundry and to clean his toilet, and assaulted him, knocking him to the floor. A subsequent cellmate, identified as “another homosexual,” made unwanted sexual advances, including what the court called an “unhygienic sexual act.” A sergeant told Toliver that, if Toliver refused to double bunk with him, he could be sent to disciplinary segregation, where he “would still be double-bunked… possibly with someone who hates faggots as opposed to wanting to fuck you.” Thereafter the cellmate urinated on Toliver’s clothes and sent him a “love letter.” Toliver was next housed with a cellmate who was a member of “Bloods” and also an “overt homosexual.” This cellmate took Toliver’s food, forced him to do laundry, and prevented him from using the bathroom, turning on lights, or making noise. The cellmate was finally moved after writing prison officials that he would make Toliver a “victim” unless they paid him to share a cell with him. Toliver was next locked with a skin-head homophobic member of “Alien Nation,” who tormented him with cigarette ashes and butts, spit on him, and threw feces on him. He threatened to kill Toliver as he slept -- in the name of the “Nation.” Toliver’s last cellmate at Five Points assaulted him, punching and kicking him while officers allegedly watched but did not intervene.

Toliver commenced this civil rights case after he was transferred from Five Points, suing officers from the prison, as well as the Commissioner of the New York Department of Correctional Services, and its housing director. The New York Attorney General’s ten-paragraph affidavit in response to Toliver’s complaint did not contest most of the allegations.

The R & R found that Toliver’s papers met “the criteria” for a TRO, restraining defendants from denying further requests for voluntary protective custody, in light of the “duty to protect prisoners from violence at the hands of other prisoners” enunciated in Farmer v. Brennan, 511 U.S. 825, 833 (1993). Toliver met the burden of showing that “corrections officials are knowingly and unreasonably disregarding an objectively intolerable risk of harm and will continue to do so absent a court order directing otherwise,” citing Farmer, 511 U.S. at 845. Magistrate Judge Foschio wrote: “Plaintiff maintains, and Defendants do not dispute, that the failure to house Plaintiff in voluntary protective custody has resulted in Plaintiff being housed in the general prison population where he is double-bunked and either physically abused by other inmates who are hostile to Plaintiff’s homosexuality, or sexually abused by other inmates who are also homosexuals.”

Toliver also sought leave to amend his complaint to allege retaliation for having brought the case, in two respects: for transferring him back to Five Points, where he was again in danger; and for setting him up on false charges of possessing contraband, causing him to be punished and adversely affecting his parole. The R & R recommended allowing amendment because the claims were not futile and they met the requirements for a claim of retaliation: protected activity, adverse action, and causal connection. The court had little trouble accepting the allegations that the transfer back to Five Points could have been retaliatory, but it paused on the disciplinary charges argument because filing a false misbehavior report is not generally actionable under the Constitution if the charged inmate is given a hearing. Nevertheless: “where, as here, the asserted false misbehavior report allegedly is filed to retaliate against an inmate for exercising his right to commence litigation seeking redress of civil rights violations, a plausible First Amendment claim is stated.” See Jones v. Coughlin, 45 F.3d 677, 679–80 (2d Cir.1995). The court also noted that Toliver’s appearance before the Parole Board was postponed because of the disciplinary charges.

The R & R concluded by adding a bit of legal advice to Toliver. His proposed amended complaint only addressed the retaliation. Since an amended pleading “supersedes and replaces” the prior complaint, Toliver was cautioned to “ensure that when filed, the second amended complaint contains the names of all who are sued as Defendants, and sets forth all factual allegations and claims for relief that Plaintiff intends to pursue in this action.”

— William J. Rold
On April 4, 2014 in Moreau v. Sylvester, 2014 Vt. 31, 2014 Vt. Lexis 30, the Vermont Supreme Court denied Christopher Moreau’s consolidated appeal challenging the Washington family court’s dismissal of his emergency petition for child custody and parentage over children of whom he is not the biological parent and does not share an established legal connection. Moreau also challenged the Caledonia family court’s issuance of a relief-from-abuse (RFA) order denying him visitation with the children. Moreau contended that he was the children’s “de facto parent” and as such entitled to assert and be heard on custody, parentage and visitation rights. The Supreme Court on review disagreed with Moreau’s arguments and affirmed the family courts’ decisions.

On its face, this case might not appear to be an LGBT related-case, but the Vermont Supreme Court’s decision rejecting the “de facto parent” doctrine is important for LGBT parents in the state of Vermont. The Supreme Court on review disagreed with Moreau’s arguments and affirmed the family courts’ decisions.

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Moreau and the plaintiff were in an on-again-off-again relationship for approximately eight to ten years but never got married. The plaintiff is the mother of two children, one born in 2003 and the other born in 2006. Moreau is not the biological father to either child. However, Moreau claims he was a father figure in both of the children’s lives. Although plaintiff and Moreau separated in February 2009, they had an arrangement for some shared responsibility for the children post-separation. Moreau was very flexible with helping care for the children. In May 2011, the children lived with him for a period of time when flooding rendered plaintiff’s residence uninhabitable.

The events giving rise to the appeal occurred on March 5, 6 and 7, 2012. The children were with the plaintiff in the home she shared with her new partner. On March 5, defendant sent the plaintiff a text message at 8:05 p.m. stating “I promise you, for the rest of my life, I will find my girls and I will never stop, ever.” Moreau proceeded on two additional occasions to drive to the new partner’s place of employment to confirm he was at his job and not at plaintiff’s residence. Then Moreau would continue to plaintiff’s residence arriving at approximately 2 a.m. Moreau argues he showed up because he was concerned for his children. The plaintiff claims she was in fear and feared for her children. The trial court’s RFA prohibits Moreau from seeing the children.

Moreau asks for a finding as to whether he is a “de facto parent” of plaintiff’s children and, if so, whether visitation is in the children’s best interest. He argues that the best interest of the children principle should be followed and that the court should re-examine its rationale in Titchenal v. Dexter, 166 Vt. 373, 693 A.2d 682 (1997). The court in that case denied equitable relief to persons asserting de facto parentage, who had argued that changing demographics in Vermont necessitated a modernized interpretation of the law.

There is a history in Vermont on parental rights and visitation dating back to 1984 when the Vermont Legislature enacted the Parentage Proceedings Act, giving putative fathers the right, denied at common law, to establish paternity and thus pursue custody or visitation. 15 V.S.A. §§ 301-306.

In 1993, Vermont allowed adoption by an unmarried, same sex partner of the child’s birth mother without having to terminate the natural mother’s parental rights. In re B.L.V.B., 160 Vt. 368, 628 A.2d 1271, 1272-73 (1993). The court by allowing same sex adoptions to come within the stepparent exception furthers the purposes of the statute as was originally intended by allowing the children of such unions the benefits and security of a legal relationship with their “de facto parents.”

This “de facto parent” concept was revisited in Titchenal v. Dexter, 166 Vt. 373, 693 A.2d 693 (1997), the case that Moreau focuses on in his appeal before us. In Titchenal, women in a same-sex relationship decided to have a child through adoption and then raised the child together. The couple then broke up. However, only one of the women had adopted the child. The second parent did not have a cause of action so the complaint was dismissed for lack of jurisdiction. On appeal, the second parent asked the court to grant her access to see the child because she was a “de facto parent” by action. In other words, a “de facto parent” is a person who shares a bond with a child.
but has no legal connection to the child. The second parent in the case explained that although she does not have a legal connection to the child, in all other aspects she has served as the child’s parent.

After the Titchenal decision, a few cases of “de facto parent” made their way to the U.S. Supreme Court. One of the cases was Troxel v. Granville, 530 U.S. 57 (2000). In that case the Supreme Court held that, despite the changing realities of the American family, a Washington State statute allowing for any person to petition for child-visitation rights at any time was impermissibly overbroad and an unconstitutional infringement upon the fundamental rights of parents to rear their children.

In Vermont, the last case to address parental rights of “de facto parents” was Miller-Jenkins v. Miller-Jenkins, 180 Vt. 441. In that case the court rejected the argument of the birth mother’s partner in a former civil union that the other partner had no parental rights to a child born to the union through their mutually agreed upon artificial insemination. The intent of the court was to address the rights of civil union partners who do not give birth.

The dissenting opinion, which was not relied upon by Moreau, states that Miller-Jenkins is very similar to the case here. However, they are not. There is no civil union between Moreau and the plaintiff and that is enough to differentiate them, even though there are many more differences between the two cases. For example, Moreau and plaintiff did not plan and decide to have children together.

The court decided that it cannot abandon the rationale of Titchenal and accept a broad “de facto parent” doctrine. To the majority, Moreau is similar to the “de facto parent” in Titchenal, and equity does not support jurisdiction for a nonparent to assert child custody rights any more here than it did in Titchenal.

Moreau tried to rely on some other cases for assistance, but none were similar in facts or circumstances to the present case and therefore none were of assistance to Moreau. He did challenge the issuance of the RFA against him. However, his challenge cannot succeed in light of the court’s holding that the family court lacks jurisdiction to review a legally unrelated defendant’s parentage and custody claims. The RFA order is supported by the trial court’s findings that Moreau placed plaintiff and her children in imminent fear by back-to-back 2 a.m. visits to plaintiff’s residence.

The dissenting opinion in this case was very lengthy and passionate. Judge Robinson focuses on the role Moreau played in the children’s lives. The children called Moreau “daddy” or “papa,” he was present in the delivery room when plaintiff gave birth to the younger child, and he has been in the other child’s life since it was 6 months old. Moreau changed diapers, tended to them when they cried in the middle of the night, and did all the things a good father does when needed by his children. Justice Robinson acknowledges that Moreau faces an uphill battle, however, given the above facts as true he would reverse and remand for further proceedings.

This case should be of concern to non-married and non-civil-unionized same-sex couples with children in Vermont. Couples with no plan to separate are not in immediate legal danger. However, in the event a custodial parent is no longer able to take care of the children (due to illness, arrest, death etc.), there will be no legal safety net for the second parent. For those couples and for the couples that do separate, this case poses a significant problem with regards to custody and visitation for the “de facto parent.” Children that a parent has presumably helped to raise, and who think of the second partner as a parent, can be removed from their care. Those seeking some legal protection for ties with their children should consider adoption. – Tara Scavo

Tara Scavo is an attorney in Washington D.C.

6th Circuit Stays Ruling in Tennessee Marriage Recognition Case Despite Limited Application to Three Couples

The U.S. Court of Appeals for the 6th Circuit issued a brief Order on April 25 in Tanco v. Haslam, No. 14-5297, staying an injunction issued by U.S. District Judge Aleta A. Trauger (M.D. Tenn.) on March 14. Trauger had ruled that Tennessee’s refusal to recognize out-of-state marriages of same-sex couples violates the 14th Amendment, and had issued a preliminary injunction requiring the state to recognize such marriages. However, she made her injunction effective immediately only with respect to the three plaintiff couples in the case, otherwise putting it on hold in anticipation of the state’s inevitable appeal. See 2014 U.S. Dist. LEXIS 33463. The state moved to stay her entire order, but Judge Trauger denied the state’s motion, see 2014 U.S. Dist. LEXIS 36823 (March 20, 2014), finding that requiring the state to extend recognition only to the three couples would be consistent with the 6th Circuit’s standards for preliminary relief and would not be disruptive to the state.

But a three-judge motion panel of the 6th Circuit disagreed, stating “we find that a stay of the district court’s order pending consideration of this matter by a merits panel of this Court is warranted, and that this case should be assigned to a merits panel without delay.” After reciting the four factors that the 6th Circuit “balances” in deciding whether to issue a stay of a preliminary injunction, the court said, “Because the law in this area is so unsettled, in our judgment the

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United States District Judge Jon S. Tigar ruled in Norsworthy v. Beard, 2014 U.S. Dist. LEXIS 41519 (N.D. Calif., March 26, 2014), that pro se state prison inmate Jeffrey B. Norsworthy, a/k/a Michell-Lael B. Norsworthy, stated “a cognizable claim for relief for deliberate indifference to [her] serious medical needs” in violation of the Eighth and Fourteen Amendments to the United States Constitution. Judge Tigar ruled that courts “have consistently considered GID (including transsexualism or transgenderism) to be a serious medical condition for purposes of the Eighth Amendment.” He cited Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000); White v. Farrer, 849 F.2d 322, 369 (8th Cir. 1987); Faulkner v. Kercher, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010).

Norsworthy, who is serving a life sentence, was diagnosed with “severe” Gender Identity Disorder [GID under the prior Diagnostic and Statistical Manual] in 2000. She has received “feminizing” hormones and psychotherapy over the last 14 years. She has undergone castration; and, according to the complaint -- taken as true for purposes of screening it under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b) -- she “has developed and evolved into an extremely feminine, female, and womanly person in form and stature.” She seeks a court order directing reassignment surgery to complete her transition. Judge Tigar noted that she has lived as female for 13 years, “far exceeding the guidelines” of 2-5 years of the World Professional Association for Transgender Health, Inc. Her prison psychotherapist supports her surgery as a “medical necessity,” and Norsworthy alleges that surgery “would allow her to reduce her hormone therapies and medications to safer doses.”

After exhausting her inmate grievance remedies without success, Norsworthy sued for deliberate indifference to her serious health care needs and for violation of Equal Protection of the law. She named, collectively, the California Department of Corrections and Rehabilitation Secretary, the Receiver appointed over the California prison health care system, the warden at her prison, its chief medical officer, and the head of the prison grievance system, claiming: “each defendant has the power and authority to deny and obstruct ‘medically necessary’ treatments and procedures, and therefore, they, logically, have the power and authority to approve, order, and schedule surgeries.” While agreeing with Norsworthy’s claim in theory, citing Estelle v. Gamble, 429 U.S. 97, 104 (1976), Judge Tigar found this pleading to be insufficient to link the individual defendants to her allegations of wrongdoing. He granted leave to amend to show each individual’s involvement.

Judge Tigar also dismissed the Equal Protection claim, characterizing it as one comparing distinctions in treatment between prisoners and non-prisoners, based in part on Norsworthy’s complaint, which stated: “Plaintiff, a prisoner, is still a citizen, by birthright, of the United States of America. Plaintiff has a right to be treated equally to that of any other citizen, incarcerated or not.” Judge Tigar found Norsworthy not to be “similarly situated” for Equal Protection analysis, again granting leave to amend. [Note: the claim could have been formulated in many other ways in light of United States v. Windsor, 133 S. Ct. 2675 (2013); and Romer v. Evans, 517 U.S. 620 (1996), or even by just comparing the health care rights of straight prisoners with those of transgender prisoners.]

Judge Tigar stayed the proceedings while he sought counsel for Norsworthy, noting that the case raised “exceptional circumstances” and that the issue of Eighth Amendment entitlement to sex reassignment surgery “has not been resolved” by the Ninth Circuit. Judge Tigar noted that the issue is in flux in the First Circuit case of Kosilek v. Spencer, 740 F.3d 733 (1st Cir. 2014). In Kosilek, the panel split 2-1, affirming a district court injunction requiring Massachusetts to provide a prisoner sex reassignment surgery. Judge O. Rogeriee Thompson, for himself and Judge William J. Kayatta, upheld the prisoner’s claim; Judge Juan R. Torruella dissented. On February 12, 2014, the circuit granted rehearing en banc. The First Circuit has five active judges, and there were no senior or visiting judges on the Kosilek panel. If the panel members retained their votes on the motion for rehearing en banc, this means that two of the five agreed with dissenting Judge Torruella to rehear the case, which would constitute a majority to reverse the panel if those voting to hear the case are inclined to reverse the district court. The Kosilek litigation has attracted large amicus interest. Given the “novel and complex legal issues” and the “exceptional character of this case,” Judge Tigar referred it to the Federal Pro Bono Project to find counsel for Norsworthy.

– William J. Rold

Transgender Inmate Seeking Sexual Reassignment Surgery
States Civil Rights Claim – Court Surveys Law

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– William J. Rold
San Antonio Judge Will Hear Lesbian Divorce and Custody Case

Rejecting a motion by the Respondent to dismiss a divorce and child custody action, Bexar County (Texas) District Court Judge Barbara Hanson Nellermoe ruled on April 22 in A.L.F.L. v. K.L.L., No. 2014-CI-02421 (Bexar County, 438th Jud. Dist.), that a lesbian couple married in Washington, D.C., in 2010 could get a divorce in Texas, their current state of residence, because Texas laws banning the recognition of same-sex marriages are unconstitutional. She ruled that Texas’ refusal to recognize the out-of-state marriage of a same-sex couple with a child created a “suspect classification” of children deprived of legal connections to their parents.

Judge Nellermoe relied heavily on a recent ruling striking down the Texas same-sex marriage ban by U.S. District Judge Orlando Garcia, De Leon v. Perry, 2014 WL 715741 (W.D. Tex., Feb. 26, 2014). Although Judge Garcia stayed his decision pending the state’s appeal to the U.S. Court of Appeals for the 5th Circuit, the stay does not prevent Judge Nellermoe from relying on the ruling as a “persuasive precedent” guiding her own legal analysis.

A.L.F.L. and K.L.L. decided to have children together after they were married. K.L.L. became pregnant through donor insemination and gave birth to their child in February 2013. Several months later the women separated, and shortly after the child’s first birthday A.L.F.L. filed a petition for divorce, seeking not only to dissolve the marriage but also to get a legal determination of her parental rights. She sought orders regarding “conservatorship, possession and access, child support, and a division of the marital estate,” according to Judge Nellermoe’s opinion. K.L.L.’s response was to assert that the court has no jurisdiction because Texas doesn’t recognize the marriage, and she asked that the case be dismissed.

Judge Nellermoe explained that Judge Garcia ruled in his case that “Texas’ denial of recognition of the parties’ out-of-state same-sex marriage violates equal protection and due process rights when Texas does afford full faith and credit to opposite-sex marriages celebrated in other states. On this reasoning, alone,” she wrote, “Petitioner would have standing to pursue her divorce in a Texas state court.”

But she found even more compelling that this marriage involves a child. Because the “best interest of the child” is supposed to be the court’s “primary consideration,” she wrote, the court must assert jurisdiction in this case to protect the child’s interest as well as the parents’ interests.

“Petitioner joins a chorus of concern that a ‘new class of children without mothers or fathers increasing the costs of corporate and governmental spending’ arises from the rash of state constitutional and statutory discriminatory restrictions against the children of same-sex couples,” she wrote. “By denying their parents the right to marry, Texas has created a ‘illegitimate’ children and children of undocumented workers, are entitled to all the legal protections afforded to other similarly-situated children.”

Judge Nellermoe concluded her decision with a list of findings, key among them that Texas’ constitutional amendment banning same-sex marriage and its statutes implementing that ban are “facially unconstitutional” and that various Texas statutes that would deprive the court of jurisdiction to protect the best interests of the children of same-sex married couples are unconstitutional as applied to this situation. She found as a matter of law that “Petitioner and Respondent are the parents of the child the subject of this suit” and that “No other legal parent of the child exists.” Based on these findings, she denied

“By denying their parents the right to marry, Texas has created a suspect classification of children who are denied Equal Protection of the law under the Fourteenth Amendment.”

K.L.L.’s motion to dismiss the case, and ordered the parties to consult the clerk about scheduling a hearing on the Petitioner’s divorce and custody case. She also directed that a copy of her Order be sent to the Texas Attorney General’s Office.

Judge Nellermoe’s ruling came as about five months have passed since the Texas Supreme Court heard arguments in two same-sex divorce cases, in both of which the Attorney General’s Office had appealed rulings by lower courts asserting jurisdiction to decide these cases. Judge Nellermoe could have put this case on hold and waited for the Texas Supreme Court to rule, but the involvement of a young child in the case clearly led her to decide that it was more important to move forward so that an appropriate ruling could be made on the relationship between this child and its parents.
change of residential custody was in the best interests of the children was not error and is supported by substantial evidence.” The court found that the mother’s sexual orientation was not a factor in the decision.

The parties were married for 15 years and had four children when the father filed for divorce in June 2012. The parties negotiated a property settlement and a shared custody plan that provided that “each parent would have residential custody on ‘an equal or nearly equal basis.’” That was approved by the trial court in August 2012. Shortly afterwards, the mother moved out to her own residence, where she began cohabiting with a same-sex partner. The children were unhappy with the situation, and the father’s contention that this was a case of sexual orientation discrimination. The trial judge had addressed this claim as follows: “[Mother] now suggests that the Court based its decision on her non-traditional relationship. Such a suggestion is not accurate. This Court could care less what type of relationship the Defendant had involved herself in, except as it affects the minor children. It would not make any difference whether [she] was involved with another man or woman as long as it did not affect the minor children. Evidence was presented and verified by the minor children that they had not adjusted well to the Mother’s home and her relationship did affect this.” (Emphasis added by the Court of Appeals).

The court of appeals noted that the trial judge had carefully reviewed the statutory factors to consider in such cases, and had made factual findings that supported the decision. It appears that the mother’s partner was a friend during the marriage and their relationship had become closer. According to the court, the children associated the breakup of their parents’ marriage with the mother’s relationship with her partner, which helped to make the situation more difficult for them. “As the trial court recognized,” wrote Justice Buser for the court of appeals, “the children’s reaction was an understandable one based not on [the partner’s] gender but on their perception of her impact on the family. Relying on discussions with the children and the other evidence, the district court could fairly conclude that immediately thrusting the children into a situation in which they had to live with [the partner] part of the time would be contrary to their best interests.” Although the move to the mother’s home did not require them to change schools, they expressed a preference to the judge to remain in the home in which they had grown up, their father’s house, which the district court decided to honor.

The court of appeals observed that the mother “is asking us to reweigh the evidence, which is beyond our standard of review,” and the court did not find persuasive the mother’s argument that she had cured the problem by having her partner move out for a period of time. Since she was planning to reintroduce the partner with the idea of her moving back within six months, the court pointed out that “the issues involving the children’s residency and [the partner] are not moot.”

The mother was represented on the appeal by Allen S. Russell, Jr., of Kansas City, Missouri. John W. Fresh of Atchison represented the father.
Kentucky Jail Inmate States Claim against Operations Chief for Sexual Assault

Pro se plaintiff William M. Derksen alleges that defendant Melissa Causey, Chief Deputy of the Warren County (Kentucky) Regional Jail arranged his sexual assault on November 16, 2013. He says that Causey first housed him in segregation due to his sexual orientation. When he protested this confinement, Derksen says that Causey told him: “I HATE FAGGOTS I HOPE YALL ROT IN HELL I HAVE SOMETHING FOR YOUR A**” [all caps and expletive deleted in the opinion]. Thirty minutes later, Derksen claims that Causey opened his cell door, stated “Good Lucky,” housed a registered sex offender in the cell with him, and re-secured the door. Derksen claims that his new cellmate then covered his mouth with a pillowcase to keep him “from getting unwanted attention” and proceeded to sexually assault him.

Derksen did not immediately inform anyone of the assault because of his cellmate’s threats, but he slipped a note outside the door after the cellmate fell asleep. A lieutenant responded but informed Derksen that he could not be moved “per Chief Deputy Melissa Causey.” The cellmate was removed the following day.


Judge Russell found that the official capacity claims against the jail’s chief deputy were tantamount to claims against the county, which required a showing of “a direct causal link between a municipal policy or custom and the alleged constitutional deprivation,” citing Monell v. Dep’t of Soc. Servs. of the City of N.Y., 436 U.S. 658, 694 (1978). This official capacity claim fails because the assault appeared to be an “isolated occurrence affecting only Plaintiff,” and Derksen did not allege that his assault was caused by a “municipal policy or custom.”

Judge Russell had little trouble finding the allegations against Causey individually to state a failure to protect claim under Farmer v. Brennan, 511 U.S. 825, 833 (1994), involving correctional official’s disregard of a known risk to a prisoner. He wrote: “Upon consideration, the Court will allow the failure-to-protect claim against Defendant in her individual capacity to proceed.”

[Editorial note: The court might have gone farther. This is not a typical failure to protect claim, where the issues are what correctional staff knew and how they responded. Here, if the pro se allegations are to be deemed true and liberally construed, defendant Causey personally orchestrated the plaintiff’s rape. This goes beyond mere deliberate indifference. The conduct comprises the separate constitutional tort of “state-created danger.” See discussion in reporting of Rosado v. Herard, in this issue of Law Notes; see also Mathie v. Fries, 121 F.3d 808, 817 (2d Cir. 1997) (officer who sodomized inmate in “outrageous abuse of power and authority” liable under civil rights laws for compensatory and punitive damages).]

That such blatant homophobia should occur in 2013 by government actors in corrections is disturbing, even though the Supreme Court has protected such speech by private parties. See Snyder v. Phelps, 131 S. Ct. 1207 (2011) (dismissing claims against late Westboro Baptist Church minister Fred Phelps for hateful and homophobic picketing at a military funeral). Defendant Causey is listed on the Warren County Regional Jail’s website as promoted to Chief of Operations in 2011, in charge of all “security operations” and “review and response to all grievances.” Her biography on the website includes “community involvement” as a member of the Providence Knob Baptist Church, whose own website says she is the organist. The church advertised a study group on “The Bible Speaks on Homosexuality” on March 19, 2012 (Bowling Green Church News). Pastor of the church for over thirty years is Joe Causey, father of three children. Publicizing of the Derksen case could lead to future potential municipal liability for the county’s knowing employment of a tortfeasor who brings hate politics to work.

Judge Russell’s opinion concluded: “In permitting this claim to continue, the Court passes no judgment on the merit and ultimate outcome of the action.” He did not comment on the requested relief that Causey be discharged. – William J. Rold
NY Judge Rules That State Ban on Gestational Surrogacy is No Impediment for Second Parent Adoption

Ruling on a previously-undeclared question under New York law, Queens County Family Court Judge Barbara Salinitro has decided that New York’s ban on surrogacy contracts does not present an impediment to her consideration of an adoption petition from the same-sex spouse of a man whose twins were conceived and born through a gestational surrogacy contract with a woman in India. The April 3 ruling in Matter of J.J., 2014 N.Y. Misc. LEXIS 1493, 2014 N.Y. Slip Op 24089, notes the failure of New York’s statutory law to keep up with social change.

The fathers in this case are J.H.-W. and M.H.-W, New York residents who are legally married to each other. M.H.-W. entered into a gestational surrogacy contract with Y.M.A.K. in India. M.H.-W. provided sperm, which were used to fertilize an anonymous donor’s egg in vitro, and M.H.-W. gestated the twins, to whom she is not biologically related. On May 12, 2013, upon birth of the twins, Y.M.A.K. immediately turned over the twins to M.H.-W., who came to India together with his husband, J.H.-W., for their birth. “On May 28, 2013, the Proposed Adoptive Children were granted United States Citizenship and were permitted to return to the United States with the Birth Parent and Proposed Adoptive Parent,” wrote Judge Salinitro. “The Proposed Adoptive Children have been living with the Birth Parent and the Proposed Adoptive Parent since placement. The home study provided to the Court reports that the Proposed Adoptive Children are thriving in their care. The Proposed Adoptive Parent seeks the Court’s approval for finalization of his adoption petition.”

New York law has developed in significant ways apart from the controversial statutory ban on surrogacy contracts, which the legislature adopted in the 1980s in response to the notorious Baby M Case, Matter of Baby M., 109 N.J. 396 (1988). In that case, the New Jersey Supreme Court held unenforceable as a matter of a public policy a contract between a heterosexual married couple and a married woman under which she promised to bear them a child conceived with the husband’s sperm and to surrender the child for adoption upon its birth. The surrogate changed her mind and fled the jurisdiction with the baby, leading to a nationwide media sensation. While the court held that contract unenforceable on public policy grounds, despite the lack of any statutory ban at the time in New Jersey, it concluded that the “best interest of the child,” the central doctrine of family law in the United States, should overcome any type of compensation in exchange for placement of a child for the purpose of adoption. Although such scenarios are consistent with statutes dictating that no person may give or accept any type of compensation in exchange for placement of a child for the purpose of adoption, such results are inconsistent with the Legislature’s intent that “each adoption should be judged upon the best interests of the child based upon a totality of the circumstances.”

Ultimately, Judge Salinitro found that the “best interest of the child,” the central doctrine of family law in the United States, should overcome any doubts created by the surrogacy statute. After reviewing a variety of cases on related issues and recent attempts to get surrogacy reform through the New York
Federal Court Holds Gay Prisoner States Equal Protection Claim When Denied a Prison Job because He Was a “Vulnerable” Inmate

A gay prisoner stated a claim for denial of Equal Protection when a prison denied him all access to jobs on the ground that his sexual orientation made him “vulnerable,” in White v. Hodge, 2014 U.S. Dist. LEXIS 44075 (S. D. Ill., April 1, 2014). Pro se inmate Vince White sued the Warden and the Deputy Warden for Programs for violating his civil rights under 42 U.S.C. § 1983 after they denied him prison employment pursuant to a policy “prohibiting inmates who are identified as ‘vulnerable’ from obtaining prison jobs.” According to the opinion of United States District Judge Michael J. Reagan, the excluded group “consist[ed] almost entirely of openly homosexual inmates.” White, identified as “openly gay,” was classified as “vulnerable” following “an incident of unwanted sexual touching by a cellmate while [he] slept.”

White filed grievances after he was denied any prison job, to no avail. His exhaustion of grievance remedies confirmed that the prison did not allow jobs “for vulnerable.” Claiming that the “policy prevents homosexuals from working to earn state pay,” White alleged discrimination on the basis of sexual orientation in violation of the Equal Protection Clause.

Judge Reagan upheld White’s claim on “merits review” under 28 U.S.C. § 1915A. A prisoners’ prima facie case of discrimination under the Equal Protection Clause must show that he was a member of a protected class, that he is similarly situated to members of an unprotected class, and that he was treated differently from members of the unprotected class... “unless unequal treatment bears a rational relation to a legitimate penal interest,” wrote Judge Reagan, citing Hudson v. Palmer, 468 U.S. 517, 523 (1984).

Judge Reagan explored the level of Equal Protection scrutiny that applied to White’s claim in light of United States v. Windsor, 570 U.S. 12 (2013), in which the United States Supreme Court held that denying same-sex couples equal status under the law serves no constitutionally legitimate purpose. He noted that, while the Supreme Court “did not definitively state which standard of review applies to discriminatory classifications based on sexual orientation,” the Ninth Circuit used “heightened scrutiny” after Windsor in SmithKline Beecham Corp. v. Abbott Labs, 740 F.3d 471 (9th Cir. 2014). He found that the Seventh Circuit had not revisited this issue since Windsor, even though Illinois had adopted marriage equality. Judge Reagan nevertheless found a “viable equal protection claim,” “[r]egardless of whether the applicable standard of review is rational basis or heightened scrutiny.”

This case is notable in at least two respects. First, the court framed the Equal Protection issue by comparing prisoners with similarly situated other prisoners (not prisoners with unincarcerated people). Secondly, it found that denial of work to gay prisoners while allowing it to other inmates cannot survive even rational basis scrutiny; although it is unclear from the opinion what, if any, state interests were advanced in defense of the policy.

Judge Reagan denied preliminary relief at this stage because White failed to demonstrate “irreparable injury” from the denial of prison employment, and White’s complaint did “not suggest that there is any urgency in addressing this matter.” Accordingly, he denied an injunction without prejudice. Judge Reagan likewise denied this plaintiff preliminary relief against harassment but allowed the case to proceed in White v. Hodge, 2014 U. S. Dist. LEXIS 18132 (S.D. Ill., February 13, 2014), reported in Law Notes (March 2014) at 122.

Finally, Judge Reagan dismissed with prejudice White’s claims that denial of his grievances denied him access to court under the First Amendment’s right to petition clause, since the Illinois grievances system created no substantive rights. – William J. Rold

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NEW REFERENCE SOURCE – Lambda Legal has now made it easier to keep track of the more than 60 same-sex marriage lawsuits pending in federal and state courts by dedicating a portion of its website to a chart detailing the current status of all such cases. As of April 9, Lambda counted 64 pending cases, and several have been filed since then. In fact, several media sources have reported that upon filing of a new marriage equality lawsuit in South Dakota, there will be cases seeking the right to marry or to recognition of marriages on file in every state where it is banned except Alaska, North Dakota and Montana. The Lambda chart can be accessed at: http://www.lambdalegal.org/pending-marriage-equality-cases.

6TH CIRCUIT, U.S. COURT OF APPEALS – New York attorney Roberta Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison LLP, who represented Edith Windsor in U.S. v. Windsor and whose attempt to intervene on behalf of some Utah couples in the 10th Circuit’s consideration of Kitchen v. Herbert was rebuffed by that court, will seek to intervene on behalf of Equality Ohio, a gay rights organization, in the pending 6th Circuit consideration of marriage equality in DeBoer v. Snyder, the pending Michigan equality case, denying a petition by Michigan Attorney General Bill Schuette, one of the appellants, that the case bypass the usual three-judge panel and be heard en banc. Schuette had argued that since the case was inevitably headed to the Supreme Court, and that the losing party before a three-judge panel would likely seek en banc review, it would be efficient to go directly to an en banc panel of the full 15-judge circuit. His petition was circulated to all active judges of the circuit, and “no judge of this court having favored the suggestion,” it was rejected without further explanation.

6TH CIRCUIT, U.S. COURT OF APPEALS – The 6th Circuit issued an Order on April 28 in DeBoer v. Snyder, the pending Michigan equality case, denying a petition by Michigan Attorney General Bill Schuette, one of the appellants, that the case bypass the usual three-judge panel and be heard en banc. Schuette had argued that since the case was inevitably headed to the Supreme Court, and that the losing party before a three-judge panel would likely seek en banc review, it would be efficient to go directly to an en banc panel of the full 15-judge circuit. His petition was circulated to all active judges of the circuit, and “no judge of this court having favored the suggestion,” it was rejected without further explanation.

10TH CIRCUIT, U.S. COURT OF APPEALS – A panel of the 10th Circuit Court of Appeals heard oral arguments during April in the Utah and Oklahoma marriage equality cases. In the Utah case, Kitchen v. Herbert, the district court held that the state’s ban on same-sex marriages, both as to celebration and recognition, violates the due process and equal protection clauses of the 14th Amendment. The governor and attorney general appealed, but the defendant county clerk did not. At the oral argument, the court raised the question whether the governor and attorney general had Article III standing to appeal the ruling, absent participation by the county clerk. Both parties argued in favor of standing, with plaintiffs contending that in Utah the Attorney General has supervisory authority over county clerks so that a court order to him would provide an effective remedy. In the Oklahoma case, Bishop v. Smith, the court held that the state’s ban on celebration of same-sex marriages violates the equal protection clause of the 14th Amendment, but that plaintiffs had not sued an appropriate state official on the recognition issue, which the court thus abstained from deciding. At the Oklahoma oral argument, the court devoted substantial time during argument by plaintiffs’ counsel to the standing/jurisdictional questions raised by plaintiffs’ cross-appeal on the marriage recognition issue. Most commentators suggested that the resulting opinion in these cases may be 2-1, with some uncertainty as to which side will win. Based on questioning and comments by the judges, most commentators see Judge Carlos Lucero, a Democratic appointee, as a likely vote to affirm the district court opinions, and Judge Paul J. Kelly, Jr., a Republican appointee, as a likely vote to reverse. Judge Jerome A. Holmes has generally been seen as the swing voter whose questions and comments have projected some support for arguments on both sides, although some commentators saw signs at the second argument that Holmes might be leaning toward finding that a heightened scrutiny standard applied to the case – a critical development since Holmes had stated during the first argument that it seem to him that the marriage bans would survive under a rational basis level of review. However, predicting the outcome based on questions and comments by the judges during oral
argument is a hazardous occupation, so suspense continues as to the outcome of these cases. The court faces no firm deadline for issuing its opinions, and gave no hint whether it would combine the cases in one opinion or treat them separately. Audio recordings of the oral arguments can be found on the 10th Circuit website.

ALABAMA – The Alabama House of Representatives approved a resolution on April 2 calling for a convention to put a same-sex marriage ban in the U.S. Constitution, according to the Montgomery Advertiser (April 2). The resolution calls for a Constitutional Convention convened pursuant to Article V of the Constitution, which must be convened if called for by at least 34 states. Such a convention has never before been called in U.S. history. The measure passed on a voice vote.

FLORIDA – On April 24, U.S. District Judge Robert L. Hinkle denied an intervention motion by Florida Family Action, Inc., an anti-gay group, in Brenner v. Scott, Case No. 4:14-cv107-RH/CAS (N.D. Fla.), a pending marriage equality lawsuit. Judge Hinkle did allow FFA to file “a timely amicus memorandum on any legal issue submitted by the parties,” but found that FFA’s claimed interest in opposing same-sex marriage did not confer it standing to participate as a party. Hinkle also noted that “existing defendants, especially the Governor and Attorney General, can be relied upon to adequately – indeed, zealously – defend these actions on the merits.” * * * A couple of gay bartenders in Key West have sued Monroe County Clerk Amy Heavilin on April 1 after her office refused to issue them a marriage license. Aaron Huntsman and William Lee Jones retained Key Large attorney Bernadette Restivo to represent them in the case, which has been assigned to Monroe County Chief Judge David Audlin, who ruled in 2008 that Florida’s ban on gays adopting children was unconstitutional. Miami Herald, April 2.

GEORGIA – On April 22, Lambda Legal and cooperating attorneys from the Georgia and District of Columbia offices of Bryan Cave LLP and the Miami office of White & Case LLP filed suit in the U.S. District Court for the Northern District of Georgia in Atlanta, seeking injunctive and declaratory relief as a class action for same-sex couples and surviving same-sex spouses in Georgia who seek the right to marry or to have their out-of-state marriages recognized. The named plaintiffs include two male same-sex couples who seek to marry (Christopher Inniss and Shelton Stroman; Michael Bishop and Johnny Shane), a married female same-sex couple seeking recognition of their marriage (Rayshawn Chandler and Avery Chandler, who married in Connecticut) and a female surviving spouse from a marriage performed last year in New York seeking correction of her wife’s death certificate (Jennifer Sisson). The case is named Inniss v. Aderhold, No. 1:14-cv-1180 . The named defendants, all sued in their official capacities, including State Registrar and Director of Vital Records Deborah Aderhold, Gwinnett County Probate Court Clerk Brook Davidson, and Fulton County Probate Court Judge Pinkie Toomer. The complaint spells out numerous ways that same-sex couples seeking to marry or have their marriages recognized in Georgia are excluded from rights, benefits and responsibilities, and argues that there is “no legitimate interest, let alone an important or compelling one, in excluding same-sex couples from the institution of marriage.” The complaint states claims under the due process and equal protection clauses of the 14th Amendment, arguing that the right to marry is a fundamental right and that denial of that right to same-sex couples impermissibly discriminates because of sex and sexual orientation. While arguing that these claims should invoke heightened or strict scrutiny, the complaint argues that the Georgia marriage bans cannot survive even rational basis review. Lambda staff attorney Tara Borelli signed the complaint as lead counsel in the case. The case has been assigned to U.S. District Judge William Duffey Jr., a former U.S. attorney who was appointed to the bench by President George W. Bush.

ILLINOIS – Governor Pat Quinn ordered the state’s national guard to recognize marriages of same-sex couples performed in the state. Although the marriage equality law passed by Illinois last year does not go into effect according to its terms until June 1, federal court orders have led several counties to issue marriage licenses “early,” so the governor’s order was intended to provide for recognition of such “early” marriages by the national guard, which may be significant in terms of benefits rights for the spouses of guard members. Quinn sent his directive to the state’s Department of Military Affairs on April 11. buzzfeed.com, April 14.

MARYLAND – Jaime Medina filed suit against her former employer, L&M Construction, Inc., in Montgomery County Circuit Court, alleging that as a transgender person transitioning from male to female she had suffered sexual harassment, had been discharged for rejecting her supervisor’s sexual advances, and suffered retaliation for assisting another employee in reporting an incident of sexual harassment. She asserted seven counts, including four under Maryland law and three under Title VII, which was a strategic error if she wanted to keep her case in state
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court, as L&M promptly removed the case to federal court. Medina then amended her complaint to remove the three Title VII claims (which were, in any event, duplicative of some of her state law claims), and moved to have the case remanded back to state court. L&M resisted the motion, arguing that because Medina’s complaint recited discrimination findings by the Office of Federal Contract Compliance Programs, there remained a necessary federal element in the case. U.S. District Judge Roger W. Titus disagreed with L&M, finding that the amended complaint stated no federal claims and did not necessarily raise any federal claims, and granted Medina’s motion in Medina v. L&M Construction, Inc., 2014 U.S. Dist. LEXIS 56188 (D. Md., April 23, 2014). Medina is represented by C. Christopher Brown, Gregory P. Care, and Sharon Krevor Weisbaum, of Brown Goldstein and Levy LLP, Baltimore.

MICHIGAN – The ACLU has filed suit in federal court on behalf of eight same-sex couples who were married in Michigan the morning of March 22 after the U.S. District Court issued its ruling in DeBoer v. Snyder, 2014 U.S. Dist. LEXIS 37274 (E.D. Mich., March 21, 2014), but have been denied recognition of their marriages by the state. Caspar v. Snyder, filed on April 14 in the U.S. District Court, Eastern District of Michigan. The 6th Circuit stayed the DeBoer ruling in the afternoon on March 22, shortly after the plaintiffs’ marriages were celebrated. The complaint argues that once the plaintiffs were married, their marriages were protected under the 14th Amendment and must be recognized by state officials, “regardless of the ultimate outcome of the DeBoer litigation.” The complaint rests on a theory of vested rights, and that any “suspension” of those rights by the state without a legitimate justification violates due process and equal protection. The complaint notes

that lead defendant Governor Rick Snyder publicly stated that the couples married on the morning of March 22 were legally married, but that the 6th Circuit’s stay of the district court decision “has the effect of suspending the benefits of marriage until further court rulings are issued on this matter.” However, subsequently U.S. Attorney General Eric Holder announced that the federal government would recognize the validity of those marriages and that “these Michigan couples will not be asked to wait for further resolution in the courts before they may seek federal benefits to which they are entitled.” A pretty pass, this . . .

MISSOURI – After Governor Jay Nixon directed the state’s tax authorities to accept joint tax returns filed by same-sex couples who had married out of state, several state legislators initiated impeachment proceedings against him, while a group of marriage equality opponents filed suit in Cole County Circuit Court, seeking a temporary restraining order to bar Nixon’s directive. Judge Jon Beetem denied the request for a TRO on April 4, writing that he was not taking a position on whether the legal challenge is likely to succeed, but finding that the plaintiffs had not established irreparable injury to them and that a TRO would not avoid the intangible injury that they were claiming. Lake Sun Leader (Camdenton, MO), April 8.

NORTH CAROLINA – The United Church of Christ in concert with representatives of several other liberal religious movements and some same-sex couples has filed suit in North Carolina challenging the state’s ban on same-sex marriage. General Synod of the United Church of Christ v. Cooper. This lawsuit comes with a new twist: in addition to the usual 14th Amendment arguments that have prevailed in all marriage equality cases decided since last fall’s U.S. Supreme Court ruling in Windsor, the plaintiffs in this case assert a 1st Amendment claim, arguing that their rights, consistent with their religious doctrines, to perform same-sex marriages is being unconstitutionally abridged by the state. It is common knowledge that much of the opposition to same-sex marriage is religiously inspired, as any objective consideration of the arguments made by supporters of the anti-marriage referenda of the past two decades will show. This lawsuit seeks to fight fire with fire by asserting the free exercise rights of those who consider marriage a sacred rite that should be open to same-sex couples. The suit was filed on April 28 in the U.S. District Court for the Western District of North Carolina. Washington Blade, April 28. On April 9, the ACLU had filed a new marriage equality lawsuit, Gerber v. Cooper, in the U.S. District Court on behalf of three same-sex couples married in other states who are seeking recognition of their marriages in North Carolina; that step would require invalidation of Amendment 1, passed by voters in a special election held in the spring of 2012, shortly before President Obama first publicly endorsed marriage equality. That same year, the ACLU had filed a lawsuit challenging the state’s ban on second-parent adoptions, Fisher-Borne v. Smith, which was expanded after the U.S. Supreme Court’s Windsor ruling to attack the state’s same-sex marriage ban. North Carolina Attorney General Roy Cooper has he personally stated that he believes the state should change its laws to allow and recognize same-sex marriages, but that it is his duty to defend the existing ban in court. Greensboro News & Record, April 10.

OHIO – On April 14, Attorney General Mike DeWine certified a proposed ballot question to repeal the state’s constitutional ban on same-sex marriage. Ohio now has two appeals pending in

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the 6th Circuit from decisions by U.S. District Judge Timothy Black striking down the state’s ban on recognizing same-sex marriages contracted in other jurisdictions, but neither of those opinions directly took on the ban on same-sex marriages being celebrated in the state. Pursuing repeal of the constitutional amendment through a referendum is controversial, especially now that it appears that the U.S. Supreme Court will be taking on the issue of marriage equality within the next year or two, given the pace with which marriage equality cases are being advanced to the circuit courts of appeals. A state-wide referendum would be costly and divisive and, if the marriage quality lawsuits are ultimately successful, unnecessary. On the other hand, it is probably true that the 2012 ballot victories for same-sex marriage (including the rejection of a ban in Minnesota) may have helped to influence the Supreme Court majority that struck down Section 3 of DOMA in June 2013. Perhaps some successful repeal initiatives of anti-gay marriage amendments before the Supreme Court takes up the issue in 2015 would help to build momentum for a Supreme Court victory that would lead to nation-wide marriage equality.*** A labor arbitrator ruling on contract grievances filed by the Ohio Civil Service Employee’s Association on behalf of gay and lesbian state employees has ruled that they are entitled to bereavement leave to attend the funeral of a same-sex spouse’s parent. Arbitrator Sarah Rudolph Cole found that the labor agreement says that the union and the state agreed to “act in a manner that is consistent with federal anti-discrimination law.” Cole observed, “At the present time, federal law requires the state to recognize valid out-of-state marriages. As a result, the grievants’ partners must be considered ‘spouses’ for purposes of applying. . . bereavement leave policies. If they are spouses, then the spouses’ parents are grievants’ inlaws.” The grievants are Federico Reyes, an employee of the Ohio Department of Commerce, who married Michael Rose in Toronto, Canada, in 2005, and Kelly Hedglin, an employee of the Public Utilities Commission of Ohio, who formed a Vermont civil union with Bonnie Bish in 2003. Under the Vermont Civil Union Act, which has since been superseded by marriage equality litigation, civil union partners are considered to be “spouses” and, since Vermont passed the marriage equality litigation, to be married. Evidently Arbitrator Cole was not dissuaded by the Ohio constitutional amendment banning recognition of same-sex marriages, or Section 2 of the federal Defense of Marriage Act, which says that states are not required to extend full faith and credit to same-sex marriages performed in other states, as her role was one of contract interpretation. Her reference to “federal law” sounds like a reference to Judge Black’s decisions. Columbus Dispatch, April 16. *** Going beyond existing litigation seeking recognition for out-of-state same-sex marriages, a group of same-sex couples filed a new lawsuit in the U.S. District Court for the Southern District of Ohio on April 30, seeking the right to marry. Six Southwest Ohio couples joined as plaintiffs in the case filed by Jennifer Branch of the Cincinnati law firm Gerhardstein & Branch. The case is Gibson v. Cissell, with the lead defendant being Hamilton County Probate Judge James Cissell, whose court issues marriage licenses. Also sued in Department of Health Interim Director Lance Himes. Her partner is counsel in the marriage recognition cases, where affirmative rulings are being appealed to the 6th Circuit by Attorney General Mike DeWine. Cincinnati Enquirer, April 30.

OREGON – U.S. District Judge Michael McShane heard oral arguments on April 23 in pending challenges to the state’s ban on same-sex marriage. Although the state is not arguing against the lawsuit, the National Organization for Marriage, an opponent of same-sex marriages, moved the court prior to the hearing to be allowed to intervene as a defendant. NOM requested that the court postpone the scheduled hearing on plaintiffs’ motion for summary judgment until the court had decided NOM’s motion to intervene, but Judge McShane rejected that course. He indicated that there will be a separate hearing in May on NOM’s motion, and if the motion is granted, there will be another hearing on the summary judgment motion in which NOM can participate. Since none of the named defendants are opposing the case on the merits, a ruling by the district court would be final unless a party with standing files an appeal. After the Supreme Court’s decision in Hollingsworth v. Perry, it seems unlikely that NOM would have standing to appeal unless it could identify individuals among its membership who would have individual standing. During the hearing, Judge McShane asked the parties whether he should stay any ruling in favor of the plaintiffs until such time as the 9th Circuit has ruling in one of the other marriage equality cases. Such a case is pending from Nevada, but a hearing in that case seems to be on hold while the circuit decides whether to hold en banc rehearing in SmithKline Beecham v. Abbott Laboratories, an antitrust case in which the level of judicial review for sexual orientation discrimination became relevant during the jury selection process. A panel of the circuit held that heightened scrutiny was the appropriate standard. Abbott has filed a brief with the 9th Circuit urging en banc review but arguing that the court need not revisit the issue of whether heightened scrutiny applies to sexual orientation discrimination claims, according to a Reuters report (April 18).

PENNSYLVANIA – As the state has announced that it does not intend
to present any expert testimony in Whitwood v. Corbett, a pending marriage equality case that was filed in July 2013, the plaintiffs are suggesting that U.S. District Judge John E. Jones III (M.D. Pa.) cancel a scheduled June trial date and decide pending summary judgment motions based on the briefs. Mark Aronchick of Hanglely Aronchick Segal Pudlin & Schiller, cooperating attorneys with the ACLU on the case, pointed out that all but one of the string of marriage equality decisions issued since the Windsor ruling last year have been on summary judgment motions without a trial. “We have as complete a record as any of them” he commented, in support of the idea of dispensing with a trial. *The Legal Intelligencer*, April 21.

**PENNSYLVANIA** – Barbara Baus married Catherine C. Burgi-Rios in Connecticut in 2011. Burgi-Rios died in September 2012 and Baus was assessed $11,000 in inheritance taxes that would not have been levied if Pennsylvania recognized their marriage. Baus is suing state tax authorities in Northampton County Court, charging that Pennsylvania’s refusal to recognize her status as a surviving spouse violates the equal protection requirements of Pennsylvania’s constitution. The state has moved to dismiss the case, arguing that courts have traditionally left it to the political branches to determine who can marry and which marriages to recognize. Baus is represented by Benjamin Jerner. The case is pending before County Judge Craig Dally. *Morning Call*, April 29.

**WISCONSIN** – Katherine and Linda Halopka-Ivery, who were legally married in California in December 2013, have filed an original action in the Wisconsin Supreme Court, seeking a declaratory judgment requiring the state to recognize their marriage. *Halopka-Ivery v. Walker*, 2014AP000839-OA (filed April 16, 2014). The plaintiffs, represented by Milwaukee attorney Paul Ksicinski, allege that the Milwaukee County register of deeds, a co-defendant, refused to record a real estate property ownership transfer unless the women were registered as Wisconsin domestic partners. They argue that Wisconsin’s marriage recognition law, which recognizes different-sex marriages from other states but not same-sex marriages, harms same-sex couples, interfering with “fundamental rights regarding deeply personal choices about marriage and family life,” and that there is no legitimate secular purpose for Wisconsin to ban same-sex marriages. Wisconsin voters approved a marriage amendment in 2006, which is already other challenge in another case pending in federal court in Madison. The Supreme Court is also currently considering a challenge by conservatives to the state’s domestic partnership registry law, which appellants argue violates the marriage amendment by providing a legal status similar to marriage for same-sex couples. *Milwaukee Journal Sentinel*, April 17. **U.S. District Judge Barbara Crabb has refused to dismiss a legal challenge to the state’s same-sex marriage ban, but has agreed to dismiss two prosecutors and the state’s top tax official as defendants, according to an April 30 report in the *Journal Sentinel*. The judge rejected Attorney General J.B. Van Hollen’s argument that the plaintiffs failed to meet detailed federal civil pleading standards in their complaint. The state’s Revenue Secretary was dropped from the case upon the judge’s conclusion that he did not have any authority to decide whether to provide benefits to same-sex couples. The two prosecutors were sued because the case also challenges a state law making it a crime for couples resident in Wisconsin to go out of state to get married if they were prohibited from marrying in the state, a so-called “marriage evasion law.” The prosecutors filed statements with the court saying they did not believe that the marriage evasion law applied to the plaintiff couples who had married out of state, so Crabb found that there was no threat that they would be prosecuted and dismissed the prosecutors as defendants. Judge Crabb refused to dismiss State Registrar Oskar Anderson, however, finding that he is in charge of designing marriage license applications and other documents relevant to the litigation. **WISCONSIN** - In re James Matson & Kevin Mabry, Debtors, 2014 WL 1678989 (U.S. Bankruptcy Ct., E.D. Wis., April 29, 2014), Bankruptcy Judge Margaret Dee McGarity denied a motion by creditors to bifurcate a case that had been filed jointly by a married same-sex couple. The two men, who live in
Wisconsin, married in Iowa. At present Wisconsin does not recognize their marriage, and the creditors argued that under Windsor the federal government is only required to recognize marriages that are recognized by the state in which the debtor resides. Judge McGarity rejected this construction of Windsor, asserting that the federal government applies the “place of celebration” rule in determining whether a marriage is valid as a matter of federal law. This is actually consistent with some pre-Windsor bankruptcy court rulings.

### CIVIL LITIGATION NOTES

**SUPREME COURT** – The U.S. Supreme Court announced that it had denied a petition for certiorari in *Elane Photography v. Willock*, No. 13-585 (cert. denied, April 7), case below, 309 P.3d 53 (N.M. 2013), in which the New Mexico Supreme Court rejected a First Amendment challenge to the application of a state law banning sexual orientation discrimination to a wedding photography business that refused to provide services for a lesbian commitment ceremony. Although some of the public accommodation cases that have achieve notoriety lately have been staged as religious discrimination cases by the businesses, Elane Photography’s argument to the New Mexico court was that application of the statute improperly abridge the business’s rights to artistic expression.

**2ND CIRCUIT, U.S. COURT OF APPEALS** – A 2nd Circuit panel ruled on April 3 that the New York City Board of Education’s policy against renting school facilities for the holding of religious worship services does not violate the 1st Amendment. *The Bronx Household of Faith v. Board of Education of the City of New York*, 2014 WL 1316301. The panel reversed a district court decision, which had enjoined the policy. The panel vote was 2-1, with Circuit Judge John Walker siding with the church that was suing for the right to “equal treatment” with other organizations seeking to rent church space. The court held that the Board could rely on its desire to avoid possibly violating the Establishment Clause as a basis for its policy, but the court, frustratingly, refrained from ruling on whether allowing the services would violate the Establishment Clause, thus leaving it open to the Board to change its policy. As Mayor Bill de Blasio has voiced support for allowing religious organizations to hold worship services in school facilities, such a change seemed likely. LGBT groups were concerned about this issue because some of the churches involved take virulently anti-gay positions, and were
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seen by critics as using the schools as a venue to disseminate their homophobic messages, using public facilities constructed and maintained with public tax dollars.

2nd Circuit, U.S. Court of Appeals – The court affirmed a decision by U.S. District Judge Telesca (W.D.N.Y.) dismissing a sexual orientation discrimination and retaliation complaint filed by Joseph Lotta, an employee of the University of Rochester. Lotta v. University of Rochester, 2014 U.S. App. LEXIS 6652 (April 11, 2014). “Lotta, a gay man who served in the military, alleged that he complained to the University after a co-worker made offensive comments about gays in the military,” wrote the court. “He did not allege that either the University or the co-worker knew about his sexual orientation or his military service, and he did not allege that he had complaint to the University of discrimination or discriminatory harassment on either of these bases (although he alleges that his supervisor knew of the offensive comments). According to the complaint, the co-worker stopped harassing Lotta, but Lotta still sought a transfer to another department to avoid the co-worker. Lotta alleges that, ultimately, he transferred himself to a lower paying position.” The dismissal was premised on the failure of Lotta to allege a prima facie case, either under the Employment Retaliation Act or the Equal Protection Claims. Lewis v. City of Norwalk, 2014 U.S. App. LEXIS 6821 (2nd Cir., April 14, 2014). The plaintiff, a heterosexual man, claims that he was subjected to hostile environment sexual harassment by an openly-gay male supervisor, who subsequently discharged him. The 2nd Circuit affirmed the trial court’s conclusion that based on the factual record the alleged conduct was neither severe nor pervasive enough to meet the high bar set by federal courts for such claims, that there was a well-documented record of poor performance by the plaintiff, and that he was informed that he would be dismissed if he did not resign before, not after, he asserted his discrimination claim with management. The court found that there were a few instances of the gay supervisor engaging in inappropriate sexually-related behavior, but they were not frequent enough to create a hostile environment. The court wrote, “The Supreme Court has emphasized that ‘employers need not suspend previously planned [employment actions] upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality. Because there is ample evidence of grounds for terminating Lewis – namely, his documented poor performance reviews dating back to 2006 – and no plausible allegation that his poor performance reviews were themselves related to the alleged harassment, we conclude that there was no material issue of fact as to whether Lewis’s termination was a result of his sexual harassment claims against defendants.”

6th Circuit, U.S. Court of Appeals – The U.S. Court of Appeals for the 6th Circuit denied a petition to review a ruling by the Board of Immigration Appeals that denied applications for asylum, withholding of removal and protection under the Convention Against Torture for a man from Uganda, in Masiko v. Holder, 2014 U.S. App. LEXIS 7048, 2014 FED App. 0277N, 2014 WL 1424497 (April 14, 2014). Masiko testified to various experiences he had in Uganda that, if believed, would surely qualify him for refugee status in the United States, including actual persecution by law enforcement officials. However, the Immigration Judge found that he was not credible due to numerous discrepancies in his testimony, including omission from his direct testimony of the most compelling incident recounted in his written application. “To be eligible for asylum,” wrote the court, “Masiko must demonstrate that he ‘is unable or unwilling to return to’ Uganda because he fears persecution on account of his sexual orientation. Credible testimony may satisfy this burden, but incredible testimony will not. The immigration judge gets substantial leeway to make the credibility call, and he may base his credibility finding on ‘the totality of the circumstances . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.’” The court found that “plenty of evidence” supported the IJ’s credibility ruling. “Masiko testified inconsistently (and presented conflicting evidence) about who he was, what acts of persecution he suffered and where he suffered them. Each time he tried to explain a glaring inconsistency, things got worse – from a new story about the origins of his passport to lies about preparing his written application. To be eligible for asylum,” wrote the court, “Masiko must demonstrate that he ‘is unable or unwilling to return to’ Uganda because he fears persecution on account of his sexual orientation. Credible testimony may satisfy this burden, but incredible testimony will not. The immigration judge gets substantial leeway to make the credibility call, and he may base his credibility finding on ‘the totality of the circumstances . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.’” The court found that “plenty of evidence” supported the IJ’s credibility ruling. “Masiko testified inconsistently (and presented conflicting evidence) about who he was, what acts of persecution he suffered and where he suffered them. Each time he tried to explain a glaring inconsistency, things got worse – from a new story about the origins of his passport to lies about preparing his written application. To be eligible for asylum,” wrote the court, “Masiko must demonstrate that he ‘is unable or unwilling to return to’ Uganda because he fears persecution on account of his sexual orientation. Credible testimony may satisfy this burden, but incredible testimony will not. The immigration judge gets substantial leeway to make the credibility call, and he may base his credibility finding on ‘the totality of the circumstances . . . without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.’”
9TH CIRCUIT, U.S. COURT OF APPEALS – A 9th Circuit panel voted 2-1 to uphold summary judgment in favor of an employer’s disability benefits plan where an HIV-positive employee sat on her claim until well after the statute of limitations had expired, rejecting the employee’s argument that the plan had waived its right to rely on the statute of limitations when it reopened her case for a new review and told her that if the claim was denied she had a right to sue under ERISA. Gordon v. Deloitte & Touche, 2014 U.S. App. LEXIS 6688 (April 11, 2014). The majority asserted that, applying California law in the absence of express provisions on point in ERISA, California courts had not allowed the use of waiver and estoppel to revive stale claims based on an insurer’s agreement to reconsider a claim that it had previously denied. In this case, the plaintiff’s claim had been denied on the ground that the plan placed a durational limitation on claims for disabilities due to mental illness, and she had exhausted her benefits. The basis of the plaintiff’s claim was that she suffered severe, disabling depression subsequent to her HIV diagnosis which prevented her from working. Presumably the plaintiff sought to persuade the court that her claim was not due to mental illness, but rather was a side-effect of her HIV infection, and thus was medically based and not subject to the mental illness limitation. Dissenting, Circuit Judge Stephen Reinhardt claimed that the majority had misconstrued the California case law, and that it was consistent with California law to recognize waiver in this case. He refrained from discussing an alternative estoppel theory without dismissing it.

CALIFORNIA – U.S. Magistrate Judge Douglas F. McCormick affirmed the ALJ’s decision to deny benefits in Turner v. Colvin, 2014 U.S. Dist. LEXIS 50539 (C.D. Cal., April 9, 2014). The ALJ had explained in his opinion that Turner’s treating physician’s report was not supported in various particulars by the medical evidence, and that Turner had responded well to treatment with the “HIV cocktail.” “As a general matter,” wrote the judge, “the ALJ properly relied on evidence of Plaintiff’s effective treatment and improved CD4 count in discounting Dr. Song’s claim that his patient was disabled. More specifically, where the medical evidence reflects good response to treatment and an increased CD4 count, a claimant’s HIV infection will not meet Listing 14.08(K).” The court also found that statements from Turner and his wife “concerning his daily activities demonstrate little limitation,” so the plaintiff had not “met his burden of demonstrating that his impairments met or equaled the criteria of Listing 14.08(K)” to be considered too disabled to work.

CALIFORNIA – U.S. District Judge Richard Seeborg granted a motion to compel arbitration of a sexual orientation discrimination claim in Marquez v. Brookdale Senior Living, 2014 U.S. Dist. LEXIS 49266 (N.D. Cal., April 8, 2014). The plaintiff had signed an arbitration agreement as a condition of employment. After she was discharged, she sued in state court alleging a violation of California’s Fair Employment and Housing Act, but the employer removed the case to federal court on diversity grounds and moved to compel arbitration. Marquez claimed that the arbitration agreement was unenforceable on diversity grounds. Judge Seeborg found that the take-it-or-leave-it agreement was procedurally unconscionable, and that some provisions of the agreement were substantively unconscionable, but that those provisions were severable, so the agreement was enforceable.

CALIFORNIA – U.S. Magistrate Judge Suzanne H. Segal affirmed the decision of the Social Security Administration finding that a person living with HIV was not sufficiently disabled to qualify for benefits. Suiter v. Colvin, 2014 U.S. Dist. LEXIS 58035 (C.D. Cal., April 25, 2014). This case was unusual in that the court had previously reversed an ALJ’s decision as to this plaintiff, finding that the ALJ had improperly rejected the medical opinions of the treating physician, had failed to provide clear and convincing reasons for rejecting the plaintiff’s credibility, and made other analytical errors. The case was sent back for a new hearing, at which testimony from several medical experts was presented. This time, the ALJ dotted all the i’s and crossed all the t’s, leading the court to determine that the renewed denial of benefits should be upheld because substantial evidence supported the ALJ’s non-disability determination.

COLORADO – A gay New Jersey couple whose kissing photograph posted on their wedding website was appropriated by anti-gay political groups to illustrate political flyers for use in a Colorado state legislative Republican primary election suffered dismissal of their action against the organizations involved for the tort of appropriation of name or likeness, but Senior District Judge Wiley Y. Daniel refused to dismiss the claim by their use of the photograph in political flyers for use in a Colorado state legislative Republican primary election. Hill v. Public Advocate of the United States and others, 2014 U.S. Dist. LEXIS 43658 (D. Colo., March 31, 2014). The parties disputed
which state’s tort law would apply to the appropriation claim; the court concluded that Colorado law would apply. However, the court found that the appropriation tort in Colorado applied only to commercial appropriation, and that material put to political use on a subject of public interest enjoyed a First Amendment privilege against tort liability. In this case, the defendants had lifted the photo, which depicted the plaintiffs kissing in a park next to the East River in New York City, and superimposed it on a background of snow-covered pine trees with captions for political flyers in two Republican primaries in which candidates supported by the defendants were challenging candidates who supported either civil unions or same-sex marriage. The captions on the flyers suggested that the illustration showed the candidate’s “idea of family values.” The court found that this was a non-commercial use and that the use reasonably related to a publication concerning a matter that is newsworthy or of legitimate public concern. “The mailers, in which the predominant image is Edwards and Privitera kissing, were used to voice disapproval of Senator Jean White and candidate Jeffrey Ware’s support for same-sex marriages. Thus, the matter of public concern is same-sex marriage and it cannot be said that the lifted portion of the photo is not reasonably related to same-sex marriage.” However, the court decided that the complaint alleged a plausible claim of copyright infringement. The photographer reserved a copyright in the photo, and the court found that enough artistry went into its composition to support the claim of originality of expression, but there were factual disputes as to the effect of the use on the potential market for or value of the work. This determination is “evidence driven,” wrote Judge Daniel, and thus “analysis of this element is evidence driven,” wrote Judge Daniel, and thus “analysis of this element is evidence driven,” wrote Judge Daniel, and thus did not “evidence driven,” wrote Judge Daniel, and thus did not “evidence driven,” wrote Judge Daniel, and thus did not apply. However, the court found that the conduct alleged was neither pervasive nor severe enough to meet the high bar that courts set for hostile environment harassment cases, so granted the motion on that claim.

CONNECTICUT – Ruling on defendant’s pretrial motion for summary judgment in an employment discrimination case, U.S. District Judge Janet C. Hall denied the motion as to the plaintiff’s claims of sexual orientation discrimination and quid pro quo sexual harassment in violation of Connecticut’s Fair Employment Practices Act (which prohibits employment discrimination because of sexual orientation), but granted the motion as to the plaintiff’s hostile environment harassment claim. *Fu v. ISO Innovative Analytics*, 2014 U.S. Dist. LEXIS 44488 (D. Conn., March 31, 2014). Plaintiff Wei Fu, a gay man, alleged that a male supervisor had propositioned him for sex and, after his refusal, had turned against him and eventually engineered his termination through negative evaluations and declining to work with him. There are numerous contested fact issues, including whether Fu was known to be gay at the company or to this supervisor, whether the supervisor’s emails to Fu had sexual connotations, and whether Fu’s performance was sufficiently deficient to conclude that he was not qualified for the job and thus merited termination. The court also acknowledged that the 2nd Circuit has not yet approved use of the “cat’s paw” theory of liability, under which an employer may be liable for intentional discrimination when a non-discriminatory decision-maker acts based on the adverse conduct of a discriminatory supervisor, as is alleged in this case. The court concluded, however, that this theory was consistent with 2nd Circuit case law in discrimination cases. Having concluded that a jury could go either way on these factual issues, the court ruled that summary judgment was inappropriate. However, as to the hostile environment claim, even if Fu’s allegations were believed, the court found that the conduct alleged was neither pervasive nor severe enough to meet the high bar that courts set for hostile environment harassment cases, so granted the motion on that claim.

DELAWARE – U.S. Magistrate Judge Sherry R. Fallon recommended granting summary judgment for the employer in *Smith v. Perdue Farms*, 2014 U.S. Dist. LEXIS 50279 (D. Del., April 11, 2014), a case in which the male plaintiff alleged that he had been subjected to hostile environment sexual harassment by his male supervisor. As is frequently the case in such situations, the court’s opinion intimates that Smith was a straight-laced fellow who felt oppressed by the normal vulgarity of a blue collar male workplace, and may have misconstrued the antics of his boss and some co-workers. Fallon found no evidence that the boss was gay or harassing Smith out of sexual desire, and decided that this case fell within the dictum of Justice Scalia’s statement in the *Oncale* case that Title VII does not enact a civility code for the workplace.

FLORIDA – Internet journalist John M. Becker’s public records request seeking evidence concerning the circumstances of publication of the infamous Regnerus gay family study (discredited by the federal court in the Michigan marriage equality case, *DeBoer v. Snyder*) ran into a determination by Florida Circuit Judge John Marshall Kest that the records sought – emails on the University of Central Florida’s computer system between a faculty member, James Wright, who was editor of the journal Social Science Research, and various other individuals in connection with publication of the article, were not “public records” subject to such disclosure. *Becker v. The University of Central Florida Board of Trustees*, 2014 WL 1499515 (Fla. 9th Judicial Circuit Ct., Orange County, April 17, 2014).

FLORIDA – The Equal Employment Opportunity Commission’s Tampa, Florida, office has issued a “letter of determination” on a charge filed by Brandi M. Branson, a transgender
woman, against Lakeland Eye Clinic, concerning an alleged violation of Title VII’s ban on sex discrimination. Branson v. Lakeland Eye Clinic, EEOC Charge No. 511-2012-00130. Branson was hired in July 2010 to be Director of Hearing Services at the Clinic. In April 2011, she informed her employer that she would be transitioning from male to female. She alleges that after she made this disclosure, the eye doctors at the clinic stopped referring cases to her, leading to her discharge, ostensibly for inadequate sales performance. The EEOC’s investigation of her charge led to the conclusion that the reason stated for her discharge was probably pretextual. The determination letter invited the parties to participate in conciliation efforts, notifying the employer that if it refuses to discuss settlement, the agency may issue a right to sue letter to the complaining party or initiate litigation itself. Branson is represented by New York attorney and LeGaL member Jillian T. Weiss.

MARYLAND – U.S. District Judge James K. Bredar has rejected a motion to dismiss in Finkle v. Howard County, Maryland, 2014 WL 1396386 (D. Md., April 10, 2014), a Title VII employment discrimination claim brought by a transgender woman whose application to be a Volunteer Mounted Patrol Auxiliary Police Officer was rejected. Before proceeding to the merits of the motion, Judge Bredar denied an amicus curiae motion filed by the ACLU and other organizations seeking to submit a memorandum in opposition to the motion to dismiss, finding that their motion had been submitted too late in the proceedings to be of assistance to the court. The defendants argued that because this was a volunteer position it was not covered by Title VII, but Judge Bredar found that under 4th Circuit precedent a volunteer position could be covered under Title VII if it provided valuable benefits, which this position did. Defendants next argued that Title VII does not forbid discrimination because of gender identity, but Judge Bredar described the growing body of case law – including decisions by some other circuit courts of appeals – holding that transgender persons who suffer discrimination because of their gender identity may bring sex discrimination claims under Title VII, using the Supreme Court’s sex-stereotyping ruling in Price Waterhouse v. Hopkins as the beginning point of the analysis, and noting that court of appeals cases relied upon by the defendants mainly pre-dated that decision. Finally, defendants argued that Finkle had not met the civil pleading requirements of alleging sufficient facts to state a claim of sex discrimination. “Although Plaintiff’s complaint represents something of a close call,” he wrote, “it sets forth sufficient allegations to allow the Court to ‘draw the reasonable inference’ that her application to join the VMP was denied ‘because of her obvious transgendered status’ and her failure to conform with gender norms.” The judge noted particularly that Finkle had passed the initial “horse and rider test” and was rejected only after the in-person panel interview, that she had alleged that the HCPD chief had instructed the other panel members to reject her application because of her transgender status, and that the reasons she was given for the rejection were obviously pretextual. She was told that they would not accept a retired police officer, that she was “overqualified” and that she lived “too far away,” when it seems that among those hired was a retired police officer who lived farther away than she did. Finally, the judge commented that a summary judgment motion filed by the defendants was obviously premature, since there were contested material facts in the case, so it would be denied without prejudice.

NEBRASKA – U.S. District Judge John A. Colborn denied a motion by the state of Nebraska to dismiss a suit brought by several same-sex couples challenging a policy adopted by the state’s Division of Children and Family Services under which same-sex couples may not receive licenses to be foster parents. Stewart v. Heineman, Case No. CI 13-3157 (Neb. Dist. Ct., Lancaster County, April 24, 2014). Judge Colborn remarked that there is no statute or regulation in Nebraska prohibiting gay people or same-sex couples or cohabiting unmarried adults from being foster parents. Indeed, he pointed out, in the course of adjudicating child custody and visitation disputes the Nebraska courts have frequently approved custodial arrangements where children are living with a parent who is cohabiting with another adult. The Division’s policy, adopted in a memorandum in January 1995, has no basis in official legislative or administrative policy. The court rejected the state’s arguments that the parties did not have standing since they had not attempted to appeal the rejection of their attempts to be licensed, pointing out that individuals are not required to undertake futile appeals. Further, the court found that the plaintiffs’ factual allegations were sufficient to state equal protection and due process claims, carefully noting that it was not ruling on the merits in deciding a motion to dismiss. “The court finds that the allegations of disparate results between the State’s treatment of persons who are ‘unrelated, unmarried adults residing together’, as well as person(s) ‘who identify themselves as homosexuals’, who wish to be foster parents and adopt children from state care and the State’s treatment of similarly situated persons who wish to adopt children through private agencies or private individuals is sufficient to state a cause of action for an equal protection violation,” wrote Colborn. As to due process, the plaintiffs argued that the Supreme Court has recognized rights of intimate association, including for same sex couples (see Lawrence v. Texas), which are burden by the state’s
refusal to license same-sex couples as foster parents. In response, Colborn found that “for purposes of a motion to dismiss, plaintiffs have sufficiently alleged a cause of action on their due process claim.” The question now is whether, the plaintiffs having survived a motion to dismiss, the state agency will have the good sense to rescind the policy memorandum that is at the heart of this dispute, since it seems likely that a federal district court, in light of the stream of judicial opinions that have now rejected attacks on the parenting abilities of same-sex couples, will rule against the state on the merits. Since this is just a policy memo, not a regulation or statute, the Department needs no legislative authorization to rescind it.

NEW JERSEY – The Appellate Division affirmed a decision by the Camden County Superior Court finding that a lesbian teen was an abused and neglected child who needed to be taken from the custody of her mother. N.J. Division of Child Protection and Permanency v. P.M., 2014 WL 1394179 (April 11, 2014) (unpublished opinion). On appeal, the mother argued that the evidence was not sufficient to support the trial court’s ruling, but the per curiam appellate panel found the evidence more than sufficient, showing that the mother threatened, cursed, degraded and belittled the child, making her “feel angry, sad, unloved, unwanted, worthless and misplaced.” The appellate court approved the trial judge’s decision to place the child in the custody of a third party. The opinion goes into the evidence in great detail.

NEW YORK – In Weslowski v. Zugibe, 2014 WL 1612967 (S.D.N.Y., March 31, 2014), U.S. District Judge Kenneth M. Karas granted a motion to dismiss by defendants Rockland County Attorney Patricia Zugibe and Deputy County Attorney Jeffrey J. Fortunato in a case brought by a gay former Senior Assistant County Attorney, John L. Weslowski. Weslowski claimed that he was forced to resign in retaliation for attempting to block a questionable contract for a federally funded program, in violation of the federal False Claims Act, under circumstances that also violated his 1st and 14th Amendment rights, in that defendants cited his use of an office computer to view legally protected gay-related material. Weslowski also asserted state law claims concerning money he claimed was due him, but which he was not paid for unused leave. Weslowski, representing himself pro se, filed his complaint on December 3, 2012. Judge Karas accepted the defendants’ argument that the FCA claim was untimely in light of a three-year statute of limitations that Karas found expired late in November, 2012, as the meeting in which Weslowski was told he could resign or be fired occurred in November 2009 (although he was allowed to continue working through the end of December). The same statute of limitations problem applied to his Section 1983 claims, but Judge Karas also went on to reject those claims on the merits, finding no 1st Amendment protection for Weslowski’s office computer use, no valid procedural due process claim, and no valid equal protection claim. On the allegation that he suffered sexual orientation discrimination, Weslowski had alleged that his computer-use was singled out because he viewed gay-related websites, but the judge found that he failed to show that there were similarly-situated non-gay employees who were treated differently. Responding to plaintiff’s examples of other employees who were not disciplined for using their office computers for non-worked related activities, the court wrote: “Even if all these examples violated the computer- and internet-usage policy, however, none satisfies Plaintiff’s burden to plead that Defendants did not take adverse employment action against a similarly-situated employee who was not a member of a protected class, because Plaintiff’s conduct – viewing sexually explicit materials – is not of ‘comparable seriousness’ to these examples.” (In a footnote, the court acknowledged that in Windsor v. United States, 699 F.3d 169 (2nd Cir. 2012), affirmed on other grounds, 133 S. Ct. 2675 (2013), the 2nd Circuit held that “homosexuals compose a class that is … quasi-suspect” and thus “heightened scrutiny” would apply to sexual orientation discrimination claims in this circuit.) As federal claims were dismissed, there remained state claims that are not time-barred, and the court gave Weslowski thirty days to file an amended complaint as to them.

OHIO – Because their affidavits were based on “personal knowledge and belief” two gay men who sought to hold police officers accountable for the allegedly rough manner in which they were arrested suffered summary judgment of their Section 1983 case at the hands of U.S. District Judge Patricia A. Gaughan in Ondoy v. City of Cleveland, 2014 U.S. Dist. LEXIS 59205 (N.D. Ohio, April 28, 2014). Steven Ondoy and Jonathon Simcox were arrested around
7 am on April 8, 2011, by a SWAT Unit team pursuant to arrest warrants. Because the SWAT Unit members were evidently not wearing police uniforms with name plates, the plaintiffs did not know their names and were not able to ascertain their identities until attending the police officers’ depositions, after the plaintiffs had already submitted their affidavits in support of their complaints. The plaintiffs never supplemented their affidavits, in which they had identified the police officers based on their recollection of physical characteristics. Judge Gaughan concluded that the identifications were insufficient as a matter of law, and also apparently found a wide range of tolerance for conduct by police officers that could clearly be labelled as homophobic, because the 6th Circuit has not recognized gays as a “protected class.” One feels while reading this opinion that the system is rigged in favor of the police, and that this ruling on a summary judgment motion did not benefit from any kind of sophisticated briefing on the developing equal protection jurisprudence concerning sexual orientation. The opinion does not specify any details about the arrest warrants, and effectively holds the Cleveland police officers unaccountable, as a matter of law, for allegedly spouting homophobic epithets and telling the plaintiffs that “faggots don’t wear pants in jail” while denying their requests to put on clothes “faggots don’t wear pants in jail” while denying their requests to put on clothes before being taken in for booking. (The men were apprehended, apparently having been rousted from their beds.)

by educational institutions that received federal financial assistance) as well as other federal rights in dealing with complaints by male plaintiffs that they had been subjected to sexual harassment and abuse by a male university executive. The executive in question, now a former employee of the university, is a co-defendant, whose summary judgment motion was to be addressed by the court in a separate opinion. In this opinion, Judge Mariani explained his findings that the defendants had responded appropriately to the complaints that were made to them, and thus were not liable on the various federal claims asserted against them. The opinion is long and detailed — to detailed to summarize here — but would be useful reading for anybody contemplating filing suit on behalf of students or university employees who claim to have suffered sexual harassment.

PENNNSYLVANIA — A panel of the Pennsylvania Commonwealth Court effectively ended a challenge to Haverford Township’s enactment of a non-discrimination ordinance that includes sexual orientation and gender identity by ruling in Teal v. Board of Commissioners, 2014 Pa. Commw. Unpub. LEXIS 226 (April 11, 2014), that a non-resident of the township, representing a Philadelphia-based anti-gay organization, could not be substituted for the original plaintiff, a township resident who died after the case was filed. The lawsuit alleged irregularities in the enactment of the ordinance.

CRIMINAL LITIGATION NOTES

UNITED STATES ARMY — Major General Jeffrey S. Buchanan, commanding authority for the court martial that convicted Chelsea Manning of violating military law by providing classified information to Wikileaks, rejected a request for clemency and upheld Manning’s 85 year sentence. Manning, confined at Ft. Leavenworth, Kansas, subsequently successfully concluded a name-change proceeding in a Kansas court, changing her name from Bradley to Chelsea in line with her determination of her gender identity. She is seeking treatment for gender dysphoria.
while confined in a military prison, which seems unlikely since military regulations ban service by transgender persons. However, Manning might be able to rely on developing federal case law suggesting that denying medical treatment for gender dysphoria violates the 8th Amendment rights of prisoners. Presumably the 8th Amendment applies in military prisons.

**IDAHO** – The Court of Appeals of Idaho ruled that the U.S. Supreme Court’s *Lawrence v. Texas* decision did not bar the prosecution of a man with mild mental retardation for initiating sex with another man suffering more severe retardation. *State of Idaho v. Hamlin*, 2014 WL 1687137 (Id. Ct. App., April 30, 2014). The defendant was convicted of three counts of sexual abuse of a vulnerable adult, a felony in Idaho, and sentenced to three consecutive, unified sentences of ten years with two years determinate, for an aggregate sentence of thirty years with six years determinate, but the trial court suspended sentence and placed the defendant on probation. This means that although he won’t do prison time, he will be tarred for life as a sex-crime felon, a felony in Idaho, and, therefore, his Fifth Amendment privilege is potentially threatened by the “victim” was mentally impaired to the degree that the court found his consent was not effective. The court also rejected the defendant’s argument that his own mental retardation should be held to excuse his violation. “To the extent that [the defendant] is contending that the statute violates equal protection by prohibiting him from engage in sex with ‘vulnerable adults’ because [the defendant] himself is mentally retarded,” wrote Justice Lansing for the court, “he presents an improperly framed equal protection claim. . . in order for [defendant] to prevail, he would be required to show that he, by virtue of some classification, is being treated differently than a person who does not share that classification. Section 18-1505B creates no such classification. By its express terms, the statute prohibits ‘any person’ from sexually abusing and exploiting a vulnerable adult.” The court affirmed the conviction and sentence.

**ILLINOIS** – Chief Judge David Herndon of the U.S. District Court for the Southern District of Illinois denied a motion to stay a civil proceeding for sexual abuse brought by a male high school student against an employee of Cahokia High School. *Doe v. Cahokia School District #187*, 2014 U.S. Dist. LEXIS 45975 (S.D. Ill., April 3, 2014). While this action against the teacher and the school district is pending, the teacher is simultaneously being prosecuted on an indictment involving charges of criminal sexual assault, aggravated criminal sexual abuse and transmitting HIV, involving a different student from the school. The defendant, Mario Hunt, sought the stay asserting that the pending criminal charges arise out of the “same events that constitute Doe’s civil lawsuit and, therefore, his Fifth Amendment privilege is potentially threatened by the “victim” was mentally impaired. The court, “Appellant’s conduct, the court decided that the defendant was not in custody when he was questioned, so *Miranda* did not apply. As to his constitutional argument, the court emphasized that the Supreme Court said in *Lawrence* that it was not dealing with situations where a party was not capable of giving consent. In this case, the “victim” was mentally impaired to the degree that the court found his consent was not effective. The court also rejected the defendant’s argument that his own mental retardation should be held to excuse his violation. “To the extent that [the defendant] is contending that the statute violates equal protection by prohibiting him from engage in sex with ‘vulnerable adults’ because [the defendant] himself is mentally retarded,” wrote Justice Lansing for the court, “he presents an improperly framed equal protection claim. . . in order for [defendant] to prevail, he would be required to show that he, by virtue of some classification, is being treated differently than a person who does not share that classification. Section 18-1505B creates no such classification. By its express terms, the statute prohibits ‘any person’ from sexually abusing and exploiting a vulnerable adult.” The court affirmed the conviction and sentence.
consenting adults in private.” Thus, Virginia courts continue to adhere to the view, repudiated by the 4th Circuit, that Lawrence was merely an “as-applied” invalidation of the Texas sodomy law. “Applying ordinary principles that govern facial and as applied challenges leads to the conclusion that Code Sec. 18.2-361 is not facially invalid,” insisted McCullough. “Appellant does not raise an as applied challenge and, therefore, his conviction for violating Code Sec. 18.2-361 could properly be considered by the court below in revoking his suspended sentences.”

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PRISONER LITIGATION NOTES

CALIFORNIA -- While transgender inmate Jeffrey B. Norsworthy, a/k/a Michell-Lael B. Norsworthy, stated a claim for sex reassignment surgery [see reporting of companion case in this issue of Law Notes, above], a federal civil rights suit to require the California Department of Corrections and Rehabilitation “to permit her a legal name change” did not fare as well before U.S. District Judge Jon S. Tigar in Norsworthy v. Beard, 2014 U.S. Dist. LEXIS 52205, 2014 WL 1477401 (N.D. Calif., April 15, 2014). Reviewing Norsworthy’s complaint under 28 U.S.C. § 1915A, Judge Tigar found that she should pursue her relief in state court, since “[t]here is not federal subject matter jurisdiction to entertain a petition for change of name.” Judge Tigar noted that Norsworthy is serving a life sentence; that she has “severe Gender Identity Disorder,” with diagnoses and hormone treatment extending over 14 years; and that he has allowed a companion case for sexual reassignment surgery to proceed, for which he has appointed counsel. He found no First Amendment claim, since the name change was sought for personal and not religious reasons; and no Equal Protection claim, since prisoners and non-prisoners are not “similarly situated” with respect to this relief. His dismissal was without prejudice to proceeding in state court, or for amendment of the companion action to assert the name change as “related” relief, if she can establish jurisdiction. William J. Rold

 GEORGIA -- Repeated denial of a gay inmate’s requests for protective custody formed the basis for civil rights claims against six of eight defendants sued after the plaintiff was raped in Bettencourt v. Owens, 2014 U.S. Dist. LEXIS 41687 (M. D. Ga., March 28, 2014). Pro se plaintiff Paul George Bettencourt wrote letters, filed grievances, and pleaded in person to named defendants (three officers, two counselors, and the deputy warden for security) for interdiction against escalating harassment. United States District Judge W. Louis Sands rejected a magistrate’s recommendation that Bettencourt’s case be dismissed for insufficient pleading under the Prison Litigation Reform Act, 28 U.S.C. § 1915A. Bettencourt repeatedly informed the three defendant officers and documented in written detail the increasing aggression by several other inmates -- whom he feared to name but eventually identified -- who harassed him, grabbed him, made him watch them masturbate, and tried to force him to have sex. Bettencourt wrote one defendant counselor twice, and the other one three times. He wrote to the security deputy twice, recounting in his second letter: “The last time we talked you asked me if I was homosexual. I told you I was, and you said ‘what’s the problem then.’” Bettencourt attached the written pleas to his Complaint; and Judge Sands found that these defendants “repeatedly ignored his requests for protection” in violation of the right to be free of deliberate indifference to serious risk of harm enunciated in Farmer v. Brennan, 511 U.S. 825, 833 (1994). “Taken together, the letters and conversations state a plausible claim that the defendants acted with deliberate indifference,” wrote Judge Sands (emphasis his), distinguishing cases holding that inmate letters, without more, do not establish deliberate indifference. As to Security Deputy Allen, who stayed in the case, the court said that Bellencourt wrote to him twice and noted: “The second letter recounts how Bettencourt spoke to Allen in person, only to have Allen dismiss his requests for help with a flippant remark about Bettencourt’s sexual orientation.” Judge Sands dismissed a claim against one officer, who did not learn of the harassment until after the rape, and against the Secretary of Corrections, because his knowledge consisted of a single letter with “generalized allegations.” In what could be considered a shot across the bow, the dismissal of the Secretary was without prejudice. William J. Rold

KENTUCKY -- Holding that allegations by a pro se federal prisoner in a Special Housing Unit (solitary confinement) the he was denied HIV medication on several occasions warrant a response, Chief United States District Judge Karen K. Caldwell ordered the United States Marshal to serve process in Lewis v. Duck, 2014 U.S. Dist. LEXIS 42905 (E.D. Ky., March 31, 2014). William Solomon Lewis proceeded against a correctional lieutenant and a nurse under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), which authorized a cause of action akin to that against state actors under 42 U.S.C. § 1983 when federal officials deny civil rights. Lewis, whose grievances were denied at all levels of the Federal Bureau of Prisons, seeks damages for his “undue pain and suffering” from denial of his medication. William J. Rold

TENNESSEE – A gay jail inmate whose Equal Protection challenge to allegedly discriminatory discipline was upheld in
initial screening—see Gadson v. Fuson, 2013 U.S. Dist. LEXIS 173431 (M. D. Tenn., December 11, 2013), reported in Law Notes (January 2014) at page 39 - lost on summary judgment four months later in Gadson v. Fuson, 2014 U.S. Dist. LEXIS 58042 (M. D. Tenn., April 24, 2014). United States District Judge Aleta A. Trauger had dismissed the county sheriff as a defendant last year but allowed claims against two officers to proceed before United States Magistrate Judge Juliet Griffin, whose Report & Recommendation [“R & R”] called for dismissal of Romania Ann Gadson’s remaining claims with prejudice. Gadson, who was no longer incarcerated, apparently failed to provide adequate papers to counter defendants’ motion for summary judgment, which claimed that her discipline was justified on the basis of her infractions and disciplinary history. Gadson had received 120 hours lock down time versus 72 hours for the others in the incident, but her penalty was later reduced to the same time. She also claimed loss of employment opportunity, which the jail said was caused by housing assignment backlogs. Without citation to any developments in Equal Protection law as applied to gay people – see United States v. Windsor, 570 U.S. 12 (2013); Romer v. Evans, 517 U.S. 620 (1996) -- the R & R: relied on traditional “suspect class “ Equal Protection theory; said gays are not a suspect class in the Sixth Circuit; and found the discrimination justified by a rational basis, at least since it was not adequately contested. [Editor’s Note: Compare Santiago v. Miles, 774 F. Supp. 775 (W.D.N.Y. 1991), which granted relief on allegations of race-base prison discipline in a class action, where discrimination was proven by a showing of widespread anecdotal and disparate impact evidence, expert testimony, and admissions.] Here, the R & R found Gadson’s “subjective objection... simply insufficient support for an Equal Protection claim.” William J. Rold

**LEGAL ADMINISTRATIVE NOTES**

**TITLE IX** – The U.S. Department of Education has issued a new guidance document on Title IX of the Education Act Amendments, which prohibits sex discrimination in educational institutions that received federal financial assistance. The new guidance, titled “Questions and Answers on Title IX and Sexual Violence,” makes clear that violence against people because of their gender identity or transgender status prohibits the statute. The document is available on the Department of Education website: http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

**VIOLENCE AGAINST WOMEN ACT** – A guidance document issued by the Justice Department contains explicit non-discrimination rules for LGBT employees of organizations receiving federal grants to fund domestic violence programs, even though the statute itself does not mention this and President Obama has not yet acceded to requests by LGBT rights advocates to issue a general executive order banning such discrimination by federal contractors and grant recipients. The guidance, dated April 9, is claimed to be the first time the Obama Administration has extended such protections beyond the existing executive orders covering federal employment. Legal Monitor Worldwide, 2014 WLNR 11104249 (April 25, 2014).

**SOCIAL SECURITY ADMIN.** – Lambda Legal announced on April 2 that the Social Security Administration, in response to advocacy by Lambda, had updated its policies and procedures affecting the ability of transgender individuals to receive benefits through their spouses. This followed months of advocacy by Lambda on behalf of Robina Asti, a 92-year-old transgender woman whom Social Security had denied survivor benefits after her husband’s death. The new guidance indicates that regional offices can process such claims without referring them to the Regional Chief Counsel for a legal opinion, providing a detailed multi-step analysis for Social Security staff to follow in determining whether a particular transgender claimant can be considered a surviving spouse. The guidance, effective March 25, 2014, is published in Program Operations Manual System, Part 02 – General, Chapter 003 – Evidence, Subchapter 05 – Proof of Marital Relationship.

**INTERNAL REVENUE SERVICE** – On April 5, 2014, the Internal Revenue Service released a Notice titled “Application of the Windsor Decision and Rev. Rul. 2013-17 to Qualified Retirement Plans, Notice 2014-19, 2014 WL 1334128. Unfortunately, some employee benefits specialists have criticized the notice as leaving some ambiguities. The principal authors of the notice are identified as Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division, and Jeremy Lamb of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). Those seeking further information are advised to contact Ms. Carrington at RetirementPlanQuestions@irs.gov.

**FLORIDA** – Pembroke Pine’s commissioners unanimously voted to extend benefits to employees in domestic partnerships, after an actuarial firm estimated that the cost would be about $1.16 million annually. Some supporters noted that the real issue – the right of same-sex couples to marry – was now in the courts and
might make this measure superfluous. *Sun Sentinel*, April 21.

**FLORIDA** – The Neptune Beach City Council voted 3-2 on April 7 to approve a resolution supporting pending state legislation that would ban discrimination because of sexual orientation or gender identity. *Florida Times-Union*, April 8.

**FLORIDA** – The Punta Gorda City Council voted unanimously on April 2 to approve a domestic partnership law extending to unmarried gay and straight couples some of the same legal rights under local laws enjoyed by married couples. The measure establishes a partnership registry. Registered partners will be authorized to act on each other’s behalf within city limits in medical emergencies and end-of-life situations. It also extends to making health care decisions, visitation rights at health care facilities, making funeral and burial decisions, notifications in the event of emergencies, allows partners to be appointed as guardians and allows for participation in educational decisions for a dependent. *Charlotte Sun*, April 3.

**LOUISIANA** – Refusing to follow the lead of Virginia, which recently repealed its unconstitutional sodomy law after it had been held unconstitutional by the 4th Circuit Court of Appeals in a habeas corpus proceeding, the Louisiana House voted 27-66 against a bill that would have repealed its unconstitutional sodomy law. A House committee had previously approved by the bill by a vote of 9-6, but one of the state’s most influential lobbying groups, the Christian Louisiana Family Forum, opposed the measure, according to an April 15 post on the blog nola.com. The lobbying group sent a letter to legislators stating that the existing sodomy law “is consistent with the values of Louisiana residents who consider this behavior to be dangerous, unhealthy and immoral.” ** * The Louisiana House Commerce Committee voted 12-3 on April 28 to reject a bill that would have outlawed discrimination because of sexual orientation, gender identity, veteran’s status, source of income, domestic abuse victim status and conviction record in the sale or lease of residential property. *Shreveporttimes.com.*

**MASSACHUSETTS** – On April 25, Governor Deval Patrick signed into law An Act Relative to Bullying in Schools which enhances a statute passed on this issue in 2010, to require that school districts include in their bullying prevention plans the recognition that certain categories of students, including LGBTQ students, are particularly vulnerable to bullying. The measure also establishes a data collection and reporting process that will provide empirical evidence upon which policymakers and administrators can rely to evaluate the effectiveness of school efforts to combat bullying. *MassEquality News Release*, April 26.

**MINNESOTA** – On May 7 Governor Mark Dayton signed a bill intended to provide better protection against bullying to LGBT students in the state. The law requires school districts to track and investigate reports of bullying within three days and to train faculty to prevent harassment. The previous law merely required school districts to have an anti-bullying policy, but did not establish standards for content or enforcement, according to a report published May 10 by *advocate.com*. The measure identifies nineteen prohibited grounds for bullying, including sexual orientation, gender identity, physical appearance and economic class.

**MISSISSIPPI** – Governor Phil Bryant signed into law the Mississippi Religious Freedom Restoration Act, which will take effect on July 1. In common with similarly-named bills enacted in other jurisdictions and by the U.S. Congress, the measure is intended to protect free exercise of religion against government burdens. During the period leading to its enactment, critics charged that it might lead to state-sanctioned discrimination against gays and lesbians, according to a report in the *Washington Post* on April 4. However, since Mississippi does not include sexual orientation or gender identity in its civil rights laws, such discrimination is already lawful in the state.

**MISSISSIPPI** – The Board of Aldermen in Magnolia, Mississippi, passed a resolution on April 22 recognizing the dignity and worth of all city residents, including those who are LGBT, thus joining three other Mississippi cities that have passed such resolutions this year: Starkville, Hattiesburg, and Oxford. Recent public opinion polling in Mississippi shows that 64 percent of the resident favor workplace non-discrimination protection for LGBT employees, but nobody suggests that a legislative proposal to that effect is likely to be enacted by the state legislature. Local governments do not have legislative authority to enact such a ban; thus, the resolutions of support. *lgbtweekly.com.*

**NEBRASKA** – Proponents of a measure to ban discrimination because of sexual orientation and gender identity fell seven votes short of ending a filibuster by Republicans in the Nebraska legislature, as senators voted 26-22 to end debate. The measure needed 33 votes to carry. A similar measure was defeated in 2007. *Associated Press*, April 7.
LEGISLATIVE / LAW & SOCIETY / INT’L

WISCONSIN – The Milwaukee County Board voted 12-6 in favor of adding sexual orientation and gender identity and expression to the county’s anti-discrimination ordinance, with the endorsement of County Executive Chris Abele. The Board rejected an amendment offered by one member who expressed concern that the measure would protect “male pedophiles” and “sex criminals” who might cross-dress in order to gain access to women’s public restrooms.” Milwaukee Journal Sentinel, April 25.

LAW & SOCIETY NOTES

CALIFORNIA – Graduate student workers in the University of California system reported that they had reached tentative agreement with the University on contract language that establishes access to gender-neutral restrooms on college campuses as a “right.” The demand was made to assure that all students, including transgender students, would have access to gender-neutral restroom facilities, and may be a first for collective bargaining demands with transgender individuals in mind. InsideHigherEd.com, April 23.

KENTUCKY – Jefferson County Attorney Mike O’Connell determined that the Louisville Metro Council cannot provide funding to the Boy Scouts because of that organization’s ban on openly gay Scout leaders, which is inconsistent with the public policy articulated by the city’s anti-discrimination ordinance. Louisville Courier-Journal, April 26.

UNITED METHODIST CHURCH – The United Methodist Church announced approval of insurance benefits to employees in same-sex marriages, according to a Washington Times report published on April 30.

TRANSGENDER LEGAL DEFENSE & EDUCATION FUND – The Transgender Legal Defense & Education Fund reported in an April 7 news release that it had succeeded in winning survivor’s benefits from a major auto company for the surviving widow of a transgender man. The spouses met in high school, then reconnected many years later. The husband completed gender transition, obtaining legal recognition of his male gender identity and worked for the same employer for decades. After the husband was diagnosed with terminal cancer in 2012, he and his wife contacted the company’s benefits administrator to ensure that everything was in order for her to receive his pension benefits when he died, but the company, which had always previously respected the marriage, now demurred. They contacted TLDEF before he died, and the organization continued to advocate on the widow’s behalf, assisted by pro bono attorneys Sarah O’Connell and Michael Flynn from Norton Rose Fulbright LLP. After a lengthy internal appeal process that went to the company’s General Counsel, they finally prevailed, agreeing to recognizing the widow’s status and to award benefits retroactive to her husband’s death. None of the parties were named in the news release to preserve the widow’s confidentiality.

INTERNATIONAL NOTES

AUSTRALIA – Reacting to a recent decision by the Supreme Court of India reinstating the country’s criminal sodomy law and the continuing oppression of gay people in Muslim communities in India, the Refugee Review Tribunal in Australia announced that it had granted refugee status to a gay university student from India who sought to escape his Muslim family and an arranged marriage with an Indian woman engineered by his father. The man, who lives with a boyfriend in New South Wales, arrived on a student visa in 2009 but withdrew from his business management course six months later. When he last returned to Hyderabad, his father locked him in a bedroom and demanded that he enter into the arranged marriage, and male cousins assaulted him and threatened his life unless he renounced homosexuality. He escaped with the help of a female friend, hiding in her house until he could use his return ticket to fly back to Australia. The immigration department had rejected his claim of persecution on account of his sexual orientation, finding that he could safely move to a different city in India, but the Tribunal disagreed, noting that the man’s father was a government official who could engage the police to hunt him down, and accepting that he could not “live openly as a homosexual in India at any location, as if he did this would result in ostracism and probable further significant harm.” The man and his partner had registered to marry in the Australian Capital Territory (ACT) before the High Court struck down ACT’s same-sex marriage legislation as preempted by national law. Australian, April 23. This decision has to be considered a severe embarrassment to the Indian government, as it signifies the Tribunal’s conclusion that the Indian government is unable or unwilling to control forces in the country that persecute gay people there. It is noteworthy, as reported above in our lead story, that the Indian government has asked the Supreme Court to reconsider its sodomy ruling, but that is the incumbent government which is not expected to survive the current national elections, and its likely successor has not publicly committed to support for gay rights in India.

AUSTRALIA – The Sydney Morning Herald (April 18) reports that a convicted rapist who was charged
with murdering a man with whom he had just had sex has been allowed to plead guilty to manslaughter, having contended that he was provoked by the victim’s admission after the sex that he was HIV-positive. According to the newspaper report, Paul Darcey Armstrong said he was “very angry” when he assaulted Felipe Flores in a “notorious Woolloomooloo lover’s lane” in September 1991. He was found guilty of murder by a jury in 2010, but the conviction was reversed on appeal and retrial ordered, leading to this plea bargain, based on the partial defense of provocation. The prosecution accepted the plea on evidence that Armstrong’s “loss of control” was “induced” by Flores’ disclosure that he was HIV-positive after the men had oral sex. The prosecution considered the state of knowledge and treatment at the time, when HIV infection was generally considered a death sentence. Armstrong had been identified through DNA collected at the murder scene when Flores’ body was found by security guards. In 2010 Armstrong had been convicted in Sydney District Court of two counts of non-consensual sexual intercourse with a male from an incident that occurred in 1992 when he was still at large before being prosecuted for the murder of Flores.

**BRUNEI** – The Sultan of Brunei, Hassanal Bolkiah, announced that as of May 1 the state would begin enforcing Sharia penal law, which includes severe punishment (death by stoning) for such acts as adultery, rape, and same-sex sexual activity. The announcement drew immediate condemnation from the United Nations Human Rights Office and various governments, including the U.S. government, and has inspired boycotts of businesses owned by Brunei, including the Beverly Hills Hotel, where a group of well-heeled gay philanthropists have cancelled plans to hold a previously-scheduled conference.

**CANADA** – Controversy over the chartering of a law school at Trinity Western University may end up in the Supreme Court of Canada, after the Federation of Canadian Law Societies and the British Columbia Ministry of Advanced Education approved the school, despite its requirement that students and staff sign a Community Covenant prohibiting any sex outside of different-sex marriage. This in a country where same-sex marriage has been established in the law for a decade... The British Columbia Civil Liberties Association supports the school, arguing TWU is a private, faith-based school and “religious believers should not be discriminated against,” reported the Vancouver Sun on May 1. Law societies in Ontario and Nova Scotia have voted against recognizing graduates of TWU for practice in those provinces, and British Columbia’s law society is reconsidering its original vote in favor of recognition in light of the controversy among its own members.

**CHINA (HONG KONG)** – The South China Morning Post reported on April 3 that Equal Opportunities Commission head Dr. York Chow Yat-ngok issued a statement objecting to a proposed bill that would require transgender people to have full “sex-change surgery” before they can marry, criticizing this as “inappropriate and unnecessary.” A transsexual litigant who had undergone such surgery recently won a ruling authorizing her to marry her male fiancé, but the court had left open the question whether such surgery is a necessary prerequisite for a transgender person to avail themselves of that right. The Marriage (Amendment) Bill, introduced after the court ruling, includes the surgery requirement. Dr. Chow said that 60-70 percent of transgender people do not submit to “the extremely invasive and difficult medical procedure” and that the surgical requirement would “deter more transgender people from being able to get married.”

**EGYPT** - Daily News Egypt reported on April 7 that an Egyptian court had sentenced four men to up to eight years in prison for “practicing homosexuality,” which consisted in this case of accusations that the men held “deviant parties” and “dressed in women’s clothes.” These recognized partnerships would be called marriages.

**MALTA** – The Parliament voted on April 14 to approve a law to recognize same-sex partnerships on a legal par with marriage, including allowing gay couples to adopt children. Reuters reported that Labor Prime Minister Joseph Muscat stated: “Malta is now more liberal and more European and it has given equality to all its people.” However, the news report did not state that

**NETHERLANDS** – New rules have come into effect providing that both women in a couple can legally be the parents of children without going through adoption procedures, according to an April 6 report by news agency ANP. The rule does not apply to male couples because legal parentage rests with a mother, who can’t transfer it without a legal proceeding.

**NORTHERN IRELAND** – The Assembly has voted for a third time to reject a proposal to adopt a same-sex marriage bill, by a vote of 51-43. This leaves Northern Ireland the only part of the United Kingdom that doesn’t allow same-sex marriages when the recent Scottish legislation goes into effect later this year. Amnesty International reacted to the vote by warning that a legal challenge might be filed contending that the failure to
extend marriage equality to Northern Ireland violates international law – presumably the European Convention on Human Rights. That is a questionable proposition, since the European Court of Human Rights has yet to declare that the right to marry includes same-sex couples. An application to consider the case of Northern Ireland would require the Court to determine whether recent prominent additions to the bloc of Convention adherents allowing same-sex marriage (Britain, Scotland, France) indicates a consensus has been reached, but at present the number of adherents allowing same-sex marriage remains a minority by number and population.

SINGAPORE – Wee Kim San Lawrence Bernard has withdrawn his appeal to the High Court seeking a declaration that the Singapore Constitution bans workplace discrimination against gay men, according to an announcement by the Attorney-General’s Chambers reported April 23 by Straits Times. Three other individual also withdrew applications to join in Mr. Wee’s appeal. Wee had sued his former employer for discrimination and lost, and then filed an action against the Attorney-General seeking a declaration from the High Court.

TURKEY – Justice and Development Minister Bekir Bozdag announced that plans were under way to construct separate prisons for gay inmates to “protect convicts” with different sexual orientations. A report on the English-language blog of Deutsche Welle World (April 17) quoted a gay man to the effect that gay prisoners are already segregated within prisons, and there are also separate facilities for transgender prisoners. Even though homosexuality is technically legal in Turkey, there is much societal discrimination and no protect under law against such discrimination.

UGANDA – The signing by President Yoweri Museveni of a “draconian anti-gay bill” has led to a time of fear and repression for gay people in Uganda, according to an April 24 report by AllAfrica.com, which reports that many gay activists have fled the country and most gay organizations were closed “due to fear.” There continue to be reports of individual gay people being attacked, evicted by landlords, arrested and detained, or targeted by anti-gay mobs. A gay hotline operator was quoted as having received reports of at least 130 incidents across the country since the bill was signed late in February, as the legislation appears to have been widely interpreted to give license to individual citizens and law enforcement officials to go after gay people. * * * The Cape Times (South Africa) reported on April 29 that the Ugandan government is considering a new legislative proposal to bar non-governmental organizations from “promoting homosexuality,” which could effectively shut down foreign-funded human rights organizations in the country.

UKRAINE (RUSSIAN- OCCUPIED CRIMEA) – As Russia has annexed the peninsula of Crimea, the Russian laws prohibiting promotion of homosexuality went into effect there, resulting in cancellation of a planned Gay Pride march in Sevastopol, according to an April 14 report by GayStarNews.com. The Crimea Republic State Council, recently constituted by the occupying authorities, adopted a new constitution on April 11. Contrary to the fears of some gay activists, the new constitution does not include a clause defining marriage as between a man and a woman, but the equality guarantee provisions do not expressly reference sexual minorities.

UNITED KINGDOM – The Court of Appeal has ruled that a gay man convicted of murdering another person over a debt cannot be deported to Jamaica because of the likelihood he would be harmed there due to his sexual orientation. The man, referred to in the court’s opinion as J.R., committed the offense while a teenager, and was released from custody in June 2012 after serving ten years detention. He successfully appealed against attempts by Home Secretary Theresa May to deport him. Lord Justice Kay, sitting in a panel with Lord Justice Lewison and Sir Stanley Burnton, blocked the latest deportation attempt, to political and press criticism. The Home Office indicated that it might appeal to the Supreme Court. Evening Standard, April 17.

SOUTHERN POVERTY LAW CENTER announced April 14 that it
LAMBDA LEGAL has hired OMAR GONZALEZ-PAGAN to be a staff attorney at its national headquarters office in New York City. He is a graduate of the University of Pennsylvania Law School and has previously worked in various capacities as a government attorney in Massachusetts, including as part of the team that represented the state in its challenge to the constitutionality of the Defense of Marriage Act.

The ASSOC. OF AMERICAN LAW SCHOOLS MIDYEAR MEETING, to be held in Washington, D.C. at the City Center Hotel on June 5-7, will include a WORKSHOP ON SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES planned by prominent scholars and teachers in the field. The program will include plenary sessions and panel discussions throughout the day on Friday June 6 and Saturday June 7 covering a wide range of LGBT legal issues, and is open to faculty from all AALS member schools. Registration and hotel information is available on the AALS website.

The WILLIAMS INSTITUTE at UCLA Law School announced the appointment of Adam P. Romero as Senior Counsel and Arnold D. Kassoy Scholar of Law. A graduate of Yale Law School, Romero was previously an associate at WilmerHale, where he successfully represented plaintiffs in Cooper-Harris v. USA, the first case to declare that a provision barring the federal government from recognizing same-sex marriages for Veterans Benefits was unconstitutional. Before entering law school, Romero was a criminal defense investigator for Bronx Defenders in New York City.

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PUBLICATIONS NOTED


21. Greenberg, Brad A., DOMA’s Ghost and Copyright Reversionary Interests, 108 Nw. U. L. Rev. 391 (Fall 2013) (argues for amendment of federal copyright law to adopt place of celebration rule in determining whether a copyright holder is survived by a spouse; at present, law looks to place of domicile, which would consider unmarried same-sex spouses who reside in states that do not recognize their marriages).


27. Joslin, Courtney G., and Lawrence C. Levine, The Restatement of Gay(?), 79 Brook. L. Rev. 621 (Winter 2014) (Should the ALI publish a Restatement of the law as it relates to LGBT issues, or instead expand the inclusion of LGBT issues in the existing restatements and uniform state laws?; co-authors, leading LGBT rights scholars and advocates, favor the expanded inclusion approach).


29. Kaplan, Margo, Sex-Positive Law, 89 N.Y.U. L. Rev. 89 (April 2014) (argues that current law inappropriately incorporates assumption that sexual pleasure has no or negative value and suggests reformulation of law to accommodate the idea that sexual pleasure is a good).


31. Krotoszynski, Ronald J., Jr., A Prolegomenon to Any Future Restatement of Privacy, 79 Brook. L. Rev. 505 (Winter 2014) (Should the ALI promulgate a Restatement of Privacy and what should it cover?).

33. Lamparello, Adam, Why Justice Kennedy’s Opinion in Windsor Shortchanged Same-Sex Couples, 46 Conn. L. Rev. Online 27 (January 2014) (argues that the opinion was “doctrinally muddled” and should have contained a clear equal protection rationale that would be textually-based and easier for lower courts to apply in marriage equality litigation).


42. Mate, Manoj, State Constitutions and the Basic Structure Doctrine, 45 Colum. Hum. Rts. L. Rev. 441 (Winter 2014) (advances theory for state constitutional challenges to new amendments, such as Proposition 8 in California).

43. McCabe, Julianna Thomas, et al., Recent Developments in Appellate Advocacy, 49 Tort Trial & Ins. Prac. L.J. 53 (Fall 2013) (includes discussion of “standing” holdings in Hollingsworth v. Perry and U.S. v. Windsor, the Supreme Court’s June 2013 marriage equality cases).

44. McKay, Bernard L., “Are We Married Or Not?”: Estate Planning Challenges for Same Sex couples in Light of DOMA, 24 No. 4 Ohio Prob. L.J. NL 7 (March/April 2014).

45. McNamara, Maura, Better to Be Out in Prison Than Out in Public: LGBTQ Constitutional Protection if They are Open About Their Sexuality While in Prison, 23 Tulane J. L. & Sexuality 135 (2014).


51. Rachmilovitz, Orly, Family Assimilation Demands and Sexual Minority Youth, 98 Minn. L. Rev. 1374 (April 2014) (How should the law deal with situations where families persecute their sexual minority members?).


58. Simson, Gary J., Religion’s Role in Bans on Same-Sex Marriage: Attributing laws to deep animus is inaccurate — and makes them more difficult to defeat, National L. J., April 14, 2014 (argues that bans on same-sex marriage should be struck down as violative of the Establishment Clause, not the Equal Protection Clause).


63. Stevens, Andrew C., By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage, 63 Emory L.J. 979 (2014) (argues that licensing religious officials to solemnize marriages may violate the Establishment Clause and that religious officials who are licensed to solemnize marriages may not escape Equal Protection liability for refusing to marry same-sex couples).


public interest and the interests of the parties would be best served by this Court imposing a stay on the district court’s order until this case is reviewed on appeal.” The court then quoted from the decision by District Judge Timothy S. Black in an Ohio marriage recognition case, Henry v. Himes, 2014 WL 1512541 (S.D. Ohio), explaining why he was staying that decision pending a ruling on appeal. Judge Black had written, “Premature celebration and confusion do not serve anyone’s best interests. The federal appeals courts need to rule, as does the United States Supreme Court.”

Without tipping its hand as to the appropriate outcome on the merits, the motion panel joined with other courts (but not, initially, the 10th Circuit) in concluding that requiring states to allow same-sex couples to marry or to recognize out-of-state same-sex marriages is too big a step to take without appellate authority – and, most particularly, Supreme Court authority.


SPECIALY NOTED

The Tulane Journal of Law & Sexuality has published its 2014 issue, Volume 23. Individual articles, notes and comments are listed separately. The issue also includes the winning paper for the National LGBT Bar Association Michael Greenberg Writing Competition, by Natacha Lam, Harvard Law Class of 2014. * * * The annual Developments in the Law issue of the Harvard Law Review is devoted to LGBT legal issues other than marriage equality. 127 Harvard L. Rev. (April 2014). The editors explained that many law reviews have published symposia on marriage equality recently, so they decided to focus on the myriad of other LGBT legal issues that need to be addressed. Individual articles are noted separately. * * * The Congressional Research Service has released a report by one of its legislative attorneys, Alison M. Smith, titled Same-Sex Marriage: A Legal Background After United States v. Windsor, which is available on the CRS website: www.crs.gov. Dated April 17, 2014, the report’s summary of post-Windsor litigation developments has already been outdated by new decisions issued after its publication, but can provide a useful interim resource as the campaign for marriage equality continues to unfold.

EDITOR’S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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