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Trump Administration Urges Supreme Court to Let Transgender Military Ban Go into Effect

By Arthur S. Leonard

Apparently irked by lower federal courts refusing to let President Trump's transgender military ban go into effect, the Administration, represented by Solicitor General Noel J. Francisco, has peppered the Supreme Court with petitions and motions seeking to short-circuit the normal litigation process and allow the ban to go into effect while the lawsuits pending in several federal district and appellate courts grind on. Impatient that two circuit courts of appeals had not yet ruled on the government's motions to dissolve preliminary injunctions issued a year ago blocking the ban, Francisco filed petitions in three pending cases on November 23, asking the Court to take those appeals directly and decide them this term. Then, on December 13, Francisco filed motions in all three cases asking the Court to issue a stay against the preliminary injunctions, even if it decides not to grant the petitions, so that the policy can go into effect right away. As a last-ditch move, Francisco asked that if the Court was unwilling to stay the injunctions, it at least narrow them so they apply only to the plaintiffs in the three cases. On December 24, briefs in opposition to the petitions for certiorari before judgment were filed by teams of attorneys for the respondents in all three cases, and briefs in opposition to the motions were filed December 28. (Neither the Solicitor General nor the Supreme Court (which required that the motions be answered by the 28th) thought it mete to allow attorneys for the plaintiffs to celebrate the holidays in peace.)

The cases on the Supreme Court docket are Trump v. Karnoski, No. 18-676; Trump v. Jane Doe 2, No. 18-677; and Trump v. Stockman, No. 18-678. Upon filing of responsive briefs, the Supreme Court on-line docket showed that the files on the cert petitions had been circulated for the Court's conference on January 11, 2019. The 9th Circuit, having heard argument in Karnoski, issued an Order in Stockman on December 19, announcing that the appeal in that case would be "held in abeyance pending issuance of this court's mandate" in Karnoski.

Trump announced his ban in a series of three tweets on July 26, 2017. Reportedly, Defense Secretary Mattis, who was on vacation at the time, was first informed about this the prior evening, and the Defense Department was caught by surprise, unable to respond to journalist's inquiries the next day because nobody had been alerted to this policy change. As the government has stonewalled against discovery requests in the pending cases, district judges have suggested that there was no factual basis for the ban, and press reports in the weeks following its announcement suggested that it was entirely political, Trump's response to demands by some House Republicans that he take action to prevent federal funds being spent on gender transition procedures for military personnel. The Republicans had attempted to prohibit such expenditures through an amendment to a military appropriations bill then pending in the House, but the amendment was narrowly defeated. Its proponents threatened the president with blocking the appropriations bill – which included funding for his Wall – if he didn't take action. Banning all transgender people from serving in the military was his apparent response.

Litigation followed in four federal district courts, resulting within months in all four trial judges granting plaintiffs' motions for preliminary injunctions to stop the ban from going into effect while the litigation was going on. Plaintiffs had to persuade all four judges that they were likely to succeed in proving that the ban was unconstitutional, that blocking it was not harmful to the national interest, and that letting it go into effect would cause irreparable harm to the plaintiffs. All four judges agreed with the plaintiffs, and several held that a policy that discriminates against transgender individuals is subject to intermediate scrutiny under the Equal Protection requirement of the 5th Amendment. This means that it is presumed unconstitutional and the government bears the burden of showing that the challenged policy substantially advances an important public interest. One of the judges, Marsha Pechman of the Western District of Washington, went further and found that gender identity discrimination involves a "suspect classification" subject to strict scrutiny, putting a heavier burden on the government: to show the policy is necessary to achieve a compelling government interest.

In August 2017, Trump issued a memorandum expanding on his tweets, ordering Defense Secretary James Mattis to devise an implementation plan for the ban to be submitted in February 2018. In the meantime, the existing ban on enlistment of transgender people would continue indefinitely, and the ban on continued service by transgender military personnel would not go into effect until March 2018. The first impact of the preliminary injunctions was to require the Defense Department to allow transgender individuals to enlist beginning January 1, 2018, a date that Secretary Mattis had announced at the end of June 2017, when he ordered a six-month delay past the date that had been specified by former Defense Secretary Ashton Carter in June 2016, when Carter had announced the end of the existing transgender ban after two years of study. At that time, Carter concluded that banning transgender people from serving in the military was generally unjustified, although he set criteria for determining which transgender people should be allowed to serve, and he delayed raising the ban on enlistment for a year to give the military services time to work out implementation details.

Mattis's submission to Trump in February 2018 recommended a revised
version of the policy that Trump had described in his August 2017 memorandum. It was purportedly based on the findings of a new policy review undertaken by a special Task Force that Mattis had appointed pursuant to the August memorandum, the identity of whose members was undisclosed. Mattis purported to shift the ban from transgender identity to individuals diagnosed with gender dysphoria, thus claiming that his “new” policy was not a “transgender ban” but was rather a ban on individuals suffering a diagnosable mental condition which, as characterized in the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM), was a mental disorder that Mattis contended should be disqualifying for military service. This “new” policy also “grandfathered” transgender military personnel who had identified themselves and transitioned after Secretary Carter ended the prior ban effective July 1, 2016. They would be allowed to continue serving, although those who had not already initiated their transition when the Mattis policy went into effect could not initiate a transition thereafter and continue serving. Essentially, under the Mattis policy, transgender people who are diagnosed with gender dysphoria may not serve in the military, and transgender people who have not been formally diagnosed may continue to serve so long as they don’t transition and serve in their “biological” sex. The “new” policy also provided that transgender people can enlist, provided they have not been diagnosed with gender dysphoria, have not transitioned, and do not intend to transition while in the service.

After Trump issued a new memorandum “withdrawing” his prior memorandum and tweets and authorizing the Defense Department and the Coast Guard to adopt Mattis’s “new” policy, the government filed motions in all four pending lawsuits to dissolve the preliminary injunctions, arguing that these injunctions were directed against the August 2017 Trump Memorandum, and were now moot because Trump had rescinded that Memorandum. The government argued that the “new” Mattis policy was no longer a transgender ban, but rather a restriction on military service by individuals who were suffering from a diagnosed medical condition. As such, the government argued, it does not get heightened scrutiny, is not presumptively unconstitutional, and the government has no burden to justify it. Indeed, they now argued, Mattis’s determination, pursuant to the Task Force Report, that those diagnosed with gender dysphoria should be medically disqualified from the service, is entitled to the traditional deference that federal courts pay to military personnel policies based on professional military expertise.

Three of the district judges, in Seattle, Riverside (California), and Washington, D.C., rejected the government’s motions to dissolve the preliminary injunctions. All of them have seen through the semantic game that the Administration is playing. They have pointed out that Trump’s August 2017 Memorandum directed Mattis to come up with a plan for “implementing” the ban, and that this is what his “new” policy is. Indeed, with minor exceptions, the judges concluded, the “new” policy is merely a restatement of the old one, and has the same effect, albeit purporting to remove a class of plaintiffs by allowing military personnel who have transitioned to continue serving. The government has appealed those three rulings. The 9th Circuit Court of Appeals heard arguments in the cases from Washington State and California in October, and the D.C. Circuit heard arguments on December 10. The impatient administration, perhaps anticipating that its appeals might be unsuccessful, filed its cert petitions on November 23 urging the Supreme Court to intervene in the cases without waiting for those opinions to be issued. [Late Bulletin: On January 4, 2019, the D.C. Circuit issued a ruling reversing the district court’s determination that the Mattis Implementation Plan was merely a slightly different version of the original total ban tweeted by Trump, and reversed that court’s denial of the government’s motion to dissolve the preliminary injunction that had been issued in October 2017. Full details in the February issue of Law Notes.]

In the fourth case, pending in the District Court in Baltimore, the judge who issued the preliminary injunction retired in June 2018, and the judge who has taken over the case has yet to rule on the government’s motion. However, in a ruling on discovery matters issued on November 30, the judge clearly signaled the likelihood that he will join his three colleagues in denying the motion, in which case the government would be filing an appeal in the 4th Circuit and would likely file a new cert petition and motion in the Supreme Court.

In both the November Cert Petitions and the December Motions for a Stay, Solicitor General Francisco argued as if there is some emergency to national security that requires the Defense Department to start dismissing those barred from continuing service under the Mattis policy as quickly as possible, without, of course, citing any concrete evidence that such individuals are currently impairing the national defense. But the government’s position is internally inconsistent, since the policy it wants to implement allows currently serving transgender people who have transitioned to continue serving, while at the same time arguing that the military must exclude anybody who has been diagnosed with gender dysphoria, while instituting the equivalent of the old “don’t ask, don’t tell” policy on transgender personnel who have not yet come forward seeking a diagnosis and transitional health care. Of course, under the standards of care followed by medical professionals, only those who have been diagnosed with gender dysphoria will be provided with medical procedures for transition, including prescription hormones and surgical alteration, so the government is conceding, de facto, that there is no good reason to discharge people just because they have been diagnosed with gender dysphoria, other than the likelihood that they would be able to successfully challenge those discharges in court.

The Petitions and Motions that Francisco filed in the Supreme Court present the Court with what appears to be deceptive and revisionist accounts of the Trump Administration’s treatment of this issue. For example, even though Trump’s initial tweets stated a categorical ban on transsexual individuals serving in the military (“may not serve in any
capacity”), Francisco’s account suggests that this is not a ban at all, projecting backwards from the semantic sleight-of-hand engaged by the Task Force Report. In addition, Francisco implies that Mattis’s directive at the end of June 2017 delaying the lifting of the enlistment ban by six months and appointing a group to study the enlistment issue further was actually setting in motion a complete re-evaluation of Carter’s transgender policy decision and, by implication, provide the military justification for Trump’s July tweets and subsequent August memorandum. This was clearly an attempt to counter findings by the district judges that the Trump ban was implemented without any advance study or factual basis, and that the Task Force Mattis subsequently appointed in the fall of 2017 was intended to provide an after-the-fact justification for Trump’s politically-motivated policy declarations.

In his petitions filed on November 23, Francisco urged the Court to deny any request for an extension of time by the plaintiffs to file reply briefs, and he waived in advance the government’s right to file briefs responding to whatever the plaintiffs file, with the expectation that this would make it possible for the Court to consider the petitions quickly enough that if they are granted, the cases can be argued during the current term of the Court and decided before the end of June 2019. In the event, the Respondents filed reply briefs on December 24, leaving plenty of time for distribution of the files to the justices for conference in January. The Court lists April 24 as the last argument date for this Term. After a petition is granted, the petitioners have 45 days to file a brief on the merits, the respondents then have 30 days to file responding briefs in support of the decision being appealed, and the petitioners then have a last chance to file replies to the petitioners’ responses within 30 days. That adds up to 3-1/2 months, so a petition granted after mid-January would likely be put over to the Fall 2019 Term for argument unless the Court were convinced that there was an urgent reason to decide the case this term. A case is scheduled for oral argument after all these papers (including any friend-of-the-court briefs) have been filed. Solicitor General Francisco urges similar expedition regarding his motions for staying the injunctions, asking that they be taken up together with the Petitions, most likely at the Court’s January 11 conference. (The Court’s rules give respondents up to 10 days to file briefs responding to motions. Upon filing of the Motions, the justices asked for any responses to be filed by December 28.) If the Supreme Court granted a stay of the preliminary injunctions, the Mattis policy could go into effect while the case is pending, which means the Defense Department could move immediately to discharge transgender personnel who are not “grandfathered” under the policy and who are not willing to forswear any transitional treatment until after retiring from the military.

Given his contention that it is vitally important for national security for the Mattis policy to go into effect as soon as possible, Francisco obviously viewed the possibility that the cases might not be argued until the Court’s next Term with alarm, as expressed in his Motions for Stay. But, of course, this urgency was inconsistent with allowing transgender troops to continue serving if they had already transitioned, unless the government is willing to drop its argument that anybody who has ever been diagnosed with gender dysphoria (other than these “grandfathered” troops) should be disqualified from military service. And if it drops that position, it is conceding that a categorical ban based on a diagnosis of gender dysphoria is not warranted, and essentially exposing that the motivation behind this ban is political rather than military. Furthermore, as all three responding briefs filed on December 24 argue, the Petitions themselves, seeking to jump over intermediate appellate review, don’t support the argument that such a disruption of the usual litigation path is necessary because their recitation of the history of the issue shows that it was not until recently that the government has suddenly discerned an emergency. All of the preliminary injunctions have been in effect for more than a year, with no demonstrated untoward effect on military readiness, morale, or “lethality,” to use the term favored by Mattis, whose sudden retirement was provoked by the president shortly before Christmas when the president decided, without input and over the protests of military leaders, to order withdrawal of U.S. forces from Syria and a sharp reduction of U.S. forces in Afghanistan, a move applauded by Russian President Vladimir Putin. Mattis stated his retirement would be effective the end of February, but the snowflake president was so flustered by media commentary pointed out the implied criticism of the president in Mattis’s resignation letter that the president abruptly accelerated the retirement to the end of December, placing in charge of the Pentagon Mattis’s deputy whose qualifications for the main job were dubious at best (which is not a departure for President Trump’s standards for placing persons at the head of vital federal departments and agencies).

Francisco’s Motions urge that if the Court is not willing to stay the preliminary injunctions, it should narrow them to focus on the individual plaintiffs in the pending cases. In making this argument, Francisco incidentally casts light on the active role that district courts have been playing during the first two years of the Trump Administration in checking the president’s errant executive policy-making, noting that district courts have issued 25 nationwide injunctions against Trump Executive Orders and other policy directives. This is certainly some kind of record, and it illustrates Trump’s disdain for separation of powers and his conception of the president as a sovereign monarch who can legislate from his desk rather than a public servant charged primarily with enforcing the policies enacted by the Congress. Francisco bemoans the phenomenon of nationwide injunctions, suggesting that they violate Article III of the Constitution by extending relief beyond the individual parties who had standing to bring the lawsuits. He cites the Supreme Court’s action in narrowing the nationwide injunctive relief that a district court had issued against the military’s administrative anti-gay policies in 1991 in the Meinhold case, failing to note the distinction that the Meinhold injunction required the DOD to discontinue a long-standing policy in...
response to an individual complaint by one discharged service member, while the preliminary injunctions in the current cases are preserving the status quo – the policy announced by Secretary Carter that went into effect on July 1, 2016 – pending an ultimate determination on the merits of whether Trump’s new policy is constitutional, a facial attack brought by four groups of plaintiffs in different parts of the country, including two states and organizational plaintiffs with large numbers of potentially affected members. There is all the difference in the world between the two kinds of injunctions, making the Court’s action on the earlier one no precedent for the Francisco Motions.

In his Petitions and Motions, Francisco argued that the Mattis policy was based on professional military judgment and entitled to deference on that basis. The briefs in response to the cert petitions, filed on December 24, provide the Court with strong counter-arguments on every point advanced by Francisco, demonstrate that there is no reason to make interlocutory rulings at this time, and generally expose the “alternate facts” propounded by the Solicitor General’s petitions. The December 28 briefs opposing the motions drove home the point that the injunctions were preserving a status quo (transgender military service) that has existed long enough without causing significant problems so that there is no urgent need to institute the new policy, which will cause irreparable injury to the lives and careers of thousands of people without any justification having been proven in court. They also note the district courts’ finding that implementing the ban would cause disruption to the military, as well as forfeiting the investment in training and experience that the country has made in the transgender personnel who are currently serving. [Late Bulletin: The D.C. Circuit’s January 4 ruling could take the wind out of the sails of the Solicitor General’s cert petition in the Jane Doe 2 case.]

Another LGBT Litigant Seeks Supreme Court Review of a Sexual Orientation Discrimination Claim

By Arthur S. Leonard

On December 14, 2018, Lisa Marie Kerr, representing herself, filed a petition for certiorari, seeking U.S. Supreme Court review in her long-running litigation against Marshall University concerning its refusal to issue her a teaching credential in the state of West Virginia, after her falling-out with faculty members in the graduate education program, as well as the classroom teacher whom was assigned as her mentor, led her not to complete her student teaching semester. She was awarded no credit for what was a mandatory part of the program. Kerr v. Marshall University Board of Governors, No. 18-780.

Her district court complaint . . . alleged seven causes of action: defamation, tortious interference with business expectancy, tort of outrage, due process violations, equal protection violations, and a violation of the Fair Labor Standards Act. (Notably missing from her complaint was an allegation of violation of Title IX of the Education Amendments of 1972, but this is not surprising given the date of her complaint, as there was not then a body of administrative and decisional law suggesting that anti-gay actions by educational institutions might violate Title IX.) Since she was representing herself, the district judge referred defendants’ motion to dismiss to a magistrate judge, who recommended dismissal, accepting, inter alia, defendants’ claims of immunity from suit. The district court accepted the magistrate’s recommendation, premised on the ground that Kerr’s factual allegations had failed to state a claim. Kerr appealed to the 4th Circuit, which affirmed the district court’s decision in a published opinion, Kerr v. Marshall University Board of Governors, 824 F.3d 72 (4th Cir. 2016). The court did not remand the matter for further proceedings. Kerr’s motion for reconsideration was denied, and she did not file a petition for certiorari with the Supreme Court at that time.

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Kerr, a member of the bar in California and West Virginia, decided to leave law practice after her same-sex partner died, to become a public school teacher. She enrolled in Marshall University’s two-year master’s program seeking to achieve West Virginia teacher certification. (In her Petition, she says that the state has delegated to educational institutions the ability to confer the required certification.) Kerr alleges that she received excellent grades and evaluations until she “disclosed her homosexual orientation” to an instructor, after which everything soured because, according to Kerr, the University will not, allegedly as a matter of policy, award a teaching credential to somebody they know to be gay. Kerr appealed the decision to deny her certification internally before filing suit in federal district court.

Her district court complaint, filed pro se on March 14, 2014, alleged seven causes of action: defamation, tortious interference with business expectancy, tort of outrage, due process violations, equal protection violations, and a violation of the Fair Labor Standards Act.
More than a year later, Kerr filed a motion with the district court to “re-open judgment” and for leave to file an amended complaint. However, she had earlier filed a new complaint with the court, alleging several of the claims from her earlier complaint, this time adopting the theory (by 2016 reasonably well-advanced in cases involving students and in developing case law under other federal sex discrimination statutes, such as the EEOC’s 2015 ruling that sexual orientation claims could be asserted under Title VII) that her equal protection arguments should instead be considered under Title IX, and further elaborating her factual allegations. Defendants moved that the new suit should be dismissed under the principles of res judicata and the applicable statute of limitations. The district court dismissed the 2016 lawsuit in an order dated September 21, 2017. And, on February 26, 2018, the district court denied Kerr’s motion to reopen the earlier-filed case. See Kerr v. Marshall University Board of Governors, 2018 WL 934614. Chief District Judge Thomas E. Johnston rejected Kerr’s argument that the 4th Circuit’s ruling on failure to state a claim “somehow equates to authorization for her to re-litigate the closed action.” The district court decided that Kerr was acting in bad faith, stating: “Plaintiff has strategically drug Defendants through litigious waters for the better part of four years in two separately filed actions. Regardless of whether the proposed amendments would be futile, the Court is convinced that indications of bad faith coupled with the additional prejudice it would cause Defendants are reason enough to forbid Plaintiff from amending her Complaint at this exceptionally belated point in time.”

Kerr appealed this ruling to the 4th Circuit, which summarily affirmed with a brief per curiam opinion, see 735 Fed. Appx. 827, issued on August 28, 2018. While denying the defendants’ motion to deem her appeal frivolous, the court said it found that no reversible error had been committed by the district court in handling the two cases.

Kerr’s petition focuses both on the underlying merits of her sex discrimination/equal protection claim and procedural issues. Noting recent court of appeals decisions in the 2nd, 7th and 11th Circuits on the question whether sexual orientation discrimination claims may be brought under Title VII, in her first question presented she asks the Court to take up the same question presented in the cert petitions filed last year in the 2nd and 11th Circuit cases, noting the split of circuit authority. The remainder of her four questions go to other issues peculiar to her case, including whether it was an abuse of discretion for the district court to deny leave to amend her first-filed complaint “when a non-frivolous First Amended Complaint is filed after 12(b) (6) judgment,” and questioning whether the district court had properly handled the issue of “academic deference” in the context of a summary judgment motion.

If the Supreme Court grants review in Altitude Express v. Zarda (2nd Circuit) and/or Bostock v. Clayton County Board of Commissioners (11th Circuit), it seems unlikely that it would subsequently grant review in this case, with all its jurisdictional and procedural complications. And even if the Court decides to put off for now the Title VII question by denying review in both those cases, it would seem even more unlikely that it would seize upon this case as a new vehicle for addressing the question, inasmuch as the 4th Circuit did not address the issue on the merits in its published ruling affirming the district court’s dismissal of Kerr’s equal protection claim under 42 USC Sec. 1983. The 4th Circuit did not in that opinion pronounce anything on the question whether sexual orientation discrimination is actionable as sex discrimination. Rather, it focused on the shortcomings it saw in Kerr’s factual allegations, which led it to affirm the district court’s conclusion that she had not alleged facts sufficient to put into play the issue of discrimination because of sexual orientation. Thus, this case does not present itself as the sort of vehicle the Court would likely adopt to address that issue on the merits.

Obamacare Ruling Endangers Health Insurance Coverage for LGBTQ People

By Arthur S. Leonard

U.S. District Judge Reed O’Connor’s decision in Texas v. United States, 2018 U.S. Dist. LEXIS 211547, 2018 WL 6589412 (N.D. Tex., Dec. 14, 2018), declaring the Patient Protection and Affordable Care Act (a/k/a Obamacare) unconstitutional as a result of Congress’s action in 2017 reducing the amount of tax penalty for individuals who do not purchase health insurance to zero, received much press attention and outraged commentary from those supporting the continuation of Obamacare. Little noted in the press commentary, however, although mentioned in LGBTQ press coverage, was the impact that the loss of Obamacare would have on LGBTQ people, because during the Obama Administration the administrators of the program construed the statute’s ban on sex discrimination by health insurance providers to include discrimination because of sexual orientation or gender identity.

The Trump Administration, speaking through former Attorney General Jeff Sessions in a memorandum issued in October 2017, disavowed the Obama Administration’s broad interpretation of sex discrimination laws, but federal courts – including some courts of appeals – have already ruled in favor of those interpretations in enough cases to create circuit splits – thus the three pending cert. petitions before the Supreme Court in Title VII cases, one or more of which may be granted after the Court’s January cert conferences.

Several courts have cited the Obamacare regulations in important rulings concerning the obligation to provide transitional health care for transgender insureds:

On September 18, 2018, U.S. District Judge William M. Conley ruled in Boyden v. Conlin, 2018 WL 4473347 (W.D. Wis.), that the state of
Wisconsin was required to provide such coverage for its transgender employees under its state employee Group Health Insurance program, noting that the court had previously issued a similar ruling in a case involving the state’s Medicaid program, *Flack v. Wisconsin Department of Health Services*, 2018 WL 35748785 (W.D. Wis. July 25, 2018), where the court issued a preliminary injunction, having concluded that transgender plaintiffs were likely to prevail on their coverage claim. Because the *Boyden* case involved public employees, it was also based on the Constitution’s Equal Protection clause, under which many courts have now ruled that transgender people enjoy protection against unjustified discrimination by the government.

On September 20, 2018, U.S. District Judge Donovan W. Frank, rejecting a private sector employer’s motion to dismiss a similar suit under the employer’s own self-insured health coverage for its employees, also found that denial of such coverage was likely to violate the ACA, in *Tovar v. Essentia Health*, 2018 WL 4516949 (D. Minn.). Judge Frank, in addition to citing the *Flack* case from Wisconsin, also cited two earlier decisions holding that the ACA’s sex discrimination ban covered gender identity discrimination claims: *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. 2017), and *Rumble v. Fairview Health Services*, 2017 WL 401940 (D. Minn. Jan. 30, 2017). Because *Tovar* case involved a non-governmental employer, the Constitution’s Equal Protection Clause did not apply.

Although gaps in coverage for LGBTQ individuals may be addressed by state and/or local insurance and antidiscrimination laws in some parts of the country, most states do not provide such protection, so the Obamacare regulations were of overriding importance, and their loss could be a significant setback. O’Connor’s much-criticized opinion turned on two crucial holdings. First, noting that in *National Federation of Independent Businesses v. Sibelius*, 567 U.S. 519 (2012), a majority of the Supreme Court’s justices ruled that the “individual mandate” that persons must buy health insurance could not be sustained under the Commerce Clause, but could be upheld as a tax measure, Judge O’Connor found that Congress’s decision in 2017 to reduce the tax penalty to zero knocked the props out from under the individual mandate. O’Connor focused on the reasons articulated by Chief Justice John Roberts for considering the penalty provision a tax measure, and found that they were rendered a nullity by the virtual elimination of the tax. It was not enough for Congress to leave the penalty provision intact, when it had removed its revenue-generating functions.

Second, O’Connor found that the individual mandate was such an essential and all-encompassing part of Obamacare – it did not make economic sense without it, in his view – that it was not severable, and thus the entire statute had to be struck. He harvested the legislative history and certain quotes in the statute to emphasize the idea that the individual mandate was an “essential” part of the law, such that it could not be removed without collapsing the entire house of cards. Commentators criticized this holding on several grounds. For one thing, by not repealing the penalty provision outright, but just reducing the amount of the tax to be levied for tax year 2019 to zero, Congress had signaled its intent to sustain Obamacare under the taxing power in response to the Supreme Court’s decision. These commentators faulted O’Connor for prioritizing Congress’s intent when it enacted Obamacare in 2010 over Congress’s intent when it adjusted the tax rate as part of the 2017 tax cut bill. Had Congress intended to remove the penalty portion of the individual mandate provision in order to remove the mandate, it would have repealed the entire provision, they argued.

Otherwise, those who might concede that Congress’s jurisdiction to enact or keep the mandate was destroyed by the 2017 tax cut law, nonetheless argued that Obamacare without the mandate could still be sustained, at least in part, by upholding those provisions regulating the practices of insurance companies that could themselves be sustained under the Commerce Clause – an issue that the Supreme Court did not address in its 2012 ruling, although four dissenting justices, not agreeing with Roberts’ taxing power analysis, would have stricken the entire statute as beyond Congress’s Commerce Clause power to enact. O’Connor had found these regulatory provisions to be non-severable because they relied in their economic theory on the revenue generated by the individual mandate, which was supposed to offset the added cost for insurers to issue policies without individual underwriting, to continue to carry insured’s dependent children through age 26, and to provide the full menu of coverage deemed required under implementing regulations (including annual physicals without copays, for example, as well as reproductive health care, and, as it turns out, coverage for transgender health care). The purpose of the individual mandate was to significantly enlarge the number of healthy people who would be incentivized to buy insurance to avoid paying the penalty; the addition of large numbers of healthy people to the pool of insured would generate additional revenue for insurers to cover the added costs of complying with the Obamacare coverage mandates. Without the penalty, O’Connor asserted, the number of people buying insurance would fall, leaving those additional costs uncompensated. Furthermore, the penalty was supposed to generate revenue for the federal government, to help cover the costs of subsidizing states for expanding Medicaid eligibility and subsidizing individuals less prosperous individuals who did not qualify for Medicaid to purchase insurance on federal and state exchanges.

On its face, O’Connor’s decision had a certain logic, but many asserted that he had exceeded the role of judicial decision-making in declaring the statute unconstitutional based on his own economic analysis. Because the Trump Administration – speaking through the tweeting president – hailed the ruling, the work of appealing the decision fell to Intervenor-Defendants – a coalition of states that were understandably concerned that the lawsuit, deliberately filed by Texas in the Fort Worth Division of the Northern District of Texas to place it before Judge O’Connor, the only District Judge who presides in that courthouse, would adversely affect
many of their residents who would have difficulty obtaining health insurance without the subsidies provided under the statute, and their own fiscal interests because, among other things, a successful challenge to Obamacare could end federal subsidies provided under the statute to states that had expanded eligibility for their Medicaid programs.

O’Connor granted partial summary judgment to the plaintiffs, declaring the individual mandate unconstitutional and the remaining provisions of the statute non-severable and therefore “invalid,” but limited the relief to a declaratory judgment and did not issue the nationwide injunction against continued enforcement of the statute that some had feared. Perhaps he sensed that an emergency motion to the 5th Circuit for a stay of any such injunction pending a final ruling on appeal was likely to be granted – regardless of what a 5th Circuit panel might think of the merits. The opinion was issued just as the window for applying for coverage under Obamacare for calendar 2019 was closing in many states and under the federal exchanges, and there was some concern that uncertainty about the existence of the program would drive down last-minute enrollments, but in the event the number of enrollments seemed to be holding up, amidst news reports emphasizing that Obamacare would continue to function until an appellate process that might take years had run its course.

On December 30, Judge O’Connor issued a new 30-page opinion, granting a request by the Intervenor-Defendants to enter a final judgment on his summary judgment order so that it would be immediately appealable, and also granting a request for a stay until a final appellate ruling on the merits of his summary judgment is issued. While not expressing doubt about the correctness of his ruling, Judge O’Connor acknowledged that the timing of his ruling (on the last day for enrollment on the federal and some state exchanges for 2019 coverage) would make it awkward to allow his ruling to go into effect pending appeal, and that as people had enrolled for 2019 coverage, it would be very disruptive not to stay the effect of his ruling.

Federal Judge in Idaho Grants Preliminary Injunction for Confirmation Surgery for Transgender Inmate

By William J. Rold

Chief U.S. District Judge Barry Lynn Winmill ordered the Idaho Department of Corrections to provide transgender inmate Andree Edmo with “adequate medical care, including gender confirmation surgery,” within six months – in a comprehensive decision reported at Edmo v. Idaho Dep’t of Correction, 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018). Because Idaho has recently “updated” its policies and provides transgender prisoners with “gender-appropriate underwear, clothing, and commissary items,” Judge Winmill denied injunctive relief on these requests, without prejudice. This is one of a handful of district court decisions – joining others reported in Law Notes from California (Norsworthy), Florida (Keohane), and Massachusetts (Kosilek) – that is essential reading for transgender prisoner advocates.

Judge Winmill found that gender confirmation surgery is “medically necessary under generally accepted standards of care.” In so ruling, “the Court notes that its decision is based upon, and limited to, the unique facts and circumstances presented by Ms. Edmo’s case. This decision is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender confirmation surgery.” Refreshingly, Judge Winmill recognizes that not all transgender people have dysphoria, which is a disorder that occurs when the “incongruity” between birth gender and gender orientation “is so severe that it impairs the individual’s ability to function.” Many transgender people “are comfortable living with their gender identity, role, and expression without surgery. For others, however, gender confirmation surgery, also known as gender or sex reassignment surgery (“SRS”), is the only effective treatment.”

Over the last years, Edmo’s hormone therapy has rendered her “hormonally confirmed – meaning she had the same circulating sex hormones and secondary sex characteristics as a typical adult female.” Edmo has thus “achieved the maximum physical changes associated with hormone treatment.” Nevertheless, Edmo “continued to experience such extreme gender dysphoria that she twice attempted self-castration.” After the second attempt, the prison clinic could not staunch the hemorrhaging, and she was taken to a hospital emergency room.

Edmo sued officials of the Idaho Department of Corrections (“IDOC”) and Corizon, its contractual medical provider. Judge Winmill found that Edmo has a serious medical need and that the defendants, “[w]ith full awareness of [her] circumstances . . . have ignored generally accepted medical standards for the treatment of gender dysphoria.” The opinion tracks the DSM-V and the World Professional Association of Transgender Health (“WPATH”) Standards at length. Judge Winmill notes that genital surgery is “often the last and the most considered step” in the treatment process – after the maximum physical effects of hormone therapy have been achieved, typically within 2-3 years. For some, surgery is “the only effective treatment and is medically necessary.”

It is an irony of the current development of transgender civil rights law that transgender inmates who are psychologically well-adjusted may not have a “serious medical need” for surgery under the Eighth Amendment, since they do not have the diagnosed “inability to function” – yet, when it comes to the armed forces, the Trump Administration has turned the argument on its head. In its application to the Supreme Court for certiorari before judgment in the appeals of cases enjoining the ban on transgender people serving in the military (see lead articles in the December 2018 and January 2019 issues of Law Notes), the Government argues that “serious medical need” and
DSM diagnosis of gender dysphoria render transgender soldiers medically “unfit” for service. So, the argument used to support gender confirmation surgery in prison is used to support a ban on transgender military personnel. This says much about the binary roots of the nascent legal and psychiatric approaches to transgender people, despite their constellation of presentation.

Judge Winmill’s opinion dispels two of the most common objections to confirmation surgery encountered by prisoners: (1) the presence of psychological co-morbidity – or, the existence of other mental health conditions that are not well-managed; and (2) the “inability” in a male prison to experience life as a woman for twelve months prior to surgery. Judge Winmill accepts WPATH standards, which are also adopted by the National Commission on Correctional Health Care, on both points. WPATH Standards make clear that co-existing mental health conditions and their management should not be separately considered if they are a direct result of the patient’s dysphoria – here, the anxiety and self-harm. Edmo’s mental health conditions, apart from the dysphoria, are managed. In addition, WPATH Standards specifically state that living for twelve months in a gender role congruent with gender identity can be satisfied in prison. Edmo has held two jobs while in prison and has presented as feminine at work. Judge Winmill finds that neither exclusion is fatal to Edmo’s establishing a serious medical need for surgery.

Although Judge Winmill held a hearing (4 days) on a preliminary injunction, all recognized it was tantamount to a trial on the merits. At least five experts testified: Drs. Etter and Gorton for plaintiff; and Drs. Garvey, Andrade, and Campbell for defendants. Others weighed-in by affidavit. Judge Winmill discusses their backgrounds, qualifications, experience, and opinions at length. He also describes the policies of IDOC and Corizon regarding gender confirmation surgery. Neither has ever recommended or provided it. Treating providers at IDOC and Corizon both diagnosed severe gender dysphoria, but they did not recommend surgery, for reasons that Judge Winmill found to be outside the range of generally accepted medical opinion. He called their views “outliers,” but he did not exclude them under Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597 (1993). He gave little weight to their testimony, however, finding that Edmo’s treating providers in IDOC and at Corizon did not evaluate her for surgery until she filed this lawsuit. He also found that some of their reasons for denying surgery were contradicted by their own chart notes. Judge Winmill rejected the argument that irreversible surgery should not be performed in prison or “rushed,” finding no support in the facts for either proposition, and noting that Edmo’s decision is plainly not “rushed” and that studies showed that “regret” for gender confirmation surgery is no higher than 1%.

Judge Winmill noted that Edmo was viewed by some defendants as gay. He found, however, that she “views herself as a woman with a heterosexual attraction to men.” He found that Edmo was eligible for parole but denied same for disciplinary reasons. Upon scrutiny, he found that her “tickets” were for rules violations relating to her orientation: wearing make-up, styling her hair, altering male undergarments, and the like. He wrote: “Ms. Edmo will likely be released from prison sometime in 2021.”

Judge Winmill reviews the standards for a mandatory preliminary injunction, omitted here. On the specific merits, he has little trouble finding that Edmo presents a serious medical need for treatment under the Eighth Amendment, citing Norsworthy v. Beard, 87 F. Supp. 3d 1164 (N.D. Cal. 2015). He wrote: “Defendants’ evidence to the contrary is unconvincing and suggests a decided bias against approving gender confirmation surgery.” Continuing with state of mind analysis, Judge Winmill found that defendants did not exercise individualized medical judgment in Edmo’s case. Rather, they applied a de facto policy or practice of refusing this treatment for gender dysphoria to prisoners – a “blanket policy” found unconstitutional in Norsworthy, 87 F. Supp. 3d at 1191. He found that Edmo was “likely to succeed on the merits of her Eighth Amendment claim.

Edmo would likely suffer irreparable harm if not granted reasonably prompt surgery. Judge Winmill again cites to Norsworthy, 87 F. Supp. 3d at 1192-3; and to the Missouri litigation in Hicklin v. Precynthe, 2018 WL 806764 at *13 (E.D. Mo., 2018), which was the subject of a Law Notes article in March 2018, at pages 108-9. Judge Winmill also found the balance of equities and the public interest to favor the issuance of a preliminary injunction. Although two of defendants’ experts were from Massachusetts, Judge Winmill does not mention the en banc decision in which a sharply divided First Circuit overturned a preliminary injunction directing sex reassignment surgery for a transgender inmate in Koselik v. Spencer, 774 F.3d 63 (1st Cir. 2014). His findings provide ample basis for distinguishing Koselik, however, should the Ninth Circuit be so inclined.

It is unclear whether Idaho will parole Edmo rather than comply with the preliminary injunction. Litigation has continued after releases of transgender inmates – in California in Norsworthy v. Beard, 802 F.3d 1090, 1091-2 (9th Cir. 2015) – see also, Order in Norsworthy v. Lyn, 18-cv-7136 (N.D. Calif., December 7, 2018) (discussing history after remand) – and in Georgia in Diamond v. Owens, 131 F.Supp.3d 1346, 1353 (M.D. Ga., 2015).

Edmo is represented by National Center for Lesbian Rights, San Francisco; Ferguson Durham, PLLC, Boise; and Hadsell Stormer & Resnick, LLP, Pasadena. Plaintiff’s counsel notified the U.S. Department of Justice of a constitutional challenge to § 12211(b)(1) of the Americans with Disabilities Act (should it be applied to include gender dysphoria under the ADA’s exclusions for “transsexualism . . . [and] gender identity disorders not resulting from physical impairments”). The Department of Justice, through the Civil Division in Washington, declined to intervene, and Judge Winmill does not address the ADA in his opinion. Counsel also raised claims under the Fourteenth Amendment and the Affordable Care Act, but Judge Winmill did not rely on them in issuing the preliminary injunction.

William Rold is a civil rights attorney in NYC and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.
NY Court of Claims Orders New York State to Pay Brooklyn Woman $125,000 for Using Her Photo in HIV Discrimination Ad Campaign

By Arthur S. Leonard

New York Court of Claims Judge Thomas H. Scuccimarra has decided that the State of New York should pay Avril Nolan $125,000 for using her photo in an HIV Discrimination Advertising Campaign without a disclaimer that the person in the picture was a “model.” The November 8 ruling came after the Appellate Division court in Brooklyn ruled last January that the use of the photo in print and on-line advertisements, in which the statement “I AM POSITIVE (+)” appeared next to the photo, was defamatory as a matter of law, and sent the case back to the Court of Claims for a determination of damages. See Nolan v. State of New York, 158 A.D.3d 186, 69 NYS 3d 277 (App. Div., 2nd Dept., 2018). Ms. Nolan is not HIV-positive. The new opinion is Nolan v. State of New York, 2018 N.Y. Misc. LEXIS 5887, 2018 N.Y. Slip Op 51789(U) (Ct. Claims, Nov. 8, 2018).

According to Judge Scuccimarra’s opinion, “Jena Cumbo, the photographer, had taken the photograph as part of a ‘street-style’ photography piece for Soma magazine, briefly profiling those photographed about their musical interests.” Cumbo did not have Nolan sign a release and, without asking her permission, sold the photograph to Getty Images, a company that compiles and sells stock photos for use in publications, advertisements, and so forth.

The State Division of Human Rights, which enforces the New York Human Rights Law’s ban on discrimination, was planning an advertising campaign to educate the public that it is illegal to discriminate against people because they are living with HIV. Instead of finding people living with HIV who might be willing to be photographed for such advertising, the DHR contacted Getty Images and bought the right to use Nolan’s photograph.

The Court of Claims hearing about damages to be awarded to Nolan focused on how she heard about the advertisement, her subsequent contacts with AM New York, which ran the ad, and the DHR, and the impact its publication had on her life.

Nolan, an Irish immigrant who was working for a public relations company in the fashion industry when the ad was published, learned about the ad on the morning of April 3, 2013, when she arrived at work and saw a notice an acquaintance had posted on her Facebook page, asking whether she had been in that morning’s issue of AM New York. She later received a private message from the same acquaintance which enforces the New York Human Rights Law’s ban on discrimination, was planning an advertising campaign to educate the public that it is illegal to discriminate against people because they are living with HIV. Instead of finding people living with HIV who might be willing to be photographed for such advertising, the DHR contacted Getty Images and bought the right to use Nolan’s photograph.

The DHR spokesperson asked Nolan to please remove her image from the advertising. This has already caused enough problems and embarrassment.”

After her email to DHR, Nolan heard nothing further from the State to discuss the ad, but publication was quickly discontinued. Nolan testified to suffering considerable emotional distress, but over the next few months the constant thoughts about who might have seen the ad and how it might affect her subsided, although she claimed it took “a couple years” to rebuild her confidence. It was not until the discovery process for this lawsuit that she found out that the ad had been used in four print publications and three online publications, which could have seen it. They did not fire her, as she had feared.

She contacted the photographer, her mother (a psychologist, in Ireland), some friends, and an aunt who had been her mentor when she arrived in New York. Her aunt said she would find a lawyer to represent her.

The photographer contacted AM New York, Getty and the DHR, and put Nolan in touch with a DHR employee by email, who informed her, “After speaking with a Getty representative we have been told we are not liable. We are acting in good faith to remove the image based on the model’s request.” The DHR spokesperson asked Nolan to send them an email stating she would

Instead of finding people living with HIV who might be willing to be photographed for such advertising, the DHR bought the right to use Nolan’s photograph.
triggered again her concerns about how many people might have seen it. Despite a few incidents, the issue generally did not come up or have any substantial effect on her work.

When she was asked during the hearing about what this “association with HIV” meant to her, she testified that while unfortunate, there is “so much stigma around it . . . It’s not like I was in an ad for cancer treatment” where sympathy would be elicited. “There’s a lot of negativity around it,” she testified, “and there’s a lot of associations that people jump to incorrectly about your lifestyle. People think you’re easy, or you’re promiscuous. There’s a lot of just questions around your sexual behavior and your sexual activity. It makes people really think about something so personal to you. It also brings up drug use and just all of these things that I did not want to be associated with and was very embarrassed to be associated with. This goes much deeper, and it really calls into question you as a person and your lifestyle.”

Wrote Judge Scuccimarra, “On cross-examination, claimant confirmed that she did not lose her job nor did she miss any time from work when the advertisement came out. She did not lose any friends. No one other than the acquaintance who first told her about the ad, her Pilates teacher and the outside producer [from an ad shoot] ever informed her that they recognized her as the person depicted in the ad. Indeed, when claimant conducted an online search that day she was unable to see a copy of the advertisement.”

The judge reviewed testimony by several witnesses about the psychological impact of the ad on Nolan, indicating that leading to the conclusion that she had been tense and nervous in the period following the publication, but the effects dissipated and her feelings somewhat in her two years in the competitive world of New York fashion public relations. This event credibly triggered a setback for her in her confidence and outward demeanor, but she appears to have come out of the experience. She did not lose friends or beaux, and ultimately moved on from her job and succeeded in a new venture.

The judge decided that based on the “humiliation, mental suffering, anxiety and loss of confidence suffered by this young woman at the beginning of her career, and at the beginning of her growing independence, the vast extent to which the defamatory material was circulated – albeit for the laudatory purpose of getting public service information out to as many people as possible – and all the circumstances herein,” a reasonable compensation would be $125,000, with appropriate interest from the date of the determination of liability on June 18, 2015, which was the date when Judge Scuccimarra had first ruled in her favor prior to the state’s appeal, as well as a refund to her of the fees for filing her lawsuit in the Court of Claims.

Nolan was represented by attorney Erin E. Lloyd of the firm Lloyd Patel LLP. Assistant Attorney General Cheryl M. Rameau of the Attorney General’s Office represented the State of New York. ■

Colorado Court of Appeals Holds that Same-Sex Couples May Allege a Common Law Marriage Existed Pre-Obergefell

By Timothy Ramos

Similar to most television shows these days, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) left more questions unanswered than it explicitly resolved. The Supreme Court’s decision (holding that same-sex couples share the same fundamental right to marry as opposite-sex couples) has left states wondering how to apply Obergefell to their existing laws regarding parentage, spousal benefits, separation agreements, and etc., as well as whether Obergefell should be applied retroactively to relationships predating the landmark decision. See Chaisson v. State, 239 So. 3d 1074 (La. App. 4th Cir, Mar. 7, 2018) (applying Obergefell retroactively to uphold a revised birth certificate for a child born during the marriage of a lesbian couple). In a unanimous decision, a three-judge panel for the Colorado Court of Appeals has affirmed a decision by the Arapahoe County District Court to apply Obergefell retroactively so that same-sex couples can determine whether a common law marriage existed between them by using the test historically used by opposite-sex couples. In re Marriage of Hogsett & Neale, 2018 COA 176 (Colo. Ct. App., Dec. 13, 2018).

The case saw Edi Hogsett file a second petition to dissolve a common law marriage between her and Marcia Neale; Neale then moved to dismiss the petition, arguing that they had not met the test for common law marriage laid out by Colorado case law. Although both parties disagreed on whether a common law marriage existed between them specifically, both parties agreed that Obergefell applied retroactively to
As for the third claim, Judge Freyre thus, they were not preserved for appeal. Not raise those issues in the trial court, Freyre quickly dismissed the second Court of Appeals, Judge Rebecca R. separation agreement. Writing for the should have enforced the parties’ fact not in evidence; and (4) the court committed error to the test to determine whether a same-sex common law marriage existed, and whether to apply Obergefell retroactively to a relationship that ended before the landmark decision. As Judge Freyre wrote, Colorado recognizes common law marriage. A common law marriage is established by: (1) the parties’ mutual consent or agreement to be husband and wife; followed by (2) their mutual and open assumption of a marital relationship. People v. Lucero, 747 P.2d 660, 663 (Colo. 1987). Furthermore, the party alleging that common law marriage exists bears the burden of proving the two requirements by a preponderance of the evidence. Because an express agreement is unlikely to exist when dealing with a common law marriage, the Colorado Supreme Court recognizes a non-exhaustive list of conduct inferring the parties’ understanding that they are married. This list includes: cohabitation; maintaining joint banking and credit accounts; creating joint property ownership; the parties’ use of one surname; and the filing of joint income tax returns. However, Judge Freyre noted that a same-sex couple who began their relationship prior to Obergefell would be unable to demonstrate a number of Lucero factors such as listing each other as “spouses” on financial or medical documents or filing tax returns; in short, not all of Lucero’s factors reflect the reality that same-sex couples historically faced. Thus, the judge held that the Lucero test must be applied consistently with the realities and norms of a same-sex relationship, particularly during the period before same-sex marriages were legally recognized in Colorado. Furthermore, the judge found that in states like Colorado that recognize common law marriage, retroactive application of Obergefell means that same-sex couples must be accorded the same right as opposite-sex couples to prove a common law marriage—even when the alleged conduct establishing the marriage predates Obergefell.

Applying the Lucero test to the case at hand, the Court of Appeals found that the district court reasonably inferred from the parties’ testimony that no common law marriage existed between them. Although Hogsett and Neale lived and made financial arrangements together, this was insufficient to show that the parties had a mutual agreement to and mutual assumption of a marital relationship. The court placed greater weight on the parties’ desire to immediately dismiss their first dissolution petition after being told that a status-of-marriage finding was necessary, than on the parties’ initial decision to file the petition and enter into a separation agreement; as Neale testified, she believed this was necessary to legally divide their finances. Most damning was Neale’s testimony that she expressed to Hogsett numerous times during their relationship that she did not believe in marriage, which Hogsett corroborated in her own testimony. Several other witnesses also testified to confirm that Neale held this belief. Thus, Neale did not share in Hogsett’s belief that they were married. Because there was no mutual meeting of the minds, both courts could not find that a common law marriage existed between Hogsett and Neale.

The Court of Appeals’ opinion ends with a concurrence by Judge David Furman, who went on to encourage the legislature to abolish common law marriage because it is no longer practically or legally necessary. If the legislature chooses to do so, hopefully it keeps in mind that a number of older same-sex couples have opted not to seek a legal marriage after Obergefell for various reasons including hardship and disability.

Hogsett was represented by Diane R. Radman of Radham Law Firm, LLC in Denver; Rachel Catt of Harrington Brewster Clein, P.C in Denver; and Ann C. Gushurst of Griffiths Law P.C. in Lone Tree. Neale was represented by Stephen J. Plog, Curtis Wiberg, and Jessica A. Saldin of Plog Stein P.C. in Greenwood Village.

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Illinois Appellate Court Sustains Conviction of Gay Man Who Left Threatening Voicemail Messages for Homophobic State Representative

By Chan Tov McNamarah

A gay man is in hot water after a December 10 appellate ruling upheld his conviction under an Illinois statute criminalizing the threatening of a public official. The defendant, Stephen S. Bona, made headlines in 2013 when his irate—and arguably threatening—messages for his homophobic state representative, Jeanne Ives, led to her increased security detail and his arrest. The decision, People v. Bona, 2018 Ill. App. LEXIS 937, 2018 IL. App (2d) 160581 (Appellate Court of Illinois), completely rejected the defendant’s appeal challenging the constitutionality of the statute, the sufficiency and admissibility of evidence, and allegations that the prosecutor made improper closing arguments.

On February 25, 2013, Illinois State Representative Ives, renown for her intolerance of the LGBT community, appeared on a Christian radio program. There, while discussing a then-pending same-sex marriage bill, Ives characterized LGBT-relationships as “disordered,” and stated that gay people were “trying to weasel their way into acceptability so they can then start to push their agenda down into schools . . . .” She went on to maintain that children of same-sex couples were “the object[s] of desire rather than the result of a matrimony [sic].”

Following these vitriolic statements, on March 22, 2013, Ives’ legislative assistant reported a pair of threatening messages left on her office voicemail . . . the messages included a number and diversity of expletives, a claim “to know where [Representative Ives] live[d],” and a reference to assault weapons. Amongst other wrathful remarks, the messages included a number and diversity of expletives, a claim “to know where [Representative Ives] live[d],” and a reference to assault weapons. Unsurprisingly, given the nature of the messages, the assistant called the police. Bona was subsequently arrested.

At trial, Representative Ives testified that the messages caused her distress and she was particularly worried about the safety of her children. Bona testified in his defense that he never intended to harm or frighten the representative. Instead, he argued, his messages reflected his anger and outrage at Ives’ Marriage Monday statements. He went on to claim that he felt disrespected by her remarks, and they had insulted his own marriage. A jury found Bona guilty in 2016, and he was sentenced to two years of probation.

On appeal, Bona raised four contentions: (1) that the Illinois statute violates the First Amendment; (2) that the State failed to meet its burden of proof; (3) that the trial court erred by allowing Ives to testify at trial; and (4) that the prosecutor’s improper remarks deprived him of a fair trial.

Writing for the three-member panel, Justice Kathryn E. Zenoff began her thorough opinion by reciting the statute at issue, 12-9 of the Criminal Code of 2012 (720 ILCS 5/12-9 (a) (West 2012)). The section defines the offense of threatening a public official as knowingly communicating with a public official in ways that would place them “in reasonable apprehension of immediate or future bodily harm.” The threat must also be conveyed due to the official’s performance or nonperformance of a duty, or any factor related to the official’s public existence.

Bona alleged that the section was a content-based restriction on speech, and therefore subject to strict scrutiny. Alternatively, he asserted that the statute was impermissibly overbroad, since it was not limited to “true threats.”

The court acknowledged that the First Amendment did not protect “true threats.” However, what speech constitutes such a threat was a more difficult consideration. After recounting the contours of Virginia v. Black—a Supreme Court case considering the constitutionality of a Virginia statute banning cross-burning, and Elonis v. United States—a case where the Court considered threats made on Facebook – Justice Zenoff found that a statement would constitute a “true threat” where the speaker (1) intends the communication as a threat or (2) knows that it will be viewed as a threat. 538 U.S. 343 (2003) and 135 S. Ct. 2001 (2015), respectively.

Applying this rule to the statute at hand, Zenoff concluded that the section of the statute at issue was constitutional. The statute’s mental state requirement of ‘knowing’ communication only proscribed true threats. As such, the court concluded that the statute was not constrained by the First Amendment, and therefore constitutional on its face. In the same vein, Bona’s allegation that the statute was unconstitutionally overbroad was rejected because the statute’s relevant mental state requirement confined its application to speech outside of First Amendment protection.

Moreover, the Justice found that any doubt that §12-9 was
applied constitutionally was further diminished through the trial court’s jury instructions. Through the use of modified jury instructions, DuPage County Circuit Judge George J. Bakalis had carefully ensured that the jury only convict the defendant after finding that the communication was a true threat. Therefore, the statute was also constitutional in application.

Bona’s next argument was based on the sufficiency of evidence. He claimed that the state had not introduced any evidence that he intended to convey a true threat, and therefore failed to prove him guilty beyond a reasonable doubt. Perhaps incredulously, Bona asserted that his remarks about putting Representative Ives in “the crosshairs of a gun” reflected his disagreements with her position on the Second Amendment, as opposed to a threat.

Justice Zenoff was utterly unconvinced. Examining the evidence in the light most favorable to the state, she found the voicemails overwhelmingly damning. In the messages, not only did the defendant use the term “we” (suggesting he was part of a larger group), she pointed out that he followed his “crosshairs of a gun” comment with the profession that “we know where you live.” Indeed, only a few months prior to Bona’s leaving the messages, another legislator had been targeted and shot. Viewed thus, the court concluded that the defendant’s comments suggested the same fate would befall Representative Ives.

Further, Zenoff pointed to crucial discrepancies between Bona’s description of the messages and the actual recordings of the messages, which were placed in evidence. In the former, the defendant characterized the messages as only mildly disagreeable. However, as the recordings clearly demonstrated, Bona’s account was far from true. On balance, Justice Zenoff concluded that it was certainly reasonable for the jury to conclude that Bona had intended to threaten Representative Ives.

For Bona’s third claim, he contended that the trial court erred by permitting Ives to testify to her reaction to the message. He argued that her subjective feelings were not only irrelevant, but also highly prejudicial. But this too failed to persuade Justice Zenoff. In her view, Representative Ives’ statements on how the messages made her feel were relevant to whether she would be placed in “reasonable apprehension of immediate or future bodily harm,” part of the statutory definition of the offense. Additionally, Ives’ testimony added context that the jury could use to determine whether she would reasonably see the communication as a threat. Finding the testimony more probative than prejudicial, Zenoff ruled that the testimony was properly admitted.

For his final claim, Bona asserted that the prosecutor’s closing statements were improper. In particular, he pointed to six elements of the prosecutor’s statements which, collectively, he claimed had deprived him of a fair trial. Of note, Bona argued that the prosecutor misstated the law, invited the jury to convict based on anger, and improperly told the jury to disregard whether the defendant had a gun.

Opening her evaluation with the statement: “[p]rosecutors are granted wide latitude in delivering closing arguments,” it was easy to predict how Zenoff would rule. She entirely dismissed the claim, finding all of the prosecutor’s remarks either reasonable, not sufficiently prejudicial to warrant reversal, or found that Bona’s depiction of them was fundamentally inaccurate.

For instance, the defendant made the claim that the prosecutor misstated the law by telling the jury that a threat was not covered by the First Amendment, rather than using the term “true threat.” This semantic argument was dismissed when, looking to the record, the Justice found that the correct term, “true threat,” was not only used by the prosecutor thirteen other times in his closing argument, but also that it was thoroughly explained to the jury in both oral and written jury instructions.

In total, having dismissed all of Bona’s claims, the court affirmed the trial court judgment and assigned him costs of appeal.

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

Gay NYC Building Manager’s Hostile Work Environment and Discharge Claims Survive Dismissal Motion

By Ryan H. Nelson

In Walsh v. A.R. Walker & Co., 2018 N.Y. Misc. LEXIS 6007, 2018 NY Slip Op 33159(U) (N.Y. Sup. Ct., N.Y. Co., Dec. 7, 2018), Judge Paul A. Goetz of the Supreme Court of New York, New York County, considered a summary judgment motion in an employment discrimination and retaliation case involving a gay office/building manager in Manhattan. Kevin Walsh (represented by Tuckner, Sipser, Weinstock & Sipser, LLP), sued his former employer of 15 years, A.R. Walker & Co. (represented by Orrick, Herrington & Sutcliffe LLP) alleging discrimination based on his gender, sexual orientation, and disability status; retaliation; and the aiding and abetting of all claims by A.R. Walker’s president and owner, George Beane; all in violation of the New York City Human Rights Law (NYCHRL). Defendants moved for summary judgment, which is the subject of the instant opinion.

Specifically, Walsh alleged that Beane engaged in simulated sexual acts with a male friend in front of Walsh, presented Walsh with sex toys and pornographic videos that he had found in a former tenant’s apartment, expressed to Walsh his interest in naked yoga for men and Walsh’s experiences at nude and gay beaches, described to Walsh the naked bodies of the men who participated in naked yoga, asked Walsh invasive questions about his sexual orientation and relationships, encouraged Walsh to dress in drag while at work, expressed to Walsh significant interest in gay culture and sexual activities, and made unwelcome inquiries to Walsh about his participation in gay events. Walsh claimed that these incidents represented a continuing pattern of conduct that created a hostile work environment based on his gender and sexual orientation. In
response, Defendants dispute some of the particulars of these allegations, but for purposes of the instant motion for summary judgment, the court rightly credits Walsh’s rendition of the facts.

Walsh also alleged that he tearfully pleaded with Beane to stop his “ongoing bad behavior,” after which Beane encouraged him to seek help. Based on that incident, Walsh claimed a hostile work environment based on disability status. Walsh further alleged that, shortly after his plea, Beane denied him a salary increase and reduced his annual bonus in retaliation for complaining about alleged discrimination. Finally, Walsh alleged that Defendants fired him in retaliation for filing this lawsuit. Defendants denied that these allegations constituted a hostile work environment or that retaliation played any part in their decisions. Specifically, Defendants argued that the denial of Walsh’s salary increase and bonus reduction were based on Walsh’s declining performance and poor attitude, and that Walsh’s termination was caused by his deposition testimony revealing that he had disclosed sensitive information related to the future of an apartment to the tenant of that apartment.

Turning to the analysis, the court began by citing the unique standard for proving harassment under the NYCHRL. Under the NYCHRL, a plaintiff need not prove that the harassment was severe and pervasive, as required under Title VII of the Civil Rights Act of 1964 and the New York State Human Rights Law. Rather, under the NYCHRL, a plaintiff need only show conduct that was more than what a reasonable victim of discrimination would consider petty slights and trivial inconveniences.

Applying that standard to Walsh’s hostile work environment claim based on sexual orientation, the court concluded that Walsh had sufficiently raised a triable question of fact and denied defendants’ summary judgment motion on that basis. Although the court declined to engage in detailed analysis as to its reasoning, the allegation of simulated gay sex acts likely would have been sufficient by itself to raise a triable issue of fact under the low bar set by the NYCHRL.

What remains to be seen is whether the additional allegations (e.g., expressing repeated interest in gay culture and plaintiff’s sexual activities) would have been sufficient in isolation to raise an issue of fact. The court likewise found plaintiff to have sufficiently raised a triable issue of fact with respect to the claim of retaliation based on filing suit, aptly noting that defendants had failed to point to any piece of evidence (e.g., a workplace policy) prohibiting the disclosure of the allegedly-sensitive information that plaintiff disclosed to a tenant. As such, the court concluded that a reasonable finder of fact could find that the proffered reason for Walsh’s termination was mere pretext for retaliation.

However, the court granted defendants’ motion on all other claims. Some of those decisions are relatively non-controversial. Specifically, the court rightly held that Walsh’s allegation of hostile work environment based on his disability was based, at most, on a single stray remark that failed to show a disability-based bias. Moreover, the court rightly held that Walsh’s allegation of retaliation for allegedly pleading with Beane to stop his “ongoing bad behavior” failed to sufficiently allege a triable retaliation claim because Walsh was unable to articulate that he actually complained to Beane about unlawful discrimination as opposed to general workplace grievances or that Beane knew that Walsh was complaining about unlawful discrimination. And finally, the court rightly dismissed Walsh’s aiding and abetting claim because all allegations were targeted at a single individual—Beane—and a single individual cannot aid and abet himself. So far, so good.

Strikingly, however, the court dismissed Walsh’s gender discrimination claims, notwithstanding the growing body of case law finding that sexual orientation discrimination is tantamount to sex discrimination. Notable amongst those cases is Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. En banc 2018), petition for certiorari pending, No. 17-1623—a case also filed by a New York state employee (although Zarda was located on Long Island whereas Walsh is located in New York City)—where the 2nd Circuit held that “Title VII prohibits discrimination on the basis of sexual orientation as discrimination ‘because of . . . sex’.” Of course, basic principles of federalism dictate that New York state judges have the final say on interpreting the NYCHRL, so at most Zarda would be persuasive authority here, but it is odd to see a New York state judge ignore a case like Zarda entirely. Indeed, neither Zarda nor any similar cases are cited in the Walsh opinion, let alone analyzed by the court. Hence, the court’s perfunctory dismissal of Walsh’s gender discrimination claim is confusing. It also sets a bad precedent that future defendants could arguably use to claim that an allegation of sexual orientation discrimination does not necessarily state a claim of sex discrimination.

To be clear, the NYCHRL expressly prohibits discrimination on the basis of gender and sexual orientation, so such an argument would be moot under the NYCHRL. However, outside of New York City, many jurisdictions’ equal employment opportunity laws prohibit sex discrimination but not sexual orientation discrimination. In those jurisdictions, some defendants still to argue that sexual orientation discrimination claims lie beyond the ambit of federal, state, and local laws that prohibit sex discrimination but do not mention sexual orientation. In aid of that argument, such defendants could ostensibly point to Walsh’s conclusion that the plaintiff here has a viable sexual orientation discrimination claim but not a viable sex discrimination claim. Yet, such defendants should be cautious when relying on this case in making such an argument, not only because the court here interpreted only the NYCHRL, but also because the court provided no analysis, so its holding stands on a tenuous foundation as persuasive precedent.

In sum, Walsh’s sexual orientation hostile work environment and retaliatory termination claims survived summary judgment, but the court dismissed all other claims. This case highlights the growing need for national clarity not only on whether sexual orientation discrimination in the workplace is unlawful, but what standard plaintiffs must meet to prove it.

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Ryan Nelson is corporate counsel for employment law at MetLife in NYC.
Gay West Virginia Inmate Loses Discrimination Claim

By William J. Rold

U.S. District Judge Frederick P. Stamp granted summary judgment against a gay inmate Jason A. Perry in Perry v. West Virginia Correctional Industries, 2018 WL 6579169, 2018 U.S. Dist. LEXIS 210274 (N.D. W. Va., December 13, 2018), finding no triable issues in his claims of work discrimination based on “sexual preference.” The only claims remaining in this 2015 case involved a hostile work place and retaliation for complaining about it. Judge Stamp treated both claims as raising only Equal Protection issues; there is no discussion of possible First Amendment retaliation for protected activity (complaining and grievances).

The defendants tried to invoke a failure to exhaust administrative remedies under the Prison Litigation Reform Act (“PLRA”). Judge Stamp ruled that Perry had exhausted because the state considered his grievances on the merits on administrative appeal, even though they were arguably untimely and therefore could not assert PLRA exhaustion in court.

On summary judgment, Judge Stamp ruled that prisoners’ Equal Protection claims are analyzed under a rational basis test, citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (holding in case involving home for “mentally retarded” that “all persons similarly situated should be treated alike.”) Judge Stamp also relies upon Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002) (inmate must show that “he was treated differently from others with whom he is similarly situated”); and Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001) (rule applies even if inmate is member of protected racial class – here, Native American). To this writer’s knowledge, the Supreme Court has never said that.

In any event, the Fourth Circuit (unlike some other circuits) has not ruled that LGBT Equal Protection claims are entitled to heightened scrutiny. The issue was raised in GG v. Gloucester County School Board, 822 F.3d 709, 717 n.3 (4th Cir. 2016), but the circuit specifically declined to rule on it, instead upholding the claims of a transgender male student under Title IX, based on federal interpretive guidelines and “Auer deference” to them. See Auer v. Robbins, 519 U.S. 452, 461 (1997) (agency charged with enforcing statute is entitled to deference in interpretation of its own regulations). The history of GG and Auer deference could easily comprise several law review articles. Suffice it to say here that GG went to the Supreme Court on Title IX and Auer deference and that, because the Trump Administration reversed the Obama Administration’s protection of transgender students, the Supreme Court remanded to the Fourth Circuit to reconsider. The Fourth Circuit remanded to the District Court to determine whether the case was moot. The District Court found on an amended complaint that the case was not moot and that GG, as a transgender person, is a member of a “quasi-suspect class,” whose Equal Protection claims are entitled to “intermediate” scrutiny. It found that GG also stated claims under Title IX, regardless of Auer deference. It then directed the parties to discuss settlement. GG, Gloucester County School Board, 302 F.Supp.3d 730, 749,752 (E.D. Va., 2018). (“Auer deference” is on life support with attacks from various directions. Under Obama, they came from the right; under Trump, from the left – including environmental, civil rights, land use, and labor protests of administrative “interpretations.” Several justices have expressed frustration with Auer. In this writer’s view there are probably at least 4 votes to hear a properly-presented challenge to the precedent.)

In this case, Perry lost to summary judgment primarily on the facts. Despite being openly gay, he was hired and promoted from Level I to Level IV, eventually working as “camera room clerk.” “Gay jokes” at his expense and his complaints about them did not seem to affect his promotions. In this case, Perry lost to summary judgment primarily on the facts. Despite being openly gay, he was hired and promoted from Level I to Level IV, eventually working as “camera room clerk.” “Gay jokes” at his expense and his complaints about them did not seem to affect his promotions.

In this case, Perry lost to summary judgment primarily on the facts. Despite being openly gay, he was hired and promoted from Level I to Level IV, eventually working as “camera room clerk.” “Gay jokes” at his expense and his complaints about them did not seem to affect his promotions. He said that he was not promoted to Level V and was given the choice of resigning or being fired for discriminatory and retaliatory reasons. Defendants said that he was not promoted to Level V because only one other inmate has attained that rank, and he was promoted after
On December 7, 2018, the U.S. District Court, Middle District of Pennsylvania, vacated a prior order of dismissal, thereby resurrecting certain tort claims brought by a gay former Milton Hershey School student, Adam Dobson, against the school. Dobson v. The Milton Hershey School, 2018 U.S. Dist. LEXIS 206793, 2018 WL 6436718. Perhaps most significantly, the court found that facts alleged by Dobson could sustain the finding that the school's conduct towards him was sufficiently “outrageous” to ground a claim of intentional infliction of emotional distress, if Dobson amends his complaint to credibly plead physical harm from, among other things, being subjected to conversion therapy.

Chief District Judge Christopher C. Connor, an appointee of President George W. Bush, reversed his own opinion from approximately one year ago and reinstated Dobson's claim that, while he was a student at the school, Milton violated its duty to protect him from harm by “inter alia, expelling him due to his inpatient mental health treatment . . . and causing further harm to him by implementing 'conversion therapy' after learning of his homosexual orientation.”

Milton was founded in 1909 by Hershey Chocolate magnate Milton S. Hershey and his wife Kitty who, unable to conceive, decided to use their considerable wealth to create a boarding school for orphaned boys. Milton, which is now coeducational, is one of the wealthiest boarding schools in the United States and is cost-free for those who are admitted. Students live with “house parents” and, according to the school’s website, education is styled in the Judeo-Christian faith of the founders with daily devotions and Sunday chapel services. All of Milton's students come from a “lower income background.”

According to Judge Connor's opinion, Dobson enrolled in Milton in 2004 at age nine. Crucially Dobson's guardian at the time executed an “'Enrollment Agreement,' a threepage document setting forth terms and conditions of enrollment including, inter alia, attendance, conduct and discipline, student dating, school provided health care, release of personal information, visitation, textbooks, and religious services.”

Dobson realized he was gay while in the ninth grade. At some point that year a house parent caught him viewing gay pornography on a residence computer and he was forced to watch a “religious-based video intended to 'cure' him of being gay.” Then, in the eleventh grade, Dobson experienced suicidal ideations and Milton's health services intervened. This resulted in Dobson's first school-recommended inpatient stay at a local mental and behavioral health care facility.

Dobson improved for a short time, but in May of 2013 suffered another bout of severe depression culminating in an aborted suicide attempt. Dobson self-reported the incident to Milton and asked for help. The school psychologist recommended a second inpatient treatment. During this second inpatient stay, Milton – without notice to Dobson – expelled him and evicted him from his campus home. Milton explained to Dobson's mother that Dobson was expelled “because he was 'a liability' to the school.”

Dobson sued Milton in 2016. In his first amended complaint, he pleaded thirteen causes of action including state law tort claims for negligent breach of a duty of care, negligent misrepresentation, intentional misrepresentation, intentional infliction of emotional distress, civil conspiracy to endanger children, and breach of fiduciary duties of care and good faith.

In the fall of 2017, the court granted Milton's motion to dismiss the foregoing counts, citing the “Gist of the Action Doctrine.” Wrote Judge Connor, “Under the gist of the action doctrine, a contracting party cannot assert a tort claim against another party to the contract when the gravamen of such a claim is, in actuality, breach of contract. When distinguishing between tort and breach of contract claims at the motion to dismiss stage, the determinative factor is 'the nature of the duty alleged to have been breached' as pleaded by the plaintiff . . . If the duty is created by the terms of the parties' agreement, then the claim sounds in breach of contract; if it derives from a defendant's 'broader social duty owed to all individuals,' the claim must be regarded as a tort.”

The court's 2017 dismissal relied on the contractual relationship created between the parties by the Enrollment Agreement and applied Pennsylvania case law which described the relationship between a student and a private school as 'contractual in nature.'

The instant decision arose from Dobson's motion to file a second amended complaint to add contract and unfair trade practice claims. The court wrote that this motion presented "an opportunity to revisit our previous dismissal of Dobson's state law tort claims. Upon reconsideration, we believe that decision was legally incorrect and that justice requires rectification.” Judge Connor went on to write that Dobson's negligence, emotional distress, misrepresentation, civil conspiracy, and fiduciary duty claims implicated “'broader social duties' owed by [Milton] to its students” and were not, in fact, barred by the gist of the action doctrine.

In assessing the negligence claim against the school, the court found persuasive Dobson's argument that, because Milton provided education, housing, food, clothing, and medical, dental and psychological care it acted “in loco parentis,” and from this issued Milton's duty to care independent of any contract. Likewise, the court opined that Dobson's claim of negligent infliction of emotional distress, founded on his expulsion and the conversion therapy, could stand because of this same duty of care owed to him by Milton.
The court however dismissed Dobson’s intentional infliction of emotional distress (“IIED”) claim without prejudice because, as Milton argued, the alleged physical manifestations of the emotional harm pleaded by Dobson were only conclusory. The court’s discussion of the “outrageousness” prong of an IIED claim however, seemed to be invite Dobson to seek to amend his complaint once more, and signaled that an adequately-pled IIED claim could survive a future challenge, thus this count was dismissed with prejudice.

Milton had argued that its conduct did not rise to the requisite “outrageous” level for an IIED claim to stand. The court disagreed, and found it the very definition of outrageous that Milton encouraged Dobson to seek mental health treatment and then expelled him for receiving such treatment and even evicted him from his housing during the course of such treatment. The court likewise characterized Milton’s attempted conversion therapy as satisfying the “outrageous” prong necessary to state an IIED claim.

After vacatur of its prior order, the court allowed Dobson’s negligent misrepresentation claim to stand, holding that contrary to Milton’s argument, Dobson’s reliance on the school’s representation that inpatient mental health treatment would be the best course of action for success at the school and would not subject him to expulsion was reasonable.

The court dismissed, however, Dobson’s fair trade practices claim as well as his breach of contract claim (the latter without prejudice).

Milton is facing a multitude of related lawsuits in federal court, including one brought by a husband and wife pair of former house parents who claim they were fired after objecting to many of Milton’s religious practices, including the attempts at conversion therapy.

Dobson is represented by Gregory F. Cirillo, Alexander J. Nassar, John J. Higson, and Margaret R. Spitzer, of Dilworth Paxson LLP, Philadelphia.

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

CIVIL LITIGATION notes

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

U.S. COURT OF APPEALS, 2ND CIRCUIT – In Thompson v. Whitaker, 2018 WL 6641279 (Dec. 18, 2018), the 2nd Circuit denied a petition for review of a decision by the Board of Immigration Appeals by a native and citizen of Domenica who is being deported for conviction of drug-dealing. Because her removal order is based on criminal convictions, including an aggravated felony and controlled substance offense, the jurisdiction of the court is limited constitutional claims or questions of law, and the court found no basis to upset the removal order. Petitioner also raised a claim under the Convention Against Torture (CAT), which was also unsuccessful. The court pointed out that the Immigration Judge “acknowledged that homosexual conduct is criminalized in Domenica and that there have been incidents in which the law had been applied to women, but relied on more recent reports – the 2013 and 2015 State Department Reports – that the court had not seen.” The court rejected his argument that the IJ and the BIA “erred by determining that collateral estoppel precluded him from re-litigating issues that were decided in a 2013 removal proceeding, namely that harm suffered by [him] in Honduras prior to 2013 did not constitute persecution or torture,” but the court said that the Petitioner had “not shown that he did not have a full and fair opportunity to litigate the issues” in the earlier proceeding, so collateral estoppel was appropriate. It seemed that Petitioner returned to Honduras and spent time there in 2014 before returning to the U.S. and petitioning anew for asylum. He testified that while in Honduras in 2014 “he endured verbal threats, gay slurs, harassment, and a single, minor physical altercation.” But this, said the court, did “not constitute persecution,” and the court said that the evidence in the record did not mandate a conclusion different than that reached by the BIA. “Honduran country conditions, indicating widespread
societal discrimination of homosexuals and numerous killings of LGBT individuals in the past, do not establish that [Petitioner] would suffer future persecution in light of the additional undisputed evidence that he returned to Honduras in 2014 and was recognized as a homosexual but experienced only a minor physical incident and verbal threats and harassment while living there.” The court asserted that Petitioner “has not shown a clear probability of persecution by specific and detailed facts.” And, the court asserted that the IJ and the BIA “conducted separate and distinct analyses separate from the past persecution analyses when determining the future persecution issue.” The court also commented that there was “nothing in the record supporting [Petitioner’s] assertion that death squads, that allegedly collude with local authorities, killed two of his family members.” The court also rejected Petitioner’s claim that the BIA abused its discretion by denying his motion to reconsider its dismissal of his appeal. This is, as usual, so frustrating to read. It seems clear, just from general information in the media, that sending an HIV+ gay man back to Honduras from the United States will place him in grave danger. But the process in the U.S. for evaluating refugee claims appears unwilling to accept this view of the situation. Petitioner is represented by Richard Mancino and Jonathan David Waisnor of the New York office of Willkie Farr & Gallagher, LLP.

CALIFORNIA – U.S. District Judge William Alsup denied a motion by Kelseyville Unified School District to dismiss a Title IX case brought on behalf of a student who had been subjected to homophobic harassment based on his perceived sexual orientation, and who was withdrawn from school by his mother when it appeared that school officials would not sufficiently exert themselves to protect the boy from the bully in question. J.R. and O.G. v. Lakewood Unified School District, 2018 U.S. Dist. LEXIS 215252 (N.D. Cal., Dec. 21, 2018). The case actually involves two minors both suing two school districts, but the opinion deals solely with a motion by Kelseyville Unified School District to dismiss the claim brought by O.G., alleging both sex and disability discrimination. O.G. was a twelve year old special needs student at Terrace Middle School in the Lakeport Unified School District when he began to experience severe bullying and sexual harassment by another student, identified as “Bully” in the court’s opinion. Judge Alsup summarized the allegations of the complaint: “Throughout the 2014-2015 school year, plaintiff alleges he was grabbed, pinned against school walls and fences, was called ‘gay’ and a ‘little girl,’ and was repeatedly sodomized in the school’s restroom during recess.” His disability and fear of “Bully” prevented him from reporting the abuse until the end of the school year. His mother then reported it to the school, but the principal “did not respond until the end of the summer and took no further action.” O.G.’s mother than transferred O.G. to Mountain Vista Middle School in the Kelseyville district in an attempt to get him away from Bully. Things were apparently fine at Mountain Vista for the 2015-2016 school year, during which O.G. “thieved” at the school. O.G.’s mother had told the school principal that O.G. was transferring because of being abused by “Bully” at his former school. But then in the fall of 2016, would you know it? “Bully” transferred to Mountain Vista and the principal who had been informed about the problem at the former school had been replaced by a new principal who was not aware of the problem. “Bully” immediately started harassing O.G. again. “Upon Bully’s transfer to Mountain Vista, he immediately began taunting plaintiff, stating ‘O.G., O.G., remember me?’ Plaintiff alleges that Bully also stalked him in the halls, pinned him against a wall and called him ‘gay,’ and grabbed him, then poked him in the anus on the outside of his clothing.” O.G. told his mother, who contacted the new principal and pulled O.G. out of the school. Mother met with the principal and explained how the ongoing abuse was affecting O.G., and also told the principal that she had informed his predecessor about the abuse at Terrace Middle School and the reason for the transfer to Mountain Vista. “Mountain Vista’s principal informed plaintiff’s mother that the school was unable to completely protect plaintiff from Bully. The principal also stated that because Bully resided within Kelseyville Unified School District and plaintiff did not, Bully was the district’s priority, and not plaintiff.” Mother made O.G.’s withdrawal permanent, and filed suit against the school district in Superior Court, alleging both state and federal causes of action, which led defendants to remove to federal court. On the motion to dismiss, Judge Alsup found that plaintiffs had stated a case against the school district under Title IX but not under the Americans with Disabilities Act, finding no basis in the allegations of the Complaint to support a claim that O.G. was denied services because of his learning disability. But the Title IX claim continues, since Alsup concluded that the factual allegations could support a claim that the school district had actual knowledge of the problem and remains deliberately indifferent to the harassment, which was sufficiently severe, at least as alleged, to deprive the victim of access to the educational opportunities and benefits provided by the school. O.G. is represented by Deborah Hall Burton of Barron Law Corporation, Sacramento.

CALIFORNIA – The 1st District Court of Appeal rejected a challenge by a lesbian couple to a decision by the Lake County Department of Social Services to deny their attempt to reclaim custody and
eventually adopt a child who had been placed in their care shortly after birth when the child was removed from its mother’s custody for his protection. In re T.N.; H.R.-D. and E.R.-D., Petitioners, 2018 Cal. App. Unpub. LEXIS 8399, 2018 WL 6522136 (Dec. 12, 2018). The child was with the lesbian couple long enough to bond with them, but the boy’s maternal grandmother was interested in obtaining custody of the child and adopting him, so the child was removed from the couple’s custody and eventually placed with the maternal grandparents in Oregon. That didn’t work out, however, and the child was to be returned to Lake County. This time, County officials decided to place the child with a different set of prospective parents, and the lesbian couple eventually brought suit, claiming that the child should have been returned to them. At trial, representatives of the County said that the home study of the lesbian couple had raised some troubling issues about their relationship. “The study raised long-term concerns that did not impact the child’s immediate need for care,” testified the adoption supervisor who had been involved during the initial placement period. “During the time the Department was waiting for the Oregon agency to clear the maternal grandparents for adoption, [she] became aware that petitioners would sometimes bicker over T.N.’s care in the presence of social workers. [She] herself observed belittling conduct and discord.” There were also concerns because the home study “showed petitioners’ background included multiple marriages, as well as issues with substance abuse, separation, and mental health. She said petitioners had never been identified as a concurrent planning family because the maternal grandparents had stepped forward to adopt the child.” So the county officials selected different potential adoptive parents whose home study did not show such problems, and at the time of trial it appeared that T.N. was thriving in the care of that couple. Although some witnesses for the petitioners opined that they were denied the child because they were a lesbian couple, the adoption supervisor testified that their sexual orientation was not an issue in the case. The juvenile court ruled that it could not find that the current placement was not in T.N.’s best interest, using an abuse of discretion standard to evaluate the challenge to the County’s placement decision. The court of appeal held that the trial court applied the appropriate standard of review. “In effect,” wrote the court, “petitioners are asking this court to reweigh the evidence and substitute our independent evaluation of it for that of the juvenile court. Whether our review is for substantial evidence, abuse of discretion or under a hybrid standard, it is not within our purview to reweigh the evidence.” The court found that the juvenile court properly concluded that the Department did not act arbitrarily or capriciously when it chose to place T.N. with different prospective adoptive parents upon his return from Oregon. “While we agree with the juvenile court that the prospective adoption process could have been handled better, all the evidence suggests that T.N. is thriving in his current prospective adoptive placement. Although it may be small consolation, we also concur with the juvenile court that petitioners are to be commended for having provided the child with such good care during his infancy.” Petitioners are represented by Mende Lauren Romaniak, The Law Offices of Tiffany L. Andrews, Folsom, CA, and Judith Ellen Klein, La Mesa, CA.

**FLORIDA –** Pleading shortfalls led U.S. District Judge Roy B. Dalton, Jr., to grant in part a dismissal motion by Aetna Life Insurance Company (ALIC) on claims asserted by an HIV-positive insured who received mail communication from Aetna in a form that inadvertently had potentially revealed the plaintiff’s HIV status to anybody handling the unopened envelope. Doe v. Aetna Life Insurance Co., 2018 U.S. Dist. LEXIS 216447 (M.D. Fla., Dec. 27, 2018). [The facts in this case closely resemble those in a case reported below under OHIO, John Doe One v. Caremark LLC, 2018 U.S. Dist. LEXIS 215149 (S.D. Ohio, Dec. 21, 2018), although it involves a different corporate defendant presenting some different issues.] However, Judge Dalton ruled in favor of the plaintiff on some key issues, allowing the case to continue and granting leave to file an amended complaint. As Judge Dalton recounts, “This action concerns a letter mailed to Plaintiff by ALIC, Plaintiff’s insurance provider, concerning Plaintiff’s private health care information, including Plaintiff’s HIV status, revealed to the envelope’s beholder through its very large window . . . Visible also was Plaintiff’s full name, address, and claim number.” The complaint alleged that Plaintiff had kept this information private “from all persons except for those specifically chosen by [Plaintiff], until ALIC’s unlawful disclosure.” Indeed, after using this format to mail out claims information to many insureds living with HIV, ALIC received sufficient blowback that it actually sent out letters to its clients “recognizing the envelope issue,” wrote Dalton, saying “in some cases, personal health information was visible through the window of the envelope used to send the letter.” Plaintiff asserted four state-law claims against ALIC: breach of contract, negligence, negligent infliction of emotional distress, and invasion of privacy – specifically, public disclosure of private facts. Plaintiff alleged suffering “increased stress, anxiety, depression and insomnia,” which led to missing 15 days of work. Moving to dismiss, ALIC claimed plaintiff lacked standing, the claims were preempted by ERISA (because plaintiff’s insurance was provided as an employee benefit), and plaintiff had failed to allege plausible claims. Judge Dalton rejected the lack of standing claim, stating, “As
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pled, there are sufficient allegations to support injury-in-fact here, given the specific information viewable through the envelope’s window and the circumstances surrounding its exposure. The window revealed Plaintiff’s prescriptions for HIV medication, yet as Plaintiff alleges, Plaintiff’s HIV status was ‘kept private from all persons except for those specifically chosen by [Plaintiff]’ to share such personal information.” However, the ERISA argument gave concern. The invasion of privacy claim, clearly premised on Florida state tort law, was not preempted by ERISA, found the court, but the other tort and contract claims might be. Pleading breach of contract, in particular, implicated interpretation of the contract of insurance, a claim that could be brought under ERISA. Dalton found that Plaintiff had not pleaded an independent legal duty for the other claims under state law as a basis to withstand ALIC’s preemption challenge, but might be able to do so as to some of Plaintiff’s claims in an amended complaint, which the court gave Plaintiff leave to file. Finally, the court rejected ALIC’s argument that the invasion of privacy claim was inadequately pleaded. ALIC argued that Plaintiff “cannot plead publication to even a single person.” But, wrote Dalton, “the Court, at this stage, finds Plaintiff’s claim plausible given the manner of delivery – through the postal service – and Plaintiff’s living situation – housemates who Plaintiff alleges were not privy to Plaintiff’s positive HIV status.” So the privacy claim survived the motion. The Plaintiff is represented by Jennifer A. Englert of The Orlando Law Group PL, Orlando, Florida.

KENTUCKY – Partly affirming and partly reversing a summary judgment granted to defendants in Doe v. St. Joseph Health System, Inc., 2018 Ky. App. Unpub. LEXIS 893 (Ky. Ct. App., Dec. 14, 2018), the Court of Appeals held that the medical center employer could not be held liable to the John Doe plaintiff on the claim that one of the center’s employees had improperly disclosed Doe’s protected health information and his HIV positive status at a social gathering. Neither Doe nor his wife were at the party, but others told them that a person named “Kim” or “Kimberly” who may have worked at St. Joseph had stated that Doe was HIV-positive. Doe’s complaint seeks to hold the center liable for the wrongful disclosure by “Kimberly” and, going further, claims that since this “Kimberly” did not have access to Doe’s medical records at the center, somebody else must have improperly disclosed the information to her. The complaint alleges invasion of privacy, negligence, negligence per se due to the violation of federal and state medical confidentiality statutes, negligent hiring, training and retention; grossly negligent or reckless hiring, training and retention, violation of a Kentucky consumer protection act, defamation, negligent and intentional infliction of emotional distress, and sought punitive damages. Witnesses from the party had been deposed but none knew the person who had made the alleged disclosure, merely that they believed her name was “Kim” or “Kimberly.” The case languished on the court’s docket until one of the co-defendants moved for summary judgment. Then Doe requested discovery from the corporate defendants, trying to determine the identity of the person who allegedly made the disclosure at the party. Depositions were authorized, and Doe’s counsel began deposing employees named “Kim” or “Kimberly,” eventually focusing on a non-medical employee named Kimberly Middleton because “he had previously filed a complaint with Saint Joseph about her rude behavior” at around the time that Doe’s medical information was disclosed at the party, but Middleton, in her deposition, denied being at the party or disclosing Doe’s medical information. Then the trial court granted the defendants’ motions for summary judgment on all claims. The Court of Appeals found that judgment was properly granted as to any alleged disclosure by Middleton at the party (setting aside, for the moment, that it was not proved that Middleton was at the party or disclosed the information). “All but one of Doe’s claims against Appellees requires an analysis of respondeat superior,” wrote Judge Debra Hembre Lambert. “In order for an employer to be liable for the actions of his or her employee, a plaintiff must prove that the employee’s wrongful acts ‘were calculated to advance the cause of the principal or were appropriate to the normal scope of the employee’s employment.” Neither of those criteria were met here. “Appellee’s interests were in no way advanced by the disclosure of Doe’s HIV status and Middleton was not acting within the scope of her employment at the party.” However, the court of appeals found that summary judgment was premature on Doe’s claim of improper hiring, training, and retention. Assuming Doe could prove at trial that somebody at St. Joseph disclosed his medical information improperly to somebody who then made a disclosure at the party, Doe had a potentially valid claim against the center. “This cause of action does not require respondeat superior,” explained Judge Lambert, “but is focused on Appellee’s own actions. Doe would be entitled to additional discovery as to this issue as well.” However, the court rejected a claim by Doe that the center’s lawyer should have been disqualified from representing Middleton in her deposition. “Here, counsel for [defendant] only represented Middletown at a single deposition and Middleton has not been made a party to this action,” wrote Lambert, continuing: “In addition, both [defendant] and Middleton argue that Middleton is not the person who allegedly disclosed Doe’s medical information; therefore,
their legal positions are not in conflict. Doe is represented by Sandra M. Varellas, D. Todd Varellas, and James J. Varellas, III, of Lexington.

LOUISIANA – U.S. Magistrate Judge Michael B. North, faced with a motion to dismiss a sexual orientation discrimination claim asserted under Title VII of the Civil Rights Act of 1964 in Cammack v. Louisiana Department of Health, 2018 U.S. Dist. LEXIS 217275 (E.D. La., Dec. 28, 2018), decided it was prudent to say the case administratively and await a ruling by the U.S. Court of Appeals for the 5th Circuit in the pending case of Wittmer v. Phillips 66 Company, No. 18-20251 (5th Cir., appeal filed April 19, 2018; oral argument scheduled for January 8, 2019). In Wittmer, 304 F. Supp. 3d 627 (S.D. Tex. 2018), Chief District Judge Lee H. Rosenthal of the Southern District of Texas, responding to the argument that a transgender plaintiff could not sue for sex discrimination under Title VII, took note of the en banc decisions by the 2nd and 7th Circuits in Zarda and Hively, as well as decisions in the 5th and 8th Circuits in Boh Brothers and Heartland Inns, suggesting the application of Title VII to cases where plaintiffs failed to “conform to traditional gender stereotypes.” Judge Rosenthal had written: “Although the 5th Circuit has not yet addressed the issue, these very recent circuit cases are persuasive. They consistently recognize transgender status and orientation as protected classes under Title VII, applying the long-recognized protections against gender – or sex-based stereotyping. Applying these recent cases, the court assumes that Wittmer’s status as a transgender woman places her under the protections of Title VII.” Despite this, Rosenthal granted the employer’s summary judgment motion in that case based on proof issues, and plaintiff appealed. “Predictably,” wrote Magistrate North, “Judge Rosenthal’s assumption that Title VII protects employees against transgender and sexual-orientation discrimination has garnered much attention, in particular from numerous amici who have sought and received permission to file briefs and participate in oral argument on the issue . . . . Under these circumstances, the Court finds the most prudent course of action on the Defendants’ motion to dismiss in this case is to administratively stay the matter pending the outcome of the appeal in Wittmer v. Phillips 66 Company.” We found surprising that although Magistrate North included in his case citation for Zarda the fact that a petition for cert was on file in that case, he premised his administrative stay solely on the 5th Circuit’s pending consideration of the Wittmer appeal – a gender identity discrimination case – rather than on the potential that the Supreme Court may be deciding the sexual orientation issue if it grants cert in Altitude Express v. Zarda (or another petition presenting the same issue from an 11th Circuit ruling, Bostock). Strange are the ways of the courts. And we would be very surprised if the 5th Circuit used the occasion of the Wittmer appeal to reverse an old circuit precedent and rule that Title VII covers sexual orientation claims, given the conservative slant of that circuit. We would imagine that if the Supreme Court grants cert on the sexual orientation issue under Title VII, the 5th Circuit would most likely delay ruling on Wittmer’s appeal pending a Supreme Court decision. (The 5th Circuit took this route in the marriage equality litigation, hearing oral argument in cases from 5th Circuit states but then delaying its ruling until after the Supreme Court issued Obergefell v. Hodges). In the event, there are also respectable grounds for the magistrate to grant dismissal of the sexual orientation claim without deciding that issue, as plaintiff had not exhausted administrative remedies with the EEOC and was suing management officials rather than the Health Department, for reasons too complicated to address here. Individual management officials may not be sued under Title VII, just the employer entity. Plaintiff Jereld Cammack, a gay man living with HIV, is represented by John Eric Bicknell, Jr., of Scott, Vicknair, Hair & Checki, LLC, New Orleans.

MARYLAND – A gay man who was seriously injured by police officers when they were arresting him in his home on drug charges managed to largely survive a battery of pretrial dismissal motions in a December 12 ruling by Chief U.S. District James K. Bredar in Krell v. Queen Anne’s County, 2018 WL 6523883 (D. Md.). Judge Bredar related Krell’s factual allegations, presumed true for purposes of deciding the dismissial motions. On March 3, 2015, officers of the Queen Anne’s County Drug Task Force showed up at Krell’s home (where he resides with his same-sex partner) at 9:00 am planning to arrest him. When Krell saw the officers approaching, he got down on his knees and placed his hands behind his head. His dog became agitated and he lowered his hands to calm the dog. One of the officers, State Trooper Brightmeyer, grabbed Krell’s arm and twisted it behind his back; then, he shoved Krell’s face to the floor so that Krell’s face cracked a floor tile; then he placed his boot on Krell’s neck. Brightmeyer handcuffed Krell and pull him up by the handcuffs, pushing him into a chair. Krell screamed in pain and lost feeling in his right arm. State Trooper Rice, observing this and noticing that Krell was in pain, asked Brightmeyer to handcuff Krell in front of his body, but Brightmeyer responded: “This faggot is staying handcuffed just like this. I’m sticking to protocol.” Brightmeyer continued to call Krell “faggot” and cursed at him. Krell claims that none of the officers chose to touch him after Brightmeyer made these comments. From the time of his arrest to his arrival at the County detention center Krell
complained of pain and loss of feeling in his right arm, but the officers kept him cuffed in the chair for an hour while they searched his house and, “at one point, Braightmeyer hiked the handcuffs up Krell’s arm toward his shoulder, and Krell screamed in pain and requested medical attention.” At the detention center, he asked again for medical attention, telling an officer that his shoulder had been dislocated, that he was in pain, that he needed medical care, but nothing was done. During his video bail hearing the next day, he again requested medical attention. The warden was present at the hearing and asked officers why they had not taken Krell to see a doctor. He finally received attention at an emergency care facility to which he was taken by two corrections officers three days after his arrest, but staff members there were unable to fix Krell’s dislocated shoulder and the officers then took him to a Shock Trauma Center, where staff members stabilized his shoulder and said he needed immediate surgery – within two days. Needless to say, he didn’t receive it. He was returned to the detention center and didn’t see an orthopedic surgeon for two more weeks. While on pretrial release, he finally had surgery some months later. He was sentenced in November and incarcerated until the end of January 2016, when he was released to home detention. Although the orthopedic surgeon wrote to the detention center stating that Krell needed physical therapy, they did not arrange to provide it. Since the arrest, he has experienced constant pain, has difficulty sleeping, had to train himself to use his left hand, has undergone additional surgery, causing further scarring and disfigurement, and is susceptible to injury. He also became suicidal due to the constant pain and had undergone three psychiatric hospitalizations. This lawsuit is his attempt to hold the county and its police officers accountable for how he was treated. He alleges violations of the 4th and 14th Amendments involving excessive force in his arrest and deliberate indifference to his serious medical needs while in custody, as well as sexual orientation discrimination by Officer Braightmeyer. While finding that certain named defendants could not be sued for lack of individual involvement, Judge Bredar largely upheld Krell’s lawsuit, finding that his factual allegations would support most of his claims against the police officers directly implicated, including the sexual orientation discrimination claims, and the officers did not enjoy qualified immunity as to those claims. Judge Bredar found that Krell “sufficiently alleges the disparate treatment was intentional. Braightmeyer knew Plaintiff was homosexual because he used the slur ‘faggot’ and made ‘derogatory comments about Plaintiff’s sexuality.’” Finding that rational basis review applies to classifications based on sexual orientation (citing Bostic v. Schaefer, the Maryland marriage equality decision of 2014 as well as Romer v. Evans), Bredar wrote, “Based on Plaintiff’s allegations that Braightmeyer used a slur while declining to accommodate Plaintiff’s medical need, the Court can reasonably infer that Braightmeyer’s action was done with discriminatory animus rather than a rational basis. Therefore, Plaintiff sufficiently pleaded an equal protection violation.” And, as to qualified immunity, Bredar found that “the illegality of discriminating on the basis of sexual orientation is clearly established at this point. Therefore, any officer would know that treating individuals differently based on sexual orientation was unlawful. When Braightmeyer refused to stay from protocol and implied, by his slur, that he otherwise might have strayed but for Plaintiff’s sexual orientation, Braightmeyer had notice of the illegality of that conduct.” Bredar found that Office Bice, who did not intervene to alleviate Krell’s pain after Braightmeyer refused to do so, also could be liable for bystander liability. Krell is represented by Justin Stefanon and Cary Johnson Hansell, III, Hansel Law P.C., Baltimore.

MONTANA – U.S. District Judge Sam E. Haddon ruled on December 21, 2018, that neither plaintiff nor defendants were entitled to summary judgment in litigation brought by a former student at Montana State University who was disciplined under the University’s harassment policy for statements he made to an instructor about a fellow student who is transgender. Powell v. Montana State University, 2018 WL 6728061, 2018 U.S. Dist. LEXIS 215891 (D. Mont.). Plaintiff Erik Powell and Myka Perry, a transgender woman, were both enrolled in Katharine Kujawa’s course, Human Sexuality. According to “undisputed facts” related in Haddon’s opinion, during the class on May 24, 2016, “the topic of discussion was transgender issues. Perry advised the class that she identified as being transgender. Powell was uncomfortable with transgender lifestyles and opted not to speak in class.” After class, Powell visited Kujawa in her office, stating that “he did not want to sit next to Perry as doing so may result in a confrontation or altercation.” He told Kujawa and he “didn’t want to upset Perry with his opinions” and that he would not “be comfortable speaking with Perry outside of class.” Kujawa says that Powell also told him that “the only time he had a physical altercation with a member of the LGBT community [some nine years earlier] when a man, who [he] later learned was gay, groped [Powell’s] girlfriend.” Two days later, on May 26, Kujawa filed an on-line “Safety and Welfare Reporting form” with the Dean of Student’s office, and the Associate Dean opened a case and scheduled a meeting with Powell that afternoon. After the class that day, Kujawa told Perry about her conversation with Powell, and said “If you like” when Perry asked whether she should file a
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report with the Office of Institutional Equity. When Kujawa asked if Perry felt safe walking to that office unescorted, Perry said “she felt comfortable walking by herself and showed Kujawa a pocketknife.” Perry filed her complaint, relaying to Jyl Shaffer, the office’s director, what Kujawa had told her. Shaffer then called Kujawa to confirm the account, and assigned James Sletten, a staff member, to investigate Perry’s complaint against Powell. “Perry advised Shaffer that she knew Sletten. Sletten and Shaffer discussed bringing someone from the outside to deal with conflicts but deemed unnecessary.” Powell was notified of charges against him and that a trespass warning, interim suspension, and no-contact order had been issued.” The interim trespass and suspension was lifted on June 2, but Powell was prohibited from coming on to the campus for the duration of the investigation. Sletten interviewed all parties and provided a summary of his report to Perry and Powell, requesting responses by June 8. Powell responded with “comments and corrections,” and Sletten submitted a final report on June 9, finding that the allegation of Hostile Environment Harassment was substantiated,” that Powell violated the University’s anti-harassment policy, and Shaffer upheld the findings. Powell appealed at all levels, including to the University President and state education authorities, but struck out at every level. Ultimately, the Dean of Students imposed sanctions on September 1: suspension for the Fall 2016 semester, barred from campus through December 31, 2016, barred from any contact with Perry, requiring completion of anger management and civil rights training before re-enrollment, and completion of a Campus Safety Questionnaire upon re-enrollment.” The state’s commissioner of higher education affirmed, and the school refunded tuition Powell had paid for summer courses that he could not take due to the bar on his access to campus. He later enrolled at a different campus of the University for the spring 2017 term, and filed this four count lawsuit against the university and several administrators (in their official capacities). Count I – 14th amendment due process; Count II – 1st Amendment freedom of speech; Count III – Title IX sex discrimination; Count IV – Declaratory Judgment against individual defendants. On cross-motions for summary judgment, Judge Haddon found that disputed material facts stood in the way of granting any of the summary judgment motions. He found that plaintiff’s allegations in support of each of his claims was potentially meritorious, but depended on resolving disputed facts. Among other things, Perry and Kujawa had declined to attend Powell’s disciplinary hearing, and Haddon found that although the 9th Circuit had not addressed the issue yet, there was persuasive 6th Circuit precedent that a student facing serious disciplinary sanctions has a due process right to cross-examine his accusers. There were also conflict of interest questions in the assignment of Sletten to be the investigator, in light of Sletten’s friendly relationship with Perry, and other claims of differential treatment of Powell and Perry yet to be resolved. Powell is represented by Jesse R. Binnall and Louise T. Gitcheva, of Harvey & Binnall, PLLC, Alexandria, Va.; and Matthew G. Monforton, Bozeman, MT. The defendants are represented by Adam J. Warren and W. Anderson Forsythe, of Moulton Bellingham, PC, Billings, MT.

NEW YORK – A taxi driver who suffered suspension of his license for a month after he ejected a lesbian couple from his cab because they persisted in kissing each other has survived much of New York City’s summary judgment motion to dispose of his due process and defamation lawsuit against the City and various Taxi and Limousine Commission officials. El Boutary v. City of New York, 2018 U.S. Dist. LEXIS 216238 (Dec. 26, 2018). The incident occurred on June 9, 2018, when two women booked an Uber driven by the plaintiff for a trip from a bar in Brooklyn to another bar in Manhattan. Not surprisingly, coming from a bar they had been drinking, and during the ride they kissed, which evidently bothered the plaintiff, asked them to stop and became irritated when they refused. After crossing into Manhattan, the driver parked the car and asked the women to get out, resulting in an argument on the sidewalk, partially captured on the cellphone of one of the women. When the driver realized he was being recorded, he said “don’t” and reached out his arm towards one of the women, which accelerated the argument. The phone recorded an argument between the women about whether they would report the driver to the police, and he is heard saying “Report me, report me, I don't give a shit.” One of the women uploaded her video to the Web and by the next day the Daily News and the Post had stories about a “lesbian couple” who were kicked out of a Uber “for kissing.” The newspapers contacted the Taxi and Limousine Commission for comment, eliciting a statement from the TLC’s public relations official (a named defendant in the lawsuit) that a driver “is most definitely not allowed to do such a thing,” and CNN quoted the official as saying that “the blatantly discriminatory behavior described by the complainant is repugnant and will not be tolerated in the City of New York.” The TLC contacted the passengers but did not speak to the driver before suspending his license, but an administrative law judge recommended restoring the license a month later after a hearing, and the TLC accepted the recommendation. Then the driver filed suit, claiming a violation of his due process rights and defamation. U.S. District Judge Allynne R. Ross ruled on cross-motions for summary judgment, finding that contested facts precluded
granting summary judgment to plaintiff, although some of the individual defendants (the TLC Commissioner particularly) were dismissed from the case for lack of personal involvement in the suspension decision, and some but not all of the defamation claims survived a close reading by Judge Ross of exactly what the defendant had said or not said specifically about the driver. The case will continue likely continue unless cooler heads prevail at the Law Department and the City offers a decent settlement. El Boutary is represented by Daniel L. Ackman of New York.

NEW YORK – Stephanie Lynn Slominski, pro se, a transgender woman who was an employee of the New York State Office of Mental Health (OMH) from March until October in 2015, filed suit in the U.S. District Court for the Northern District of New York, naming as defendants both OMH and Wendy Fox, identified in the complaint as “the highest-ranking person employed by NYS Office of Mental Health Bureau of Audit,” who “had the ability to make decisions as to the hiring and firing of employees.” Slominski v. New York State Office of Mental Health, 2018 U.S. Dist. LEXIS 207031 (N.D.N.Y., Dec. 20, 2018). Slominski’s case was referred to U.S. Magistrate Judge Christian F. Hummel for screening. Hummel denied her motion to proceed in forma pauperis, so she came up with the filing fee and refiled her complaint, having previously filed a charge with the EEOC and received a right-to-sue letter. The court’s brief account of the factual allegations is not altogether clear, but it appears that Slominski transitioned during her brief period of employment. “Plaintiff contends that, after receiving satisfactory performance reviews previously, plaintiff received an unsatisfactory review and a termination notice, which came ‘in close proximity to the completion of Ms. Slominski’s gender transition.’ Given the length of her employment, it would appear that she was possibly a probationary employee when she was discharged. She also alleged that the defendants refused to complete a necessary form for her to take a test to become a Certified Internal Auditor, and that after she filed her first discrimination charge, she suffered retaliation. Her prayer for relief seeks pay back, front pay, benefits, compensatory damages, punitive damages, attorneys’ fees, costs and interest. Magistrate Hummel recommended dismissing the Title VII charge against Wendy Fox, noting that Title VII claims can only be asserted against the employer, not against individuals as defendants, but that her Title VII claim against OMH should be allowed to proceed. As to her claims under the New York State Human Rights Law, the court found her claim against OMH to be barred by 11th Amendment immunity, as would be the claim against Wendy Fox in her official capacity. Individuals cannot sue state government agencies in federal court unless immunity is waived, and a suit against Fox in her official capacity would be, in effect, a suit against OMH. However, Hummel pointed out, the 11th Amendment “does not bar any claim brought under the NYSHRL against the individual defendant in her personal capacity.” In order to assert such a claim, wrote Hummel, “the plaintiff must show that the defendant has an ‘ownership interest or power to do more than carry out the personnel decisions made by others.’ Plaintiff pleads that Ms. Fox has such power [and] alleges that Ms. Fox ‘actually participated’ in the alleged discriminatory conduct.” Thus, Hummel concluded that the claim against Fox in her individual capacity should be allowed to proceed, but recommended that the claims barred by the 11th Amendment be dismissed with prejudice. He also noted that neither the NYS Human Rights Law nor Title VII authorized punitive damages against government entities, so recommended that the claims for punitive damages be dismissed with prejudice. It is now up to District Judge Gary L. Sharpe to rule on Hummel’s recommendations.

NEW YORK – Herewith a further report on a case of gender identity discrimination litigated under the New York Human Rights Law that generated a short memorandum appellate opinion in June 2018 that failed to mention that the case had anything to do with gender identity discrimination. Fuller v. Advanced Recovery, Inc., 2018 WL 6725325, 2018 U.S. Dist. LEXIS 215098 (S.D.N.Y., Dec. 20, 2018). We reported in the Summer 2018 issue of Law Notes the Appellate Division, 2nd Department’s, memorandum upholding the N.Y. State Division of Human Rights’ determination that the employer had discriminated against Erin Fuller on the basis of sex and disability and awarding her damages, as well as assessing a civil fine and penalty against the employer. Advanced Recovery v. Fuller, 162 App. Div. 3d 659, 77 N.Y. Supp. 3d 151 (Mem) (June 6, 2018). We noted with disappointment then that nothing in the court’s opinion would inform the reader that the complainant was a transgender woman who was the victim of gender identity discrimination. The case had been brought to our attention by somebody conversant with the facts, who was similarly concerned that what could have been an important published appellate precedent helping to establish that gender identity discrimination is sex discrimination and illegal under the HRL was forfeited thereby. Both SDHR, in affirming the ALJ’s ruling, and the 2nd Department treated it as an ordinary sex discrimination case, as far as a reader could tell. We stated our disappointment that the opinion effectively concealed the potential significance of the case, both in Law Notes and an article we published in Gay City News. After SDHR adopted the ALJ’s decision, the EEOC sent a
right-to-sue letter under Title VII and the Americans with Disabilities Act to Fuller in May 2015, and she initiated a lawsuit in U.S. District Court for the Southern District of New York, seeking an award of attorneys’ fees as a prevailing party in the state action, as authorized under the federal statutes. U.S. District Judge Cathy Seibel awaited the 2nd Department’s affirmance of the SDHR decision before taking up the question of a fee award. The defendant argued, successfully, that the fees requested should be reduced, contending that the case was over-lawyered, with “two experienced lawyers” representing Fuller at the SDHR hearing. “I agree,” wrote Judge Seibel. “While two (or more) lawyers may sometimes be appropriate in a complex case, this was a short hearing (three days, only two of which were consecutive and only one of which was a full day), and while it may have been legally complex and factually challenging, it was not factually complex. The issue was simply whether Plaintiff had been fired because she is transgender or because of misfeasance on the job. An experienced civil rights litigator should be able to handle such a hearing alone.” Aha! For the first time in this litigation, there is a written decision mentioning the plaintiff’s transgender identity as the reason for discrimination against her, so at last it will be possible for somebody researching the electronic databases for New York cases involving transgender discrimination actually to find this case. Interestingly, it is possible that our own reporting was seized upon by defendant’s counsel in arguing against the fee award. Wrote the judge, “Defendant’s opposition focuses largely on irrelevant factors, such as counsel’s disapproval of SDHR’s administrative scheme; the amount his clients paid him; his view that the ALJ was biased and incompetent; and his opinion that the LGBTQ community was disappointed that the Appellate Division affirmed the SDHR decision without writing a precedential decision on transgender rights. These comments are almost entirely inappropriate as well as being beside the point.” The court mentions that a “newspaper article” was included in defendant’s submission as an exhibit, but does not identify it specifically. Could it have been our account of the 2nd Department decision, used by the defendant’s counsel to detract from plaintiff’s “prevailing party” claim? If so, the ploy didn’t work! Judge Seibel granted an award of $89,747.87 in total for attorneys’ fees and costs. Fuller was represented at SDHR by Stephen Bergstein and Hellen Ulrich, Bergstein & Ulrich, LLP, New Paltz; Bergstein was counsel in the federal action.

NEW YORK – In Peckham v. Island Park Union Free School District, 2018 WL 6332441, 2018 N.Y. App. LEXIS 8244 (App. Div., 2nd Dept., Dec. 5, 2018), the Appellate Division reversed an order by Nassau County Supreme Court Justice Antonio I. Brandveen allowing plaintiff Elizabeth Peckham to file an amended complaint while denying the defendant’s motion to dismiss her age and sexual orientation discrimination claims as time-barred. The Appellate Division found that the school district had established that the last alleged adverse employment action occurred more than a year prior to the commencement of the action, and thus was barred under the Human Rights Law. Justice Brandveen would have allowed the plaintiff to file an amended complaint so that she could attempt to allege facts that would overcome this defect, but the Appellate Division concluded that the allegations in the “proposed amended complaint” are “insufficient to establish a viable claim of a continuing violation and, therefore, the continuing violation doctrine did not toll the running of the statute of limitations.” Without relating the factual allegations at issue, the court quoted a prior ruling that the continuing violation doctrine “may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct.” The court said that leave to amend should not be granted “when the proposed amendment is palpably insufficient or devoid of merit.” Thus, plaintiff/respondent Peckham, who is represented by Maurizio Savoiardo and Michael Feinstein of Miranda Sambursky Slone Sklarin Veneniotis LLP, of Mineola, is out of luck.

NEW YORK – Reiterating a position that she took in a prior case, Senior U.S. District Judge Loretta A. Preska granted without prejudice an employer’s motion to dismiss a former employee’s Title VII sexual orientation discrimination claim for failure to exhaust administrative remedies, because the EEOC issued its right-to-sue letter at plaintiff’s request fewer than 180 days after he filed his discrimination charge with the agency. Gibb v. Tapestry, Inc., 2018 U.S. Dist. LEXIS 204112, 2018 WL 6329403 (S.D.N.Y., Dec. 3, 2018). In this case, plaintiff Thomas Gibb had sued the employer in New York State Supreme Court on May 29, 2018, asserting claims under the NY State and City Human Rights Laws. On June 4, 2018, he filed a discrimination charge with the EEOC under Title VII, based on the same claims alleged in his state court complaint of discrimination and sexual harassment by a former boss who was apparently obsessed with Gibb’s sexual orientation to the extent of “bombarding” Gibbs with “coarse remarks about Gibb’s genitals, unwanted physical touching, and derogatory comments about Gibb’s sexual orientation.” Gibbs had complained to HR without effect, but after he retained counsel who wrote to the company’s HR department with another yet complaint, both the harassing supervisor and the HR employee who failed to act on Gibb’s earlier complaints “resigned.” Gibbs then filed his state suit and EEOC charge. Two weeks after filing his EEOC charge, Gibbs
was fired, allegedly for violating his employment contract and breaching his fiduciary duty by taking an active interest in a company he had founded with his brother. Gibbs characterizes the discharge as “retaliatory and baseless,” relating it back to his discrimination suit and EEOC charges. When he received a right-to-sue letter from the EEOC, he moved to dismiss the state action in order to consolidate all his claims in a federal court Title VII suit with supplementary state and local law claims. He had asked the EEOC to issue the right-to-sue letter quickly, which they did, on the ground that they would be unable to fully investigate his claim within 180 days, the length of time authorized under the statute for the agency either dismissing or taking action on a Title VII charge. (The EEOC now routinely issues such letters on complainants’ requests, since the understaffed agency is so backlogged on investigating charges that it would be unusual, especially for a busy regional office such as New York, to complete an investigation within 180 days.) Now the employer moved to dismiss on the ground of failure of exhaust statutory remedies, arguing that the agency is required under Title VII to wait the full 180 days before issuing a right-to-sue letter. Judge Preska noted that the circuit courts are divided about whether a “premature” right-to-sue letter is fatal to a Title VII claim, and that the 2nd Circuit has yet to issue a merits ruling directly on point. But in a previous case, Henschke v. New York Hospital, 821 F. Supp. 166 (S.D.N.Y. 1993), she had taken the position that the EEOC may not issue an effective right-to-sue letter before 180 days had elapsed. Absent a 2nd Circuit ruling to the contrary, she saw no reason to “tread on new ground.” Judge Preska declined to retain jurisdiction over the state and local law discrimination claims. The complaint was dismissed without prejudice, however, so Gibb can start over again to get a new letter from the EEOC. Gibb is represented by Kenneth Daniel Walsh and David Evan Gottlieb of Wigdor LLP, New York.

**OHIO** – Chief U.S. District Judge Edmund A. Sargus has largely rejected motions to dismiss two prospective class-action lawsuits on behalf of thousands of people living with HIV who claim that a mailing by Caremark CVS improperly disclosed their HIV status to anyone who might see the envelopes used for the mailing. John Doe One v. Caremark LLC, 2018 U.S. Dist. LEXIS 215149, 2018 WL 6715471(S.D. Ohio, Dec. 21, 2018). Caremark won the contract to administer the distribution of HIV-related medications under Ohio’s AIDS Drug Assistance Program (ADAP), which is funded in part by the federal government under the Ryan White Act. Caremark had a mailing house send out letters to all the individuals registered with the Ohio Health Department as eligible for the program – thus, by definition, using a mailing list obtained from the state of everybody living with HIV. The envelope had a see-through window exhibiting the individual’s address as printed on the form letter that was sent out, and appearing above the name, visible through the window, was a code ending with the letters HIV. The outside of the envelope, in “big red letters” referred to “new prescription benefits.” Thus, anybody seeing the envelope, plaintiffs allege, would draw the logical conclusion that the person named was HIV-positive. Thus, plaintiffs alleged, their confidential HIV-related health care information was being disclosed without their authorization by the Ohio Department of Health, Caremark, and its mailing house, to anybody who had access to the envelope, including employees of the mailing house and the postal service and anybody who might see the outside of an envelope addressed to a roommate, co-worker, or family member. Plaintiffs seek declaratory judgements that this violates their rights under Ohio statutory and tort law. The defendants sought to have the lawsuits dismissed, but Judge Sargus found that with one exception the complaints did state potentially valid claims. He found that the plaintiffs’ allegations were sufficient to meet the common law tort standard under the state supreme court’s decision in Biddle v. Warren General Hospital, 715 N.E.2d 518 (Ohio 1999), for unauthorized disclosure of confidential medical information, as well as Ohio statutes on confidentiality of medical information and AIDS-related information. The court did dismiss a count under the Fair Credit Reporting Act as not applicable to any of the defendants. Plaintiffs are represented by a large team of lawyers, as befits a potential class action implicating lots of plaintiffs. * * * The facts of this case, as well as the Doe case reported above under Florida, suggests that the use of window envelopes (presumably to save the cost of having to print addresses on individual envelopes) is a risky business if done without taking care to avoid exposing information on the enclosed communication to those who might be handling or have access to the letter before it reaches the addressee!

**OHIO** – In dicta in Hoopes v. Hoopes, 2018 WL 6818543 (Ohio Ct. App., 8th Dist., Dec. 20, 2018), a proceeding arising from the divorce of a heterosexual couple, Judge Melody J. Stewart observed that a provision in the divorce decree concerning termination of spousal support may have been rendered unenforceable as a result of the Supreme Court’s decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The provision in the trial court’s decree said that the order for spousal support for the ex-wife could be modified upon remarriage, or upon “cohabitation with another of the opposite sex in a relationship tantamount to a marriage,” but “the court’s decree makes no such distinction for remarriage, likely because at the time it entered the decree, Ohio
defined marriage as ‘a union between one man and one woman.’ Continued Judge Stewart, “That definition has been rendered unenforceable by Obergefell . . . This is, however, a constitutional question that we do not answer giving that neither party raised the issue on appeal. What is more, the issue itself is not ripe for adjudication unless and until Brenda were to cohabit with a same-sex partner in a relationship tantamount to marriage.” The court agreed with Brenda, however, that “there is no statutory requirement that remarriage terminate spousal support;” as the trial court’s decree implied. Rather, said the court, remarriage could provide “changed circumstances” under which a trial court could determine whether continued spousal support payments were warranted.

TEXAS – U.S. District Judge Gray H. Miller ruled that a disability discrimination suit by a man who was denied a choice assignment and subsequently discharged after the employer learned that he was HIV-positive was barred by a “Separation Agreement” that he signed in exchange for severance pay, even though he alleges that the company has failed to live up to the terms of that agreement. *Lee v. Accenture LLP*, 2018 U.S. Dist. LEXIS 206811 (S.D. Tex., Dec. 7, 2018). Robert Lee began working for Accenture in August 2015. He alleges that a few months later he was given a three-month assignment in South Africa, but before he could leave on the assignment, his supervisors learned that he was HIV-positive, took him off that assignment, and denied him subsequent assignments. He was discharged effective October 11, 2016, and a week later executed a general release of any claims he may have had against Accenture. In exchange, Accenture promised to pay Lee a lump sum equal to four weeks of Lee’s base pay. He filed suit against Accenture in July 2018, asserting a violation of the Americans with Disabilities Act (ADA). Accenture moved for judgment on the pleadings, setting up the “Separation Agreement” as a defense. Lee claims the release is invalid, because the company did not actually pay him the full four weeks it promised; Accenture deducted $2,000 in “work-related expenses” from the payment without Lee’s consent. Thus, he claimed, he was no longer bound by the agreement, which was, in his view, invalid. Without conceding that it had violated the agreement, Accenture argued that Lee’s only cause of action against it would be breach of contract; that if it breached the contract, that would not invalidate Lee’s release of any claims he had against Accenture at the time he signed the Agreement. “The court agrees with Accenture,” wrote Judge Miller. “Courts have uniformly held that a plaintiff who ‘voluntarily settled her claims may not renounce her settlement agreement to bring suit for additional relief. If Defendants have not fulfilled their obligations under the settlement agreement, Plaintiff may have a claim for breach of contract,’” citing one 5th Circuit ruling and some prior Texas federal district court rulings. “Thus, even on the face of Lee’s pleadings, Lee has not stated a valid claim for relief under the ADA for Accenture’s pre-Separation Agreement actions. Even if Accenture has breached the Separation Agreement, the Separation Agreement remains valid and Lee’s pre-Separation Agreement claims are not revived.” However, the judge cited 5th Circuit authority that “dismissing an action after giving the plaintiff only one opportunity to state his case is ordinarily unjustified,” so the court granted Lee’s request for leave to amend. Lee is represented by counsel: Daryl J. Sinkule of Shellist Lazarz Slobun LLP, Houston.

TEXAS – More forum-shopping here. The U.S. Pastor Council and Hotze Wellness Center have filed a class-action suit in the Fort Worth Division of the U.S. District Court for the Northern District of Texas, where the only sitting judge is Reed O’Connor, who recently declared Obamacare unconstitutional and issued a nationwide injunction against federal enforcement of Title IX on behalf of transgender students, seeking a judicial declaration that the EEOC’s interpretation of Title VII to ban sexual orientation and gender identity discrimination is not binding on “churches or corporations that oppose homosexual or transgender behavior on religious grounds.” They claim that the failure of the agency to exempt them and those similarly situated violates the federal Religious Freedom Restoration Act and the First Amendment. They seek a declaratory injunction against the federal government “enforcing anti-discrimination policies of this sort against any employer that objects to homosexual or transgender behavior on religious grounds.” The named defendants are the EEOC, its four commissioners as of the date the complaint was filed (October 6), and then-Attorney General Jeff Sessions (who, of course, agreed with the plaintiffs in a memo he issued in October 2017). Commissioner Feldblum’s term expired at the end of December, and President Trump’s nomination of her for a new term did not come up for a vote for the Senate before the end of the 115th Congress, and thus expired. As of the start of 2019, the EEOC lacks a quorum of three confirmed commissioners, and so may not vote to bring any enforcement actions.

WISCONSIN – BloombergLaw’s *Daily Labor Report* (Dec. 17) reports that Wisconsin Circuit Judge William Atkinson, ruling from the bench during a December 14 hearing in *Hope Lutheran Church v. City of De Pere*, Wisconsin, No. 2018CV000209, held that the anti-discrimination ordinance enacted by the City of De Pere in November 2017, which includes sexual
CRIMINAL LITIGATION notes

By Arthur S. Leonard

U.S. COURT OF APPEALS, 6TH CIRCUIT – “The facts of this case tell a salacious tale of star-crossed lovers, heartbreak, abduction, decade-long disappearance, and she-said-she-said intrigue originating from the now-infamous AOL chatrooms in the early days of the internet. In contrast, the actual legal issues presented in this case are dry, technical, and straightforward,” wrote Judge Alice M. Batchelder for the 6th Circuit panel in United States v. Johns, 2018 WL 6703465 (Dec. 19, 2018) (not recommended for official publication). There ensues a complicated tale of a “secret lesbian relationship” followed by an abduction and an extended chain of events too lengthy to relate here. When the abducted woman escaped and reported to the police in Michigan that she had been kidnapped across state lines, the FBI was contacted and arrested defendant Mary Jane Johns, who was charged with kidnapping and use of a firearm during and in relation to the commission of a crime of violence, and initially detained pending trial. She was released to a halfway house and absconded, disappearing for 16 years, when she was discovered by the FBI in Wisconsin. She was indicted again, with the added charge of failure to appear for trial after pre-trial release. A jury convicted her on all three counts, with the pre-sentence investigative report recommending an enhancement for “sexual exploitation.” Johns challenged the enhancement at the hearing, pointing out that the there was no indictment, charge, or finding by the jury of sexual assault, but the trial court (E.D. Mich.) stated that it found the “general credibility of the complaining witness high and believable,” and thus found by a preponderance of the evidence that sexual exploitation occurred during the abduction and applied the enhancement in determining the final sentence. On appeal, Johns challenged the trial court’s exclusion of certain email exhibits that she had hoped would show the women’s relationship was consensual, and she claimed clear error on the enhancement, arguing that it violated her right to trial by jury. The Court of Appeals upheld the district court’s exclusion of the email exhibits.

“The fact of the matter,” wrote Judge Batchelder, “is that the district court was presented with printed documents from sixteen years earlier, from an unknown computer, via an unknown program, by an unidentified person who had opportunity to alter them, with no evidence or testimony offered to account for how the documents were produced. Johns had opportunity to address the district court’s concerns at trial but did not.” Also, the court found no abuse of discretion in sentencing, finding that contrary to Johns’ argument, the U.S. Supreme Court did not eliminate all judicial fact-finding in U.S. v. Booker, 543 US. 220 (2005), and that Johns’ counsel had admitted as much at the sentencing hearing. Based on the record, the 6th Circuit said that the district court “did not clearly err in this finding of fact.” Concluded the court on the sentencing issue: “The three-level enhancement that the court applied to the kidnapping charge resulted in an advisory guideline range of 97 to 121 months. However, even with the sexual exploitation enhancement applied, the court found mitigating factors and varied downward by 13 months, arriving at a sentence of 80 months on the kidnapping charge. We find no abuse of discretion here.” The opinion does not mention the total sentenced imposed on Johns. The 6th Circuit’s opinion lists as appellant’s counsel Brian P. Lennon, Ashley Grace Chrysler, Warner, Norcross & Judd, Grand Rapids, MI; and Mary Jane Kimberley Lee Johns, Midland County Jail, Midland, MI (pro se).

INDIANA – The Court of Appeals of Indiana affirmed a 36-year prison sentence for Gerald Duane Lewis, who shot and robbed a transgender woman, Crystal Cash, shouting “die, die faggot” as he did so. Lewis v. State of Indiana, 2018 WL 6837079, 2018 Ind. App. Unpub. LEXIS 1573 (Dec. 31, 2018). Cash and Lewis were not previously acquainted, but had a “random encounter” on the street in Evansville, began to chat, and Cash, who presents as a woman, invited Lewis to come to the massage parlor she operated in an office building (which also served as her residence). Wrote Judge James S. Kirsch for the Court of Appeals, “Lewis wore combat boots and an ‘Israeli Christian’ shirt with gold fringe and had tattoos on both of his arms. Later investigation revealed that Lewis was a member of a
CRIMINAL LITIGATION notes

‘black nationalist hate group’ known as ‘Israel United in Christ.’” Lewis went to use the restroom, was in there for a “long time,” and when he came out “he had ‘turned into a monster,’” according to Cash’s testimony. “Cash fled to her bedroom, but Lewis followed her, pulled out a gun, and shot Cash in the face, yelling ‘die, die faggot.’” Cash pretended to be dead while Lewis stole all forms of her identification, including her passport, several credit cards, and the keys to Cash’s office. Lewis then left.” Cash, seriously wounded, was however capable of calling 911 and summoning help, and subsequently the police tracked down Lewis from her description. His criminal prosecution was protracted due to issues about his mental capacity, but ultimately the trial court resolved conflicting professional opinions in favor of finding that Lewis could be tried, and he pled guilty to Level 1 felony attempted murder, in exchange for which the State agreed to dismiss other counts and a proposed sentencing enhancement. (Notably, Indiana law, unlike many other jurisdictions, does not make it a hate crime to attempt to murder somebody because they are gay or transgender. The sentencing enhancement would be due to Lewis using a firearm in his commission of the crime.) The judge could have sentenced him up to 40 years, but gave only 36. Nonetheless, Lewis appealed, arguing that the court had abused its discretion by failing to give sufficient consideration to Lewis’s clean criminal record, his guilty plea, and his expression of remorse at the sentencing hearing. (He also claimed not to remember anything of what had happened.) Lewis contended that the trial court abused its discretion by not mentioning Lewis’s “mental illness” as a mitigating circumstance. The court of appeals rejected these contentions, and concluded that the sentence was not inappropriate, noting particularly the severe injuries caused to Cash. “Cash was the victim of an unprovoked shooting,” wrote Judge Kirsch. “She was hospitalized for about one month, underwent two emergency surgeries, had a complete blood transfusion, had her jaws wired shut, was placed on a breathing machine, and had a feeding tube inserted into her abdomen. Cash suffered lasting physical damage including partial loss of her tongue, jaw bone and teeth, nerve damage, and pain. She has developed a speech impediment, and has a small hole in the left side of her face that, as of the sentencing hearing, had not healed.” The court concluded that the “nature of the offense does not warrant a revision of Lewis’s sentence.” Also, despite Lewis’s denials, the court found that his “use of the homophobic slur suggests that he had knowledge of Cash’s sexual and gender identities at the time of the shooting. The Record establishes that Lewis committed a targeted act of violence. We do not believe that Lewis’s character warrants a revision of his sentence.” Karen M. Heard of the Vanderbilt County Public Defender’s Office represented Lewis on appeal.

LOUISIANA – The Louisiana 1st Circuit Court of Appeal affirmed a sentence of ten years at hard labor for Allen Odell Woods, an HIV-positive man who was convicted of exposing his rape victim to HIV under a state law that authorizes a sentence of up to ten years for such an offense. State of Louisiana v. Woods, 2018 La. App. Unpub. LEXIS 396 (Dec. 21, 2018). Woods was a client of a Baton Rouge alcohol and drug rehabilitation center, where his victim, identified as M.T., a retired public school teacher, worked part-time tutoring, checking in clients, and generally ensuring that their needs were met. M.T. became acquainted with Woods in the course of her work. She testified to an occasion when she had offered a car ride home to Christine, a client of the center, and Woods, a friend of Christine, came along. During a break in the drive, M.T. stopped at her home and let her passengers smoke on her back patio. Christine gave Woods M.T.’s phone number, and subsequently, Woods began communicating with her, stopping at her home uninvited, and even mowing her lawn without any request from her. M.T. was aware from his chart at the center that Woods was HIV-positive although they apparently never discussed that. M.T. was sleeping on her sofa when she awoke early in the morning of August 23, 2016, to find Woods standing in front of her. She had not locked her front door before falling asleep the night before. She asked him what he was doing there, and he replied that he was there to “sex” her. She kept protesting and resisting, but he beat her and raped her. (His semen was later detected in her vagina.) At some point she gave up fighting because she did not want Woods to keep beating her. After Woods allowed her to dress, she suggested they go onto her back patio to smoke. He drifted off to sleep, she called 911, he was arrested. Woods was charged and convicted by a jury on counts of home invasion, intentional exposure to HIV, and two counts of second degree rape. He was sentenced to concurrent terms of 25 years for home invasion and forty years for rape, to be followed consecutively by ten years for the HIV exposure charge. Woods’ defense at trial was that he had never ridden in M.T.’s care, she had invited him to her home, they had consensual sex, and he never struck her. The jury clearly believed none of it. He raised numerous issues unsuccessfully on appeal. One was that because M.T. was not a health care worker she should not have had access to his medical records at the clinic, but the court noted that he didn’t raise that issue at trial and thus waived it on appeal. He had also testified at trial that he was not HIV-positive, but the prosecution introduced medical records showing that he was and knew it. As relevant here, he contended that the combined 50 year sentence was “unconstitutionally excessive,” given that he was sixty years old. The court of appeals reviewed
the standards and guidelines of sentencing, particularly that maximum sentences should be given only to the worst offenders. In this connection, the Department of Corrections had recommended maximum sentencing of Woods in light of his extensive criminal history, including numerous felony and misdemeanor convictions, including offenses similar to those committed against M.T. Finding that Woods is a “danger to society because of his violent criminal history” and noting M.T.’s letter to the court detailing the physical and mental harm Woods inflicted on her and the humiliation and fear in which she has lived since the attack, rendering her unable to work, “and her mental and spiritual wounds,” the court of appeals found that it was reasonable for the trial court to have classified Wood among the worst offenders, deserving a maximum sentence. The court upheld the convictions and sentences in full.

PRISONER LITIGATION notes
By 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.

GEORGIA – In 2017, Law Notes severely criticized a federal magistrate and district judge for misreading the pro se complaint of transgender inmate Robbin Amanda Bayse, a/k/a Robert Bayse, in Bayse v. Holt, 2017 WL 3911244, 2018 U.S. Dist. LEXIS 211712 (N. D. Ga., September 7, 2017), reported October 2017 at pages 422-3. There, Bayse was complaining about access to an endocrinologist to manage her gender dysphoria, and the court treated her claim like a mere “difference of opinion” that is not actionable under the Eighth Amendment. The court said her needs were not “serious” and that her claims only involved personal preferences. This writer also criticized the supposed “de novo” review of the magistrate’s decision as “cursory.” Now, in Bayse v. Dozier, 2018 WL 6601085 (M.D. Ga., December 17, 2018), Bayse is back in federal court, with new judges, who dust off her claims with the same old misunderstandings.

Bayse now has an endocrinologist, who is supposedly monitoring her hormone treatment. Bayse claims that the Georgia Department of Correction officials (“GDOC”) are not following the recommendations of the endocrinologist on frequency of return visits and ordered lab work. GDOC admits that missing lab work has caused “rescheduling”; Bayse says sometimes that takes months. Bayse filed a motion for a preliminary injunction to compel evaluation for gender confirmation surgery, saying she had been recommended for evaluation (even sometimes for the surgery itself) on multiple occasions, providing dates and names of GDOC providers who allegedly said this. She also sought an order prohibiting GDOC from denying care ordered by the endocrinologist. U.S. Magistrate Charles H. Weigle recharacterized the first part of her motion as one for a mandatory preliminary injunction and recommended its denial because no one had found her surgery to be “medically necessary.” GDOC filed an affidavit from a “treating” physician who had known Bayse about two months at the time. He said he reviewed her chart and could find no order for gender confirmation surgery. Without such an order, Magistrate Weigle recommended that no mandatory preliminary injunction should be considered. GDOC also filed several “medical” exhibits under court-ordered seal, ostensibly to “protect” Bayse’s “privacy,” although Bayse filed several excerpts from her medical record openly to support her motion. They confirmed her allegation of referrals for evaluation for gender surgery. (It is difficult for this writer to see what “privacy” was being protected here, other than GDOC’s – it is also unclear if Bayse was shown these documents.) It is plain from the medical records available in the motion that GDOC officials kept referring Bayse’s request for evaluation for surgery to each other, with no definitive decision. This is the gravamen of the second aspect of the request for preliminary relief. One would assume that the buck would stop at GDOC’s medical director, but her sworn interrogatory answers said that she lacked professional training to opine on treatment of gender dysphoria. Magistrate Weigle found that Bayse failed to show that such volleying was “more than mere negligence” – and hence, not actionable. U.S. District Judge Tilman E. Self, III, performed what he called a “de novo” review of Bayse’s objections, which he incorrectly said were mostly conclusory or based on inadmissible evidence. The operative portion of his adoption of the Magistrate’s recommendations consists of two sentences. In this writer’s view, Bayse’s efforts here were among the best pro se attempts at litigating a medical case that we have seen. She even tried to get the judges to look at similar cases and to judicially notice the experts’ affidavits in them. Bayse has what appears to be a prima facie case of GDOC’s failure to exercise medical judgment under the Eighth Amendment, but she cannot win in this court without counsel and an expert.

KENTUCKY – U. S. District Judge Rebecca Grady Jennings, appointed by President Trump and confirmed in 2018, allowed a transgender prisoner to proceed with her claims of denial of transgender medical care in Baker v. Jarden, 2018 U.S. Dist. LEXIS 207519, 2018 WL 6492615 (W.D. Ky., December 10, 2018). Anthony Heath Baker, pro se, complained that she was promised review of her medical treatment plan by specialists in transgender care, but it never occurred. Judge Jennings allows her to proceed for injunctive relief and
what states a claim at the pleading stage.

and Recommendation [“R & R”] about
Stewart D. Aaron says in his Report
notable for what U.S. Magistrate Judge
New York City corrections system. It is
who was victimized by peers in the
case brought by a transgender inmate,
se claims in the Sixth Circuit.
summary of standards for screening pro
psychologist. The case includes a good
deliver it: the medical director and the
psychologist. The case includes a good
summary of standards for screening pro
se claims in the Sixth Circuit.

NEW YORK – This is a failure to protect
case brought by a transgender inmate,
who was victimized by peers in the
New York City corrections system. It is
notable for what U.S. Magistrate Judge
Stewart D. Aaron says in his Report
and Recommendation [“R & R”] about
what states a claim at the pleading stage.
In Braxton v. City of New York, 2018
U.S. Dist. LEXIS 215168 (S.D.N.Y.,
December 20, 2018), Judge Aaron
recommends that pro se inmate B.
Braxton/Obed-Edom be permitted to
proceed on most of her claims against
effective officials of the New York
City Department of Correction and its
regulatory body, the Board of Correction.
He also allows municipal claims against
the City of New York. Braxton, housed in
the Manhattan Detention Center (often
colloquially known as the “Tombs”)
because she had enemies on Rikers
Island, experienced harassment and
physical and sexual assault because she
identifies as a “gender non-conforming
bi-sexual gay male.” The troubles
began in 2015 and continued into 2016.
During this period, Braxton asked to
be identified as transgender and sought
housing in the Transgender Housing
Unit. Judge Aaron writes extensively
about Braxton’s efforts to protect herself
through grievances, “311” calls, and
letters on her behalf to members of the
Board of Correction from the Prisoners’
Rights Project of the Legal Aid Society.
Despite these efforts, assaults continued;
and Braxton was found “not qualified”
for Transgender Housing. After several
months, however, she was moved to the
Brooklyn Detention Center. She is
now incarcerated in upstate New York
and sues for damages for her ordeal.
The R & R explores the debate among
district courts in the Second Circuit
as to whether the five standards for
supervisory liability enunciated in
Colon v. Coughlin, 58 F.3d 865, 873
(2d Cir. 1995), survive the Supreme
Court’s “plausibility” tests for pleadings
in Ashcroft v. Iqbal, 556 U.S. 662, 679
(2009). A full description of this debate
is beyond the scope of this report, but
readers who have supervisory liability
issues may find the discussion helpful.
The R & R found the claim meritorious
where the constitutional tort – here,
protection from harm under Farmer v.
applies the same standard to the liability
of the supervisors; to wit: deliberate
indifference to Braxton’s safety in both
cases – citing Turkmen v. Hasty, 789
F.3d 218, 250 (2d Cir. 2015), rev’d in
part on other grounds sub nom. Ziglar
v. Abbasi, 137 S. Ct. 1843 (2017). Thus,
supervisory liability is permissible
where a defendant’s conduct itself
“reflects the elements of the underlying
constitutional tort.” Id. The R & R finds
that Braxton’s allegations against the
supervisors satisfy the objective prong
of Farmer: the existence of a substantial
risk of harm. On the second prong,
subjective deliberate indifference to the
risk, the R & R allows a pleadings-stage
inference under all the circumstances
that Braxton’s appeals and those on his
behalf were received and read, citing
Grullon v. City of New Haven, 720
F.3d 133, 140-41 (2d Cir. 2013), and
distinguishing Sealey v. Gilmer, 116
F.3d 47, 51 (2d Cir. 1997), where such
inference was insufficient to survive a
motion for summary judgment. This is
enough for Braxton to proceed against
the Commissioner of Corrections,
the Manhattan Detention Center
Superintendent, and the Board of
Correction Director. Although the
question is “close,” the R & R also
allowed a failure to train claim against
the supervisors, based on officers’
telling Braxton that she need to learn
to “fight” in order to protect herself.
Further development of claims against
these defendants appropriately awaits
discovery. A motion to dismiss under
F.R.C.P 12 should test the “formal
sufficiency” of the plaintiff’s claim in a
“streamlined fashion,” without
evolving into a “contest regarding its
substantive merits.” Because the Board
of Correction members who were
contacted by the Prisoners’ Rights
Project took some action and there
is no allegation they could have done
more, the R & R recommends dismissal
of claims against them. The R & R
also recommends denial of qualified
immunity at the pleading stage, citing
McKenna v. Wright, 386 F.3d 432, 436
(2d Cir. 2004). Because the R & R
finds that the executive defendants set
policy for the City of New York, the
City remains a defendant, too. Judge
Aaron allows Braxton leave to amend. It
is refreshing to see a Magistrate Judge
exercise such care in a pro se case. Law
Notes’ pages are replete with examples
where they did not.

VIRGINIA – In an opinion that treats
pro se transgender prisoner Brian
Allen Leonard respectfully (e.g., using
female pronouns), the Supreme Court
of Virginia reversed and remanded
a summary dismissal of a petition
for a name change in Leonard v.
Commonwealth of Virginia, 2018
WL 6566790, 2018 Va. LEXIS 184
(December 13, 2018). Writing for a
unanimous court, Justice William C.
Mims found that Prince George County
LEGISLATIVE & ADMINISTRATIVE notes

By Arthur S. Leonard

LGBT IN U.S. CONGRESS – The 116th Congress, scheduled to begin on January 3, 2019, has the largest contingent of “out” members in U.S. history. In the Senate, out lesbian Tammy Baldwin (D-Wisconsin) was re-elected in 2018 for another six-year term, and Kyrsten Sinema (D-Arizona), an out bisexual member of the House of Representatives, flipped the seat previously held by retiring Republican Senator Jeff Flake. Out gay incumbents re-elected to the House included David Cicilline (D-Rhode Island), Sean Patrick Maloney (D-New York), Mark Pocan (D-Wisconsin), and Mark Takano (D-California). Newly-elected members of the House LGBT caucus include Angie Craig (D-Minnesota), Sharice Davids (D-Kansas), Katie Hill (D-California), who identifies as bisexual, and Chris Pappas (D-New Hampshire).

U.S. CONGRESS – Representative Dina Titus (D-Nev.) led a group of House members on December 13 introducing a bill titled “Greater Leadership Overseas for the Benefit of Equality Act of 2018” or “GLOBE Act of 2018,” intended to outline a vision for U.S. leadership in the protection of the rights of LGBTI individuals around the world. Its introduction during the 115th Congress, when Republicans ruled the House, was merely symbolic. Its potential reintroduction and possible House passage could take place in the 116th Congress, when Democrats will take over the House. Its passage while Republicans continue to control the Senate is impossible, and President Trump would surely veto it if it were, by some miracle, to pass, because its intent is to codify Obama Administration tools aimed at promoting LGBTI equality globally.

U.S. COMMISSION ON CIVIL RIGHTS – The U.S. Commission on Civil Rights, described as a bipartisan federal agency, sent a letter to Congress on December 7 calling on the federal government to “pass legislations that adds explicit protections against workplace discrimination on the basis of sexual orientation and gender identity. The Commission was established decades ago by Congress to make policy recommendations on civil rights to the government. Four commissioners are appointed by the President and four by Congress. As of now, four of the Commission’s members are Democrats, three are Independents, and one is a Republican. The agency has also supported the EEOC’s position that the Civil Rights Act of 1964 ban on sex discrimination should be construed to cover sexual orientation and gender identity discrimination, a position opposed by the Trump Administration speaking through the Justice Department and the Solicitor General in cases pending before the Supreme Court. BloombergLaw Daily Labor Report, Dec. 10.

EEOC – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – The EEOC, the agency charged with administering federal employment discrimination law, began 2019 without a quorum, as no action was taken in the Senate during December to end the stalemate over confirmation of Chai Feldblum, an out lesbian commissioner originally nominated by President Barack Obama and renominated more than a year ago by Donald Trump to serve another full term that was to begin on January 3, 2019. Under statutory provisions governing the composition of the agency, no more than three of the five commissioners may be members of the same political party. Once President Obama had appointed a Democrat to fill a seat vacated by a Republican, the agency gained a Democratic majority that has persisted for a decade as the Senate refused to take action on the “package” of candidates nominated by Trump towards the end of 2017. The chief opponent of Feldblum (who enjoyed the endorsement of business groups that might otherwise oppose some Democratic nominees) was Senator Mike Lee, a Utah Republican and avowed homophobe who specifically criticized Feldblum for successfully advocating within the Commission to overturn old precedents and recognize sexual orientation and gender identity discrimination claims under Title VII of the Civil Rights Act. By blocking confirmation of Trump’s package, Lee has effectively stalled the ability of the Trump Administration to achieve a working Republican majority on the
Commission that might bring its position on this issue back in line with the position articulated by former Attorney General Jeff Sessions in a memorandum he issued in October 2017, contending that federal sex discrimination laws should be more narrowly construed in line with the presumed understanding of Congress in 1964 when it enacted Title VII. Trump will eventually achieve his Republican majority, but the question is when? One of his Republican nominees, frustrated by the sixteen-month delay (so far) in confirming him, has withdrawn, so a new nominee must be found. The nominations Trump made in 2017 expire with the outgoing Congress, so technically there are no nominations pending as of the beginning of January to fill the three vacancies on the Commission. And without a quorum, the Commission cannot issue regulations or rulings on individual cases. The EEOC is not an adjudicatory body regarding private sector or state public sector discrimination cases, and the administrative process of investigating charges and issuing determinations about instituting litigation are in the hands of the General Counsel, not the commissioners, but the agency does adjudicate employment discrimination claims by federal employees, as an appellate body regarding decisions issued by federal agency civil rights offices. Lacking a quorum, the EEOC will not be able to issue decisions in such cases.

OHIO – John Kasich, a Republican whose term of office ends January 14, 2019, issued Executive Order 2018-12K on December 19, rescinding his prior executive order on anti-discrimination policy in state government employment, and replacing it with a new, more expansive policy, that adds gender identity and expression to the list of prohibited grounds of employment discrimination by the state. The earlier policy had included sexual orientation, which is carried forward as part of the list of prohibited grounds, which – for the ensuing month – include race, color, religion, gender, gender identity or expression, national origin (ancestry), military status (past, present or future), disability, age (40 years of older), genetic information, or sexual orientation, “as those terms are defined in Ohio law, federal law, and previous Executive Orders.” The final sentence of the Order states: “I signed this Executive Order on December 19, 2018 in Columbus, Ohio, and it will expire on my last day as Governor Ohio unless rescinded before then.” Thus, the life of the Order is a month, unless incoming Governor Mike DeWine, a Republican whose public opposition to protecting LGBTQ people from discrimination is well known, decides to continue adopt it as his own, an unlikely scenario. The Order that Kasich rescinded and replaced had also stated that it would expire with the Governor’s term in office. Ohio does not forbid sexual orientation or gender identity discrimination by statute, although several of the state’s municipalities have ordinances that do so. The symbolic nature of Kasich’s Order aroused speculation from commentators in the LGBT press that he was staging himself for a 2020 presidential campaign, hoping to distinguish himself from President Trump on this issue and thus win the support of LGBTQ Republicans.

PENNSYLVANIA – Newtown Township passed an anti-discrimination ordinance that includes sexual orientation and gender identity and will establish a Human Relations Commission to receive and investigate discrimination charges, reported Newtownpanow.com on December 4. The 4-0 votes by the Board of Supervisors makes Newtown Township the sixth jurisdiction within Bucks county to enact such an ordinance, among the approximately 50 jurisdictions in Pennsylvania that have done so. (Efforts to achieve statewide protection through legislation have stalled, but an executive order bans discrimination by the executive branch of the state government.) The ordinance covers employment, housing and public accommodations, and also forbids the practice of conversion therapy. The ordinance will go into effect once the human relations commission has been staffed.

WEAST VIRGINIA – Beckley’s city council has set a January 8 first reading for a proposed ordinance that would make Beckley the 13th city in the state to ban discrimination because of sexual orientation or gender identity. A local newspaper, reacting to the city’s Human Rights Commission vote on December 6 in favor of the proposal, surveyed two other communities in the state to determine whether there had been any problem created by the enactment of their ordinances. Specifically, focusing on the main objection by opponents to banning gender identity discrimination, the newspaper inquired into any problems arising around access to women’s restrooms by transgender women. Officials from Charleston and Lewisburg reported that no problems had arisen along the lines argued by opponents. Men have not been using the ordinances as an excuse to invade women’s public restrooms and harass or attack their users. Register-Herald, Dec. 31.

WYOMING – The Legislative Management Council of the Wyoming legislature, bowing to objections mainly from Republican legislators, voted 7-6 to remove the listing of all protected classes from the Legislature’s own anti-discrimination and sexual harassment policy. The policy had been amended earlier in the year to add sexual orientation and gender identity, but that proved too controversial. Rather than just remove those categories, which would implicitly signal that it is fine
for legislators to discriminate on that basis, the Council decided to remove all categories and just commit to having “civil discussions” in the Legislature. Republican legislators supporting the removal of categories argued that the supporters of the anti-discrimination policy had been “weaponizing” the Legislature’s rules of conduct against “people of faith,” seeking wrongly to censure anti-LGBT arguments based on religious beliefs.

INTERNATIONAL notes

By Arthur S. Leonard

BERMUDA – The government confirmed on December 13 that it had applied to the Court of Appeal for permission to appeal to the Privy Council in the U.K. a recent local court judgment on same-sex marriage. The Bermuda Court of Appeal has ruled in Attorney General v. Ferguson and Others that same-sex couples have a constitutional right to marry in Bermuda, and the government is determined to resist this to the final possible appeal. The first pro-marriage equality ruling was issued in May 2017, and reaffirmed in a ruling on a case challenging the Domestic Partnership Act, which was an attempt by the government to subvert the ruling by creating a non-marital alternative for same-sex couples. In November, the Court of Appeals dismissed the government’s appeal of a trial court ruling that the DPA was unconstitutional. The Privy Council in England is the highest and final appeals court for constitutional claims in Bermuda. Bernews.com, Dec. 13.

CANADA – Prime Minister Justin Trudeau has approved a special dollar coin to celebrate the 50th anniversary of the decriminalization of gay sex in Canada. According to Canadian Broadcasting Company (CBC) News, Trudeau approved the special issue on December 14. The coin will be issued by the Royal Canadian Mint and be circulated throughout the country as regular legal tender. The news reports did not state what the design would be on the coin, whose reverse side will continue to depict a loon (which has led Canadians to refer to dollar coins as “loonies”).

BOTSWANA – The full bench of the High Court announced that it will hear argument in a case challenging the constitutionality of the country’s criminal laws aimed at same-sex sexual activities on March 15. The case was filed as a gay man, identified only as L.M, was to have been heard last May but was postponed for “logistical reasons.” The organization Lesbians, Gays and Bisexuals of Botswana (Legabibo) was extended amicus curiae status in the case. The appellate courts in Botswana have been increasingly supportive of LGBT rights and maintain a degree of independence from the government’s political branches. In 2016, Legabibo won a case in the court of appeal, ordering the government to officially acknowledge and register the organization, and stating that the status of being gay was not a crime in Botswana. The courts have also ordered the government to fully recognize the gender identity of transgender individuals. MambagirlNews.com, Dec. 6.

CHILE – The Supreme Court has declared in favor of a constitutional right to marry. In a ruling issued early in December, it stated: “Constitutional norms and international convention provide that every person who inhabit the State of Chile is the holder of the right to marry and to found a family.” It was ruling in a case of a straight couple whose registration was denied by the Civil Registry office because the woman was a foreigner without a Chilean identity card. The LGBT rights group Fundacion Iguales hailed the ruling and claimed that it was applicable to same-sex couples, but whether the government will take it as such is open to question.

COLOMBIA – Agence France Presse

English Wire (Dec. 18) reported that on December 3 a court handed down Colombia’s first conviction for the murder of a transgender woman. A judge sentenced Davinson Erazo to 20 years in a psychiatric facility for murdering Luis Angel Ramos, who used the name Ayela, last February. Judge Catalina Manrique wrote that Ramos was killed “for being a woman or for reasons related to her gender identity.” The judge said that Erazo could not be sent to prison because he has a mental disability. Erazo assaulted Ramos in a hair salon where she worked, and then later he killed her with a shotgun blast. According to government figures, during 2017 109 LGBT people, 36 of whom were transgendered women, were murdered in Colombia.

COSTA RICA – President Carlos Alvarado signed four decrees and directives in December to “guarantee the LGBTI society equality and parity of rights, without any discrimination,” reported qcostarica.com on December 22. One decree eliminates the prohibition and sanction of notaries who submit same-sex marriage certificates to the Civil Registry. Gender identity is recognized in the residency cedula (DIMEX) of transgender people, and migratory rights are recognized for foreigners who have married Costa Ricans of the same sex outside the country. Same-sex couples will be recognized for purposes of acquiring and financing housing transactions, and various other purposes. By order of the Constitutional Court, same-sex marriages are to be available by May 26, 2020.
CROATIA – The Parliament adopted a law blocking same-sex couples from qualifying to serve as foster parents on December 7, despite the fact that same-sex couples have been able to register as “life partners” since 2014, a development sparked by Croatia having joined the European Union – which expects its member states to provide some form of legal status for same-sex couples – in 2013. The Rainbow Families Association, an organization of same-sex parents, condemned the enactment and vowed to file a challenge with the constitutional court. “About 262 gay couples have registered as life partners in Croatia,” reported Agence France Presse English Wire on Dec. 11 in reporting on the legislative development. The report also stated that “more than 200 prominent Croatian psychologists and sociologists” had issued a statement ahead of the legislative vote, voicing hope that the legislators would not be led by “prejudices and stereotypes” and would not deprive children of “a chance to be paired with foster parents regardless of their sexual orientation.”

CUBA – Hopes that Cuba’s legislature would approve a new constitution that specifically allows for same-sex marriage were dashed on December 22, when the legislature decided that instead of changing the constitutional definition of marriage to be gender-neutral, it would altogether remove any constitutional definition of marriage, deferring the question whether to allow same-sex unions to a political process that will involve a national referendum on the question. Mariela Castro, the daughter of Raul Castro and niece of Fidel Castro, a leading proponent of marriage equality and LGBT rights in Cuba, wrote on Facebook, “There is no setback. The fight continues, let’s give a ‘yes’ to the constitution and then close ranks to achieve a family code as advanced as the new constitutional text.” There was at least some progress in the sense that the existing constitution’s definition provided a barrier to achieving same-sex marriage through a political process. Reuters News, Dec. 23.

GERMANY – The Parliament passed a measure on December 14 allowing Germans to choose “diverse” as an option for gender on birth certificates and other legal records. “Adults seeking to change their birth certificates must produce a doctor’s statement or other medical certificating confirming their gender fluidity in order to change their existing designation to the new option,” reported The New York Times (Dec. 14), leading to objections from LGBT groups who argue against relying on medical certification for gender identity determination. The measure’s enactment responded to a ruling by Germany’s highest court in 2017 that a limitation to binary gender classifications was discriminatory and unconstitutional. As long ago as 2013, reported The Times, Germany became the first country in Europe to allow parents to register newborns a neither female nor male if they were born with characteristics of both sexes, a phenomenon which occurs in one or two live births in a thousand. The plaintiff in the court case, who uses only the name Vanja, issued a statement in response to the enactment: “It is a great feeling that it is now officially recognized that there is more than just ‘men’ and ‘women’; even if it is a pity that of all things, medicine, which was so involved in making intersex people invisible, should now decide who should be allowed to choose a third option.”

INDIA – The lower house of the Parliament has passed a controversial Transgender Persons (Protection of Rights) Bill on December 17, and sent it to the Upper House. Some transgender groups within the country and the International Commission of Jurists have been very critical of the bill, complaining that it creates an overly complex bureaucratic procedure for official gender identity determinations and certifications, as well as requirements for surgery (at a time when many jurisdictions have gone the opposite direction, recognizing that people can live in the gender within which they identify without surgical alteration, which is not necessarily available, affordable, or desired by all transgender people). There are also complaints about alterations to the criminal law, including penalties for begging at a time when for some transgender people begging has been their only means of financial support due to rampant employment discrimination against them. Further, the bill fails to follow up on India Supreme Court rulings by tackling the problems of discrimination in employment and education facilities against transgender people. * * * Asia News International (Dec. 4) reports that the Labour Court on December 3 ordered a company to reinstate a woman who was terminated after being diagnosed with HIV. She alleged that she was terminated after she submitted a medical document for claiming benefits. The document revealed her diagnosis, and the company terminated her the same day. Speaking to the press, the woman said the company questioned her about how she became infected, and she said she got it from her husband (who has died from AIDS) and was forced to resign after working there for five years. Although she was told she was fired because of her HIV infection, the reason listed on documents she was given was “absenteeism.” She had taken two months of sick leave but had resumed working for a week before her discharge.

ISRAEL – The High Court of Justice ruled on December 12 that the Interior Ministry had wrongly refused to order the Interior Ministry to list both adoptive parents on a birth certificate for

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a child adopted by a same-sex couple. The Tel Aviv Family Court approved the adoption in 2015, but the Ministry, while complying with the court order to permit the adoption, refused to list both parents on the birth certificate. Attorney-General Avichai Mandelblit “essentially supported” the gay couple’s petition to the High Court to compel the Ministry to issue an amended birth certificate, arguing that it was in the best interest of the child. However, reported the Jerusalem Post (Dec. 12), “The Interior Ministry argued that there was no practical application to issuing the new document once the adoption was approved, and that the state could choose to refrain from being used by the couple to make political statements promoting its ideology, which conflicts with the ideology of much of the country’s citizenry.” The unanimous three-judge High Court panel decided that the best interest of the child was served by ordering the Ministry to issue the amended certificate, arguing that it was in the best interest of the child. However, reported the Jerusalem Post (Dec. 12), “The Interior Ministry argued that there was no practical application to issuing the new document once the adoption was approved, and that the state could choose to refrain from being used by the couple to make political statements promoting its ideology, which conflicts with the ideology of much of the country’s citizenry.” The unanimous three-judge High Court panel decided that the best interest of the child was served by ordering the Ministry to issue the amended certificate, and this principle outweighed any other considerations. As usual in such cases, the identities of the parents and child were not made public in court papers.

RUSSIA – The Organization for Security and Cooperation in Europe (OSCE) issued a report on December 20 stating that the Russian government is tolerating human rights abuses committed against LGBT people in Chechnya. OSCE said that its human rights monitors had found “clear evidence” – contrary to the denials by Russian and Chechhnian officials – confirming allegations of human rights abuses against LGBT people, as well as drug users, human rights advocates, lawyers, and independent media. The report said that Russian officials responsible for investigating alleged crimes in Chechnya “appear not to have lived up to their responsibilities,” and commented: “Most observers believe that there is a lack of political will for the sake of stability in the region.” The study confirmed “several waves of abuses in 2017 against people based on their sexual orientation and gender identity,” reported Agence France Press English Wire on December 21. The sixteen member states of the Organization who had called for the investigation and report urged Russia to “work with the relevant international institutions” on the issues raised in the report. Russia is formally a member state of the OSCE.

JAPAN – Kyodo News (Dec. 28) reported that a group of ten same-sex couples plan to jointly file a lawsuit against the government in February, arguing that the government’s denial of the right to marry to same-sex couples violates the equality under the law and protection for the right to marry in Japan’s constitution. The couples plan to file suit in district courts throughout the country and to pursue their claims simultaneously. They are relying on Article 24 of the constitution, which states, “Marriage shall be based only on the mutual consent of both sexes.” They argue that this language does not preclude same-sex marriage, but is intended to insure that people are entitled to refuse to marry and cannot be forced to marry against their will.

SOUTH AFRICA – The National Assembly passed a bill that will end the practice of marriage officers working for the State refusing to marry same-sex couples. The Civil Union Amendment Bill seeks to repeal Section 6 of the Marriage Act, under which marriage officers were allowed to opt out of performing ceremonies on grounds of “conscience, religion and belief.” The new bill had the support of most parties in the Assembly, including the ruling African National Congress. An ANC MP, Hlomani Chauke, described as “disturbing” the statistic that almost 88 percent of marriage officers were claiming the exemption. The measure gives the Home Affairs Department a 24-month “transitional period” to provide training for marriage officers before the prohibition takes effect. The measure applies only to civil marriage officers, not to religious officiants, who remain free to decide whom for whom they will officiate marriages, according to a report in iol.co.za/news, Dec. 6.
TAIWAN – The Ministry of Justice announced that a draft bill to govern same-sex marriage in accordance with recent referendum results will be presented to the legislature for review by March 1. The referendum results showed that a majority of those who voted do not want the government to make marriage available for same-sex couples, but would support legislation providing an alternative legal status for them. The nation’s Constitution Court, however, had previously ruled that the Civil Code’s definition of marriage as “the legal union between a man and a woman” violated rights guaranteed under the nation’s Constitution. As the court left things, if the legislature does not pass a measure providing marriage rights for same-sex couples by May 24, the Court’s decision will automatically go into effect and same-sex couples will have a right to register for marriage at household registration offices. The government appears to be trying to forestall that result by providing a legislative alternative, but it is uncertain whether the Court will approve if it is challenged, as it surely will be. Taipei Times, Dec. 6.

TANZANIA – The U.S. State Department issued a travel advisory in December warning that people should “exercise increased caution in Tanzania due to crime, terrorism, and targeting of LGBTI persons.” The advisory stated: “Members of the LGBTI community have been arrested, targeted, harassed, and/or charged with unrelated offenses. Individuals detained under suspicion of same-sex sexual conduct could be subject to forced anal examinations.” We are wondering whether this is the first time the U.S. State Department has referred to “anal examinations” in an official posting on its website? People intrepid enough to visit Tanzania despite these warnings are advised to “avoid public displays of affection particularly between same-sex couples.” And they are told that “U.S. citizens who travel abroad should always have a contingency plan for emergency situations,” providing a link to a “traveler’s checklist.” Travelers were also advised to “follow the Department of State and the US Embassy in Tanzania on Facebook and Twitter” in order to stay current on the situation.

THAILAND – Thai News Service (Dec. 27) reported that the cabinet had approved a bill that would legalize the cohabitation of same-sex couples and enable them to undertake collective financial transactions. A spokesperson for the deputy prime minister stated that enactment of the bill would make Thailand the first country in Asia to recognize the rights and duties of LGBT couples, and would be a first step in a gradual progression towards future recognition of same-sex marriages. The right to registration would be limited to adults (age 20 or older) who are Thai citizens. Once registered, they would have the right to collectively manage their assets and liabilities, to inherit property once either dies, and to give consent for medical treatment and to arrange for funerals.

With Democrats taking control of the New York State Senate, out gay SENATOR BRAD HOYLMAN (D-Manhattan) has been designated by the Senate Democratic Conference to chair the Senate Judiciary Committee, giving him wide-ranging power over appointments to the judiciary that require a vote in the Senate and legislation that impacts the state’s court system. Hoylman is the first out gay chair of the committee in its history.

PROFESSIONAL notes

By Arthur S. Leonard

The NATIONAL CENTER FOR LESBIAN RIGHTS has designated CINDY MYERS to be Interim Executive Director as the organization conducts a national search for a permanent E.D. to succeed KATE KENDELL, who retired at the beginning of December after many years of exceptional service.

HOLLAND & KNIGHT’s Philadelphia office issued a press release announcing that their partner, DANIEL MATEO, who was the first chair of the LGBT Division of the Hispanic National Bar Association (HNBA), has been appointed general counsel of the HNBA’s Vision in Action Fund effective December 7, 2018. This is the charitable arm of the Association. Mateo serves pro bono. Earlier in 2018, the LGBT Division of HNBA bestowed its HERO Award on Mr. Mateo to acknowledge his contributions and service. He is also a past president of the Hispanic Bar Association of New Jersey.

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

All points of view expressed in LGBT Law Notes are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. All comments in Publications Noted are attributable to the Editor. Correspondence pertinent to issues covered in LGBT Law Notes is welcome and will be published subject to editing. Please address correspondence to the Editor via e-mail to info@le-gal.org.
**PUBLICATIONS NOTED**

2. Allen, Alena, Rape Messaging, 87 Fordham L. Rev. 1033 (Dec. 2018) (suggests the need for vigorous public opinion campaigns to overcome the attitudes underlying failure to enforce rape laws adequately).
14. Melcon, John T., Thou Art Fired: A Conduct View of Title VII’s Religious Employer Exemption, 19 Rutgers J. L. & Religion 1 (Summer 2018) (If the Supreme Court upholds the view that Title VII bans discrimination because of sexual orientation or gender identity, how will that play under the Title VII exemption for religious employers, who are otherwise not allowed to discriminate because of sex regarding employees who are not covered by the ministerial exemption).
16. Monroe, Becky, An Attack on America’s Peacemakers is an Attack on All of Us: On the Importance of Embracing the Power of Communities and Rejecting the Trump Administration’s Attempt to Eliminate the Community Relations Service, 37 Yale L. & Pol’y Rev. 299 (Fall 2018) (Trump’s desired phasing out of the Community Relations Service will threaten important enforcement efforts under the Federal Hate Crimes law).
17. Orentlicher, David, Law, Religion, and Health Care, 8 UC Irvine L. Rev. 617 (July 2018).