

L G B T
LAW NOTES

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Victory for HIV+ Servicemembers

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Fourth Circuit Affirms Injunction against Department of Defense Declaring Policy that Discharges HIV+ Servicemembers as Arbitrary and Capricious and Based on Outdated Science

By David Escoto

Active-duty members of the Air Force, Richard Roe and Victor Voe, were discharged from the Air Force because of their HIV+ status. The Air Force determined that their HIV+ status made them unfit for military service, even though they were otherwise healthy. Roe and Voe sought a preliminary injunction while they challenged their discharges. U.S. District Judge Leonie M. Brinkema found that Roe and Voe would likely succeed on the merits of their claims, and granted the preliminary injunction. *Roe v. United States Department of Defense*, 359 F. Supp. Ed 382 (E.D. Va. 2019). The government appealed to the Fourth Circuit. A circuit panel of Judges James Wynn (who delivered the opinion), Albert Diaz, and Henry Floyd, all joined in affirming the lower court's injunction against the Air Force's discharges of Roe, Voe, and four other HIV+ servicemembers who still wished to serve their country, on January 10. *Roe v. United States Department of Defense*, 947 F.3d 207 (as amended January 14, 2020). The court agreed with Judge Brinkema that policy at issue here is based on outdated conceptions of the transmission and manageability of HIV. The Fourth Circuit criticizes the use of this policy as arbitrary and capricious and rejects all of the government's arguments supporting the discharges.

Despite not permitting HIV+ individuals to enlist or be promoted to officer, published Department of Defense policies exist to address the retention of those diagnosed with HIV after enlistment. The policy instructs that servicemembers diagnosed with HIV "will be referred for appropriate treatment and a medical evaluation of fitness for continued service." The Air Force has a similar policy for retaining HIV+ servicemembers.

The Air Force policy requires that "HIV-positive personnel . . . undergo medical evaluation for the purpose of determining status for continued military service." The policy goes further to state that an HIV+ status alone is not sufficient as grounds for medical separation or retirement. Therefore, HIV+ servicemembers should be allowed to continue to serve, so long as they are determined to be fit to continue performing duties of their office, grade, rank, or rating.

Part of the fitness determination is "deployability." The Department of Defense instruction governing deployability intends to ensure that military personnel can accomplish duties in deployed environments. Part of this instruction lists medical conditions that prevent servicemembers from deploying unless they obtain a waiver. The list includes HIV "with the presence of progressive clinical illness or immunological deficiency." The Air Force, however, adopted another instruction that is stricter than that of the Defense Department, and provides that HIV+ "personnel must be assigned within the continental United States, Alaska, Hawaii [or] Puerto Rico," absent a waiver.

One other policy that the Fourth Circuit found to be problematic was Central Command's (CENTCOM) Modification 13 to the Individual Protection and Individual/Unit Deployment Policy. Eighty Percent of Air Force deployments are to CENTCOM's areas of responsibility, including theater-level military operations. Modification 13 provides that personnel "found to be medically non-deployable . . . will not enter [the Central Command Area] . . . until the non-deployable condition is completely resolved" or approved

by waiver. The policy goes on to list "disqualifying medical conditions" that preclude deployment without a waiver. The list states that "confirmed HIV infection is disqualifying for deployment."

Roe and Voe experienced similar discharge processes. Both Roe and Voe were diagnosed with HIV after they enlisted. Roe takes one pill a day, Voe takes two, to manage their viral loads and maintain undetectable status. The pills do not require any sort of special storage, and their doctors have not recommended any restrictions to their daily work. After their diagnosis, they were both referred to the Disability Evaluation System for an evaluation of their fitness to serve. They both were considered valued team members, and other officials recommended retention. Still, the Air Force's Informal Physical Evaluation Board recommended that they both be discharged. The Formal Physical Evaluation Board affirmed the recommendations, and the Assistant Secretary of the Air Force for Personnel affirmed those decisions.

The memoranda for both Roe and Voe stated that they were "compliant with all treatment," "currently asymptomatic," and both at undetectable viral loads. The Council noted that both were "able to perform all in garrison duties" and had strong commander support. However, the Council still concluded that their HIV+ status "precludes [them] from being able to deploy world-wide without a waiver and renders [them] ineligible for deployment to Central Command Area of Responsibility where the majority of Air Force members are expected to deploy." OutServe, an organization that works with the LGBTQ+ and HIV+ servicemembers, identified four

other instances where the Air Force discharged servicemembers based on identical circumstances.

Plaintiffs filed suit in December 2018 against the government in the Eastern District of Virginia. Plaintiffs contend that the Air Force decisions violated the Administrative Procedure Act and equal protection under the Fifth Amendment's Due Process Clause. The district court granted in part and denied in part the motion for injunctive relief and denied the Government's motion to dismiss. The injunction prohibited the Air Force from "separating or discharging from military service Richard Roe, Victor Voe, and any other similarly situated active-duty member of the Air Force because they are classified as ineligible for worldwide deployment or deployment to the [CENTCOM] area due to their HIV-positive status." This order was amended so that servicemembers who did not wish to be retained during litigation could separate themselves. The government appealed the injunction.

The Government contends that this is a nonjusticiable military controversy. To determine the justiciability of a military decision, courts apply the framework articulated in *Mindes v. Seaman*. Under the *Mindes* framework, a challenge to a military decision must establish "the deprivation of a constitutional right, or . . . that the military has acted in violation of applicable statutes or its own regulations." Further, the plaintiff must have exhausted available internal corrective measures. Once those threshold requirements are met, a court will weigh four factors: First, "the nature and strength of the plaintiff's challenge." Second, "the potential injury to the plaintiff." Third, "the type and degree of anticipated interference with the military function." Fourth, "the extent to which the exercise of military expertise is involved." This framework parallels the factors applied when determining a motion for a preliminary injunction.

In reviewing the district court's grant of preliminary relief, the Fourth Circuit panel agrees with the district court that the Plaintiffs are likely to succeed on the merits of their claim that the

government violated the Administrative Procedure Act (APA) by acting arbitrarily and capriciously. First, the court examines the government's action itself and determines that the Air Force violated the APA because it discharged without an individualized assessment of each servicemember's fitness. Instead, the Air Force relies on the categorical status of an HIV diagnosis as a basis for discharge. Second, the court turns to Modification 13 itself, going on to state that even if the Air Force was correct in applying their policy, the rationale for the policy could not be reconciled with current medical advances and evidence.

The government has had an inconsistent relationship with Modification 13. At times the policy has functioned as a categorical ban, but as the court notes, now the government's position is that HIV+ servicemembers must obtain a waiver to deploy to CENTCOM. This position is in line with the language of Modification 13. However, to rectify the inconsistency and justify a lack of individualized assessment, the government offered a declaration from Martha P. Soper, whose office is within the Deputy Assistant Secretary's office. Soper declared that the current guidelines do allow for the "theoretical possibility of a waiver" for an individualized assessment of someone who has reached undetectable status, but the considerations noted in the policy make it "extremely unlikely that such a waiver would ever be granted."

To further explain the waiver process, the court considered another declaration by Kevin Cron, the Preventative Medicine Officer and primary Waiver Action Officer for CENTCOM. Cron's declaration states that in reviewing the waiver requests, he "conduct[ed] a thorough risk assessment" by consulting CENTCOM's Surgeon and Component Surgeons and determined "the risks of deploying an HIV-positive servicemember were too great to justify waiver approval." The government also relies on broad assertions that the laws of "some nations" within CENTCOM's area of responsibility have legal prohibitions from entering their country with a HIV+ diagnosis. However, the policy neither identifies which nations

have such prohibitions, nor articulates a relationship to how those laws bear on military deployment.

The government attempts to support Cron's declaration by asserting that an HIV diagnosis requires highly specialized treatments. Further, the government attempts to justify the categorical ban by reasoning that "the remaining force could be expos[ed] to [HIV-infected] blood from treating, or being treated for battlefield trauma, or for those individuals requiring battlefield blood transfusions." However, both of these justifications are utterly unfounded in current medical literature and evidence presented by qualified experts in current treatment for HIV infection.

The notion that HIV requires "highly specialized treatment" conflicts with the evidence presented. As noted above, Plaintiffs take one or two pills that do not require special containment, to maintain their undetectable status. The government's argument that "austere conditions would disrupt" treatment is baseless. HIV medication can be prescribed for months at a time, similar to other chronic but managed conditions, and routine viral load testing only occurs twice a year once undetectable status is reached. Evidence also establishes that even if treatment were disrupted, HIV+ servicemembers would "not immediately suffer negative health outcomes."

The declaration that there is a high risk of transmission is also unsupported by evidence and medical studies. The court notes that the risk of transmission is from servicemembers who are unaware of their HIV status, and not those who are all well aware of their status and compliant with their medication regimen. A CDC study found that the chance of transmitting untreated HIV by needlestick is 0.23% per needlestick exposure, and the chance of transmission by throwing bodily fluids is negligible. Current studies indicate that the chance of a person under treatment with undetectable viral load will transmit the virus is virtually nil. Also, military research established that there have been no servicemembers who, while deployed, contracted

HIV through “trauma care, blood splash, transfusion, or other battlefield circumstances.” There is no rational or legitimate reason to deny deployment based on HIV status. Current science undermines the government’s asserted rationale. The Fourth Circuit holds that an “obsolete understanding cannot justify a ban, even under a deferential standard of review.”

The court then goes on to weigh the likelihood that Plaintiffs will suffer irreparable harm if denied preliminary relief while the case is pending. Here, the Plaintiffs face discharge predicated on outdated conceptions of HIV, which bears no relationship to their ability to do their jobs. There is also the stigma that is accompanied by this type of discharge. Despite the government’s argument to the contrary, the court finds that these circumstances would force the Plaintiffs to disclose their HIV status in order to explain their discharge to potential employers and others. Plaintiffs planned to continue to serve their country and, if discharged, would undoubtedly have to answer questions as to why they abruptly stopped their intended career. The Fourth Circuit held that the district court did not err in arriving at this conclusion.

Regarding the public interest concern, the court finds the government’s argument that the district court erred by inadequately accounting for the harm to servicemembers who must “compensate for their unavailable team members by deploying more frequently” unpersuasive. HIV+ servicemembers make up 0.027% of active-duty servicemember. The district court’s conclusion that the harm resulting from such a miniscule retention of servicemembers is outweighed by the “potentially immense harm” to HIV+ servicemembers. Further, it is in the public interest to ensure that government institutions follow the law and act in “reasonably, nonarbitrary ways.” There is a public benefit when the military is comprised of members who are dedicated to serving their country. HIV status bears no weight on that benefit.

Despite the government’s argument that the district court’s injunction is an impermissible nationwide injunction,

the Fourth Circuit finds that the district court molded its decree to address the complexity of the particular case. The district court narrowed the scope of the injunction more than what Plaintiffs had initially requested. Further, the injunction only applies to a limited number of servicemembers. The district court found that in light of the “longstanding stigma and discrimination” those who live with HIV face, granting relief to those similarly situated is the only way to “ensure uniform, fair, rational treatment of individuals who belong to a vulnerable, and often invisible, class.” The Fourth Circuit affirmed the narrow tailoring of the preliminary injunction.

Lewis Yilin of the United States Department of Justice argued for the Department of Defense. Geoffrey Paul Eaton of Winston & Strawn LLP argued for Plaintiffs. Joseph H. Hunt, Ryan D. Newman, Michael J. Fucci, Mark B. Stern, Marleigh D. Dover, and James Y. Xi of the United States Department of Justice and Zachary Terwilliger of the Office of the United States Attorney submitted briefs for the Department of Defense. Scott A. Schoettes of Lambda Legal, Peter Perkowski of Outserve-SLDN, Inc., and Lauren Gailey, John W.H. Harding, Laura Cooley of Winston & Strawn LLP submitted briefs for Plaintiffs. ■

David Escoto is a law student at New York Law School (class of 2021).



Unanimous Federal Appeals Court Rules Indiana Must List Lesbian Mothers on Birth Certificates

By Arthur S. Leonard

A unanimous three-judge panel of the U.S. Court of Appeals for the 7th Circuit ruled on January 17, 2020, in *Henderson v. Box*, 2020 U.S. App. LEXIS 1559, 2020 WL 255305, that the state of Indiana must recognize the same-sex spouses of women who give birth as mothers, who should be listed on the birth certificates for their children. Judge Frank Easterbrook wrote the opinion for the court.

The timing of this appeal made the outcome unsurprising. In June and December 2016, District Judge Tanya Walton Pratt issued rulings in this case, ultimately holding unconstitutional various Indiana statutes upon which the state relied in refusing to list the same-sex spouses on their children’s birth certificates. *See Henderson v. Adams*, 209 F. Supp. 3d 1059 (S.D. Ind., June 30, 2016); *Henderson v. Adams*, 2016 U.S. App. LEXIS 180330, 2016 WL 7492478 (S.D. Ind., Dec. 30, 2016). Judge Pratt relied on her reading of the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which ruled that same-sex couples have a right to marry and their marriages must be treated the same for all purposes as the marriages of different-sex couples. Just six months after Judge Pratt’s last ruling, the U.S. Supreme Court stated the same conclusion in *Pavan v. Smith*, 137 S. Ct. 2075 (2017), ruling that Arkansas could not refuse to list such parents on birth certificates.

In light of the *Pavan* ruling, one would have thought that Indiana would desist from appealing Judge Pratt’s ruling to the 7th Circuit. But the state’s lawyers insisted that the state had a right to make the initial birth certificate of a child a record solely of the biological parents of the child, so long as they

would allow same-sex spouses to seek an amended birth certificate at a later date. Judge Pratt had rejected this argument, and the Supreme Court's *Pavan* ruling vindicated her reading of the *Obergefell* decision's implications for birth certificates.

Describing Judge Pratt's first ruling, issued on June 30, 2016, Judge Easterbrook wrote, "The district court issued an injunction requiring Indiana to treat children born into female-female marriages as having two female parents, who under the injunction must be listed on the birth certificate. Because Indiana lists only two parents on a birth certificate, this effectively prevents the state from treating as a parent a man who provided the sperm, while it requires the identification as parent of one spouse who provided neither sperm nor egg." Pratt concluded that this was required by *Obergefell*, which, Easterbrook noted, was confirmed by the Supreme Court in *Pavan*.

Indiana argued on this appeal that "*Obergefell* and *Pavan* do not control," explained Easterbrook. "In its view, birth certificates in Indiana follow biology rather than marital status. The state insists that a wife in an opposite-sex marriage who conceives a child through artificial insemination must identify, as the father, not her husband but the sperm donor."

By contrast, the plaintiffs argued that Indiana's statute is status-based, not based on biology, and in fact heterosexually-married women who give birth to children conceived through donor insemination routinely designate their husbands, contrary to Indiana's rather strange argument that the worksheet the women are given to complete in order to get the birth certificate is intended to elicit the identity of the child's biological father – in that case, the sperm donor. Mothers are asked to name the "father" of their child, and the state contended that this means they should be listing the sperm donor if the child was conceived through donor insemination.

That the argument is complete nonsense certainly did not help the state's case. Indeed, the semantic games that attorneys from the Office of the

Attorney General were playing makes for a curious opinion by Easterbrook, whose tone projects some bemusement. "The district judge thought the state's account of mothers' behavior to be implausible," he wrote. "Some mothers filling in the form may think that 'husband' and 'father' mean the same thing. Others may name their husbands for social reasons, no matter what the form tells them to do. Indiana contends that it is not responsible for private decisions, and that may well be so – but it is responsible for the text of Indiana Code Section 31-14-7-1(1), which establishes a presumption that applies to opposite-sex marriages but not same-sex marriages." This is the presumption that the husband of a married woman who gives birth is the father of her child. "Opposite-sex couples can have their names on children's birth certificates without going through adoption; same-sex couples cannot. Nothing about the birth worksheet changes that rule."

The state argued that of course the same-sex spouse can then adopt the child and be listed on an amended birth certificate. Thus, the same-sex couple will have a birth certificate naming both of them, and the state will retain on file the original birth certificate documenting the child's biological parentage. But why should a married same-sex couple, entitled under the Constitution to have their marriage treated the same as a different-sex marriage, have to go through an adoption to get a proper birth certificate?

The lawsuit also sought the trial court's declaration that the children of the two couples who brought the suit were born "in wedlock," not "out of wedlock" as a literal interpretation of the state's statutes would hold. Yet again, the state's insistence on perpetuating the former legal regime was rejected.

Judge Easterbrook identified another way that the statutes on the books fail to account for reality. What if the child of a same-sex female couple has two "biological" mothers? Easterbrook observed that "Indiana's current statutory system fails to acknowledge the possibility that the wife of a birth mother also is a biological mother. One set of plaintiffs in this suit shows

this. Lisa Philips-Stackman is the birth mother of L.J.P.-S., but Jackie Philips-Stackman, Lisa's wife, was the egg donor. Thus, Jackie is both L.J.P.-S.'s biological mother and the spouse of L.J.P.-S.'s birth mother. There is also a third biological parent (the sperm donor), but Indiana limits to two the number of parents it will record."

"We agree with the district court," wrote Easterbrook, "that, after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages." Because the current statute does that, he continued, "its operation was properly enjoined."

However, the court of appeals found that Judge Pratt went too far when she declared that all the relevant statutory provisions are invalid in their entirety and forbade their operation "across the board," because "some parts of these statutes have a proper application." For example, the provision that allows for somebody who is not a husband to be the birth mother to be identified as the biological father as a result of genetic testing, and, for another example, the provision that "provides that a child is born in wedlock if the parents attempted to marry each other but a technical defect prevented the marriage from being valid." Easterbrook asserted that neither of these provisions violated the constitution. "A remedy must not be broader than the legal justification for its entry, so the order in this suit must be revised," he wrote.

"The district court's order requiring Indiana to recognize the children of these plaintiffs as legitimate children, born in wedlock, and to identify both wives in each union as parents, is affirmed," the court concluded. "The injunction and declaratory judgment are affirmed to the extent they provide that the presumption in Indiana Code Sec. 31-14-7-1(1) violates the Constitution."

Circuit Judge Easterbrook was appointed by Ronald Reagan, as was Judge Joel Flaum. The third judge on the panel, Diane Sykes, was appointed by George W. Bush. Thus, the ruling is the work of a panel consisting entirely of judicial conservatives appointed

by Republican presidents. The clear holding of *Pavan v. Smith* was such that they could not honestly rule otherwise, regardless of their personal views about same-sex marriage and parentage. After all, in *Pavan* the Supreme Court rejected exactly the same arguments that Indiana was making in this case.

Attorneys for the plaintiffs include Karen Celestino-Horseman, Raymond L. Faust, Megan L. Gehring, Richard Andrew Mann, and William R. Groth, all practicing in Indianapolis in several different law firms. Amicus briefs were filed for a variety of groups by pro bono attorneys from Chicago, San Francisco, and Washington, D.C., representing the Family Equality Council, the National Center for Lesbian Rights, and 49 Professors of Family Law. ■

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Fifth Circuit Issues Hostile Opinion on Transgender Prisoner’s Name Change, Drawing “Emphatic” Dissent

By William J. Rold

Transgender prisoner Norman Keith Varner sought to change her name to Kathrine Nicole Jett on her federal criminal commitment after obtaining a Kentucky state court order changing her name. She also requested that she be addressed using female pronouns. In *United States v. Varner*, 2020 WL 215957, 2020 U.S. App. LEXIS 1346 (5th Cir., Jan. 15, 2020), Circuit Judge Stuart Kyle Duncan (appointed by Donald J. Trump), joined by Circuit Judge Jerry E. Smith (appointed by Ronald W. Reagan), vacated a decision denying all relief, writing that the District Judge (Marcia A. Crone, E.D. Texas) had no jurisdiction. The majority then wrote extensively that Varner was not entitled to be addressed using female pronouns. Circuit Judge James E. Dennis (appointed by William J. Clinton) “emphatically” dissented.

The District Court did not have jurisdiction to entertain an application to change Varner’s commitment name because the application was late under F. R. Crim. P. 35. Moreover, there was no “clerical error” in the judgment within the meaning of F. R. Crim. P. 36. The majority held that these rulings were jurisdictional; and, since the District Court did not have jurisdiction, neither did the Court of Appeals – which could be raised *sua sponte*. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Judge Dennis disagreed that these questions were jurisdictional. He noted that the Fifth Circuit had denied applications under Rules 35 and 36 in many cases without raising the issue of jurisdiction.

The majority also questioned the Kentucky state court’s decision, observing that Varner may not have been a Kentucky “resident” when the petition was filed. Federal courts, however, must generally accord “full faith and credit” to state court decisions – 28 U.S.C. § 1738 – to the extent the state’s highest court would do so, and there is no discussion of Kentucky law by the majority. There is a rebuttable

presumption that an inmate’s domicile does not change because of incarceration. See *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991) (federal prisoner may bring a diversity case, based on state residence prior to a move forced by imprisonment); see also, old Fifth Circuit case of *Polakoff v. Henderson*, 370 F. Supp. 690, 693 (N. D. Ga. 1973), *aff’d per curiam*, 488 F.2d 977 (5th Cir. 1974) (federal prisoner retains domicile she had prior to incarceration). Notably, the Fifth Circuit has a Kentucky address for Varner in PACER. None of these issues is discussed by the court.

The judges save their big guns for the pronoun issue. While Federal Bureau of Prisons Policy No. 5800.15, § 402(d) allows transgender prisoners to use a second name as an “alias,” and authorizes staff “to use either gender-neutral or an inmate’s requested gender-specific pronoun or salutation when interacting with transgender inmates” (BOP Policy No. 5800.15, § 402(d); BOP Policy No. 5200.04, § 11), “a federal court cannot require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns matching their subjective gender identity,” wrote Judge Duncan.

He continued: “We understand Varner’s motion as seeking, at a minimum, to require the district court and the government to refer to Varner with female instead of male pronouns. Varner cites no legal authority supporting this request.” While some courts have adopted a “convention” of using female pronouns in referring to transgender women, no “binding precedent” requires that courts and parties refer to gender dysphoric inmates by their “preferred pronouns.”

Glibly characterizing its own decisions, the panel majority said that the court has “gone both ways” on using pronouns in transgender cases. It compares *Gibson v. Collier*, 920 F.3d 212, 217 n.2 (5th Cir. 2019) (male

pronouns for incarcerated transgender woman); and *Rush v. Parham*, 625 F.2d 1150, 1153 n.2 (5th Cir. 1980) (female pronouns for transgender woman with Medicaid claim).

The majority finds Varner's claim on pronouns "particularly unfounded" because Congress has not specifically mandated the usage. It cites as authority Judge Ho's concurrence in *Wittmer v. Phillips* 66, 915 F.3d 328, 338 (5th Cir. 2019) (writing that Congress did not "intend" to include sexual orientation in Title VII after majority rules that plaintiff's dismissal should be affirmed for failure to have a prima facie case of discrimination whether or not Title VII reached LGBT claims). It also cites authority from the dissent in *Hively v. Ivy Tech Comm. Coll. of Indiana*, 853 F.3d 339, 363–64 (7th Cir. 2017), representing the views of three out of eleven *en banc* 7th Circuit judges.

Judge Duncan suggests that the use of female pronouns here would "raise questions about judicial impartiality." For this assertion, he cites to *Republican Party of Minnesota v. White*, 536 U.S. 765, 775–6 (1992), noting that the quoted language from the Supreme Court was "cleaned up." In fact, *White* does not support the point here. It held that Minnesota's prohibition on judges running for election from taking public positions on contested legal issues violated the First Amendment. Judge Duncan also oddly cites *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977), where a conviction was reversed because of a trial judge's repeated ridicule of a defense lawyer in front of the jury, and the Fifth Circuit counselled "neutrality" in language.

Returning to pronouns, Judge Duncan writes: "In cases like these, a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his 'deeply felt, inherent sense of [his] gender.' *Edmo v. Corizon, Inc.*, 935 F.3d 757, 768 (9th Cir. 2019) (cleaned up). Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's underlying legal position." It is hard to know where to start commenting about this. Edmo's language before it was "cleaned up" read: "Transgender individuals have a '[g]ender identity' – a 'deeply felt, inherent

sense' of their gender – that does not align with their sex assigned at birth." *Id.* By changing "their" to "him" Judge Duncan has changed the carefully drafted neutral language of the Ninth Circuit and has entered the very kind of debate he says courts should avoid. Respectfully, it is impertinent for a Circuit Judge to "clean up" a Supreme Court decision (here, one for the Court by Justice Scalia in *Republican Party v. White*); and it lacks comity to do so to that of another circuit.

Judge Duncan also writes that the use of "preferred pronouns" raises concerns about infusing legal proceedings with "neologisms" (new usages), as "gender dysphoric" people emerge from "binary stereotypes" into a "quixotic" world of "them, their, theirs" and "xemself." Varner's request for female pronouns is denied.

Judge Dennis begins his dissent by noting that, if the majority really felt there was no jurisdiction, it could have so ruled in a few sentences without any pronouns at all; thus, it has issued an improper advisory opinion, "creating a controversy where there is none." Moreover, the majority enlarges Varner's application about pronouns beyond all reasonable scope. Properly construed, she only wanted to be addressed with female pronouns in the Fifth Circuit. Judge Dennis cites decisions from other Courts of Appeals that allow this, "for the litigant's dignity," including the following circuits: First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth [citations omitted]. "The majority's lengthy opinion is dictum and not binding precedent in this court," under *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980).

A final word is appropriate. Judge Duncan repeatedly refers to Varner (and to transgender women in general) as being gender dysphoric. Judge Dennis does not call him on it. This is false equivalency, as there are many well-adjusted transgender women who do not have gender dysphoria under the DSM-V. ■

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.

Texas Court of Appeals Affirms Divorce Decree Requiring Lesbian Co-Parent to Pay Child Support

By Arthur S. Leonard

On January 23 a unanimous three-judge panel of the Texas Court of Appeals, Corpus Christi-Edinburg, ruled in *Treto v. Treto*, 2020 WL 373063, 2020 Tex. App. LEXIS 569, that the Cameron County District Court did not commit an abuse of discretion by ordering a lesbian co-parent to pay child support for a child born during the marriage as a result of donor insemination agreed upon by the spouses. Following the U.S. Supreme Court's rulings in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), the court found that equal treatment of same-sex marriages required this result, despite the failure of Texas statutes to recognize same-sex spouses as parents. Justice Gina M. Benavides wrote the opinion for the court.

Jennifer and Sandra were married in New Mexico in August 2014, shortly after marriage equality rulings went into effect in that state, after dating for about a year. At the time, same-sex marriages were not available in Texas. They were divorced in Cameron County, Texas, on October 16, 2017, in an uncontested proceeding, but Jennifer then moved successfully for a trial, with a hearing held in March 2018, addressing, among other things, financial responsibility towards the child they had during their marriage.

When they married, Jennifer already had a one-year-old child "unrelated to their relationship." They wanted to have a child together, hiring a man to be their sperm donor for a fee of \$200 per donation. They agreed that Sandra would be the birth mother. Just a few months after their marriage, they contacted the donor to come to their house, where he

“used the bathroom and ejaculated into a sterile cup the two women provided.” Jennifer then injected sperm from the cup into Sarah, who tested positive on a home pregnancy kit two weeks later. Jennifer accompanied Sandra to doctor visits and sonogram appointments during the pregnancy, and was present at the hospital when the child was born by cesarean section. Both women took leave from work to be home with the newborn baby. In January 2016, Jennifer moved out of their home and Sandra filed for divorce. The Cameron County 138th District Court determined that Jennifer was a parent of the child liable to pay child support.

Texas statutes embrace the concept of parental presumption when a married woman gives birth, but the presumption, by its terms, identifies the father as the mother’s husband. Jennifer argued that in light of the statutory scheme, she had no legal responsibility to support the child. Under the Texas Family Code, Justice Benavides wrote, “a ‘parent’ is defined to be: ‘the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.’” Jennifer maintained that this language had no room for a second mother with legal obligations to the child. The Texas Legislature adopted the Uniform Parentage Act (UPA) in 2000. The UPA’s section on parentage includes a provision stating “the provisions of this chapter relating to the determination of paternity apply to a determination of maternity.”

While Jennifer’s argument rested on the contentions that she is not biologically related to the child and the family code does not expressly recognize her as a parent, the court observed, “Jennifer ignores the portions of the Family Code that do not require a biological relationship to qualify as a parent,” as well as the provision that “maternity may be established in the same way as paternity under the Family Code.” One way paternity is established is by the man being married to the woman who gives birth. In this case,

maternity is established by the woman being married to the woman who gives birth. Simple.

The court provided a string citation of decisions from other states’ appellate courts recognizing that the parental presumption should apply to the wives of women who give birth, as well as citing to *Obergefell* and *Pavan*. “We presume that, by enacting a statute the legislature intended compliance with the constitutions of this state and the United States,” wrote Justice Benavides. “*Obergefell* decided that prohibition of same-sex marriage violated the federal constitution’s guarantee of equal protection. *Pavan* unequivocally extended *Obergefell*’s reach to ancillary benefits of marriage including such important, but mundane, things as completing the names of the parents on the birth certificate of a child . . . [W]e interpret the statute as written by the legislature, giving full effect to all of the portions of the statute, and avoiding an interpretation that violates the equal protection guarantees of the Texas and federal constitution. Accordingly, it follows that under *Pavan*, we are to give effect to the ancillary benefits of a same-sex marriage, including the determination of maternity for the non-gestational spouse [sic] of a child born to the marriage.”

The court noted that this was a planned pregnancy by the two women married to each other, who embraced the child as their own. Jennifer was clearly an intended parent who participated in the pregnancy and taking care of the child after it was born. “Now,” wrote the court, “Jennifer argues that Texas statutes allow her to walk away from her marriage without any legal relationship with the child and without supporting the child of the marriage.” This would violate the strong Texas policy of requiring parents to support their minor children. The court noted that “the former policy that allowed men who fathered children outside marriage to escape support of their children was held to violate the equal protection clause” in federal and state court decisions. “Texas policy changed to recognize that all children deserved to be supported by their parents.” Further,

applying the equal protection rulings of *Obergefell* and *Pavan*, the trial court’s decision in this case to order Jennifer to pay child support was consistent with Texas policy, if not the strict letter of the existing statutes (which, the court failed to note, could use some practical revisions).

“The trial court gave effect to the Texas Family Code presumption that a child born of the marriage is the child of the mother’s spouse . . . The trial court treated this married couple like any other married couple who separated after having a child; it divided the community property, entered an order regarding the rights and responsibilities regarding the child including support, and granted the divorce requested by both. In doing so, the trial court did not abuse its discretion.”

Attorneys for the parties are Alberto Garcia (appellant Jennifer) and Lawrence J. Rabb (appellee Sandra). ■



A Requiem for Transphobic Claims in *D Minor*: Indiana District Court Rejects Music Teacher’s Constitutional Claims of Discrimination, But Some Statutory Claims Remain

By Corey L. Gibbs

John M. Kluge was a music teacher at Brownsburg High School in Indiana. He filed this action against Brownsburg Community School Corporation (BCSC) and others in the U.S. District Court for the Southern District of Indiana. BCSC’s policy required teachers to address transgender students by their preferred names and genders. Kluge alleged that he was discriminated against based on his religious beliefs and forced to resign because of his refusal to abide by this rule. BCSC moved to dismiss all of Kluge’s claims. *Kluge v. Brownsburg Cmty. School Corp.*, 2020 U.S. Dist. LEXIS 2672, 2020 WL 95061 (January 6, 2020). The court dismissed Kluge’s constitutional claims, but allowed his Title VII claims to continue.

BCSC employed Kluge in August of 2014 as a music and orchestra teacher. He claimed that he received positive performance evaluations and met expectations. His students even received multiple awards for their musical performances. He was an evangelical Christian, who believed that “God created mankind as either male or female, that this gender [was] fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual’s feelings or desires.”

During the summer of 2017, BCSC took steps that would make the school a more inclusive environment. Transgender students and students experiencing gender dysphoria were allowed to use the restroom of their choice, and BCSC allowed the students to change their names and genders in the school database. BCSC instructed employees to use the names and genders listed in the database. Kluge was one of these employees.

Kluge told the BCSC superintendent that the policy, which required teachers

to address students by their listed names, conflicted with his religious beliefs. The superintendent told Kluge that he could either “use the transgender names, say he was forced to resign from BCSC, or be terminated without pay.” When Kluge refused to follow his employer’s policy, the superintendent commenced a leave of absence for Kluge. The principal of the high school gave Kluge a three-day ultimatum to decide if he would comply with the policy.

Kluge requested an accommodation for his beliefs. His proposed solution involved “addressing all students by their last names only, similar to a sports coach.” The superintendent and the BCSC Human Resources Director agreed in writing to Kluge’s request. By December of 2017, the principal informed Kluge that the last-names-only arrangement created tensions and that Kluge should resign. Kluge claimed that the Defendants decided not to accommodate him.

Kluge explained, “He [believed] encouraging students to present themselves as the opposite sex by calling them an opposite-sex first name is sinful and potentially harmful to the students.” The Human Resources Director advised him to resign or be fired. The Director agreed to a conditional resignation. When Kluge attempted to rescind his resignation, the Director processed his resignation instead.

Kluge asserted a multitude of claims for relief. District Judge Jane Magnus-Stinson’s discussion began with analyzing the three First Amendment speech claims. “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom,” wrote the Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court used a two-part inquiry, which

determined the level of constitutional protection given to public employee speech. First, the court must determine whether the employee *spoke as a citizen on a matter of public concern*, or as an employee carrying out his job function. In the current case, Kluge’s own allegations established that part of his duties as a teacher was to address students. The court also concluded that Kluge’s choice as to how he addressed students did not contribute to a broader public debate on transgender issues. The three First Amendment speech claims were, consequently, dismissed.

The court turned to Kluge’s First Amendment Free Exercise claim. He alleged that BCSC’s policy would require him to violate his sincerely-held religious beliefs. BCSC argued that the policy applied to all faculty and there was no intention to discriminate based on religion. “No Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest,” wrote the judge, quoting *Vision Church v. Vill. Of Long Grove*, 468 F.3d 975 (7th Cir. 2006). The court determined that the policy did not target Kluge, was not motivated by animus, and was neutral and generally applicable. Therefore, Kluge’s First Amendment Free Exercise claim was dismissed as well.

The court then assessed Kluge’s next claim: that BCSC violated the First Amendment because his employment was conditioned upon his willingness to surrender constitutional rights. The Unconstitutional Conditions Doctrine provides that the government cannot condition government employment or benefits on a basis that infringes upon one’s constitutionally protected

rights. The court dismissed Kluge's Unconstitutional Conditions claim because his alleged facts failed to demonstrate that BCSC violated the Constitution, as shown by the court's prior analysis.

The court's discussion pivoted to Kluge's Fourteenth Amendment Due Process claim. He alleged that BCSC's policy lacked factors and standards, which rendered it unconstitutionally vague. Kluge's allegations highlighted that the policy required him to refer to students by their listed names. The court stated, "Mr. Kluge's argument that the [policy] was so vague that it appeared to permit the last-names-only arrangement—because students' last names are necessarily listed in [the database]—is illogical and disingenuous at best," so the court dismissed this claim.

Kluge claimed that BCSC's policy violated his rights "to free exercise of religion guaranteed by Article 1, Sections 2 and 3 of the Indiana Constitution." The court stated, "To establish a violation of Sections 2 or 3, the plaintiff must show that a government action 'materially burdens [his] right to worship according to the dictates of conscience, [or] the right freely to exercise religious opinions and rights of conscience.'" *City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443 (Ind. 2001). The court dismissed the claim and concluded that Kluge remained free to believe that "affirming people who experience gender dysphoria is a sin" in places other than at work.

Kluge then alleged that BCSC intentionally inflicted him with severe emotional distress when it: removed his last-names-only arrangement, threatened termination, refused to accommodate him, and violated his rights. The court stated, "Under Indiana law, the elements of [Intentional Infliction of Emotional Distress] are that the defendant (1) engaged in extreme and outrageous conduct (2) which intentionally or recklessly (3) caused (4) severe emotional distress to another." Kluge failed to demonstrate

that BCSC's conduct was extreme or outrageous. Therefore, this claim was dismissed.

Kluge claimed that BCSC committed fraud when it intentionally misrepresented that he could submit the conditional resignation. The court stated, "Under Indiana law, the elements of actual fraud are: (1) a material representation of a past or existing fact by the party to be charged that; (2) was false; (3) was made with knowledge or reckless ignorance of its falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party's injury." *Ruse v. Bleake*, 914 N.E.2d 1 (Ind. App. 2009). The court concluded that the promise to allow him to withdraw his resignation later was not actionable under the theory of fraud because it was just a representation concerning future conduct.

Finally, Kluge brought three Title VII claims. The court dismissed his hostile work environment claim because he failed to allege that his work performance was impeded. However, the retaliation and religious discrimination for failure to accommodate claims succeeded. The court acknowledged that this case is still in an early phase and it is bound to accept all of Kluge's factual allegations as true. Of the many claims that Kluge brought before the District Court, only these two claims survived the defendants' motion.

After the court sorted through the abundance of claims brought by Kluge, it addressed Indiana Youth Group, Inc., which moved to intervene as a co-defendant. The corporation had no direct interest in the lawsuit and made essentially the same arguments as BCSC. Therefore, the court denied the corporation's motion to intervene as a defendant. The court suggested that the corporation could potentially file an *amicus curiae* brief should a situation arise later.

This case is a prime example of an individual, motivated by animus, attempting to weaponize the legal system. The Constitution is not a sword that a disgraced and disgruntled music teacher can wield to attack students.

The Constitution has been used as a sword numerous times, and the wounds it has left on minority groups are deep. However, the trend over time shows that courts have an increased interest in protecting the most vulnerable as opposed to attacking them. In *Palmer v. Sidoti*, Chief Justice Warren Burger wrote, "The Constitution cannot control such prejudices but neither can it tolerate them." Judge Magnus-Stinson appears to agree.

John M. Kluge was represented by Kevin Edward Green of Kevin Green Associates; Roscoe Stovall, Jr. of Roscoe Stovall, Jr. & Associates; and Michael J. Cork. The Defendants were represented by Alexander Phillip Pinegar and Brent R. Borg of Church Church Hittle & Antrim. ■

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Inmate Assault Victim Who Tried Case *Pro Se* Wins New Trial on Plain Error When Jury Instruction Erroneously Restricted Cause of Action for Sexual Abuse

By William J. Rold

Inmate DeWayne Bearchild tried his case *pro se* before a jury and Chief U.S. District Judge Dana L. Christensen (D. Mont.), in *Bearchild v. Cobban*, 2014 U.S. Dist. LEXIS 181198 (D. Mont., Nov. 19, 2014). The jury returned a verdict in favor of defendant correction officer Larry Pasha on a claim of performing a sexually abusive pat down search. Writing for herself and 9th Circuit Judge William A. Fletcher (appointed by President Bill Clinton), Circuit Judge Morgen Christen (appointed by President Barack Obama) reversed, finding that the jury instruction on the elements of sexual abuse as a civil rights violation constituted plain error, in *Bearchild v. Cobban*, 2020 U.S. App. LEXIS 1521, 2020 WL 239431 (9th Cir., Jan. 16, 2020). Circuit Judge Consuelo M. Callahan (appointed by President George W. Bush) dissented.

Bearchild's essential claim is that Pasha converted a routine pat down search into a sexual assault, by rubbing, stroking, squeezing, groping, staring, and making sexual remarks. Most of the discussion concerns the propriety of 9th Circuit Model Jury Instruction 9.26, which addresses excessive force. It requires that the jury find that force was "excessive and unnecessary" under all of the circumstances, that the defendant acted maliciously and sadistically for the purpose of causing harm, and that the defendant caused harm. In making this determination, the jury is to consider the extent of the injury, the need for force, the amount of force, the threat posed, and any efforts to temper the response, if feasible. Bearchild did not object to this instruction at trial. Hence, the plain error analysis.

The majority found that this pattern instruction was not well-suited to a sexual abuse case that began by excessive groping/touching. The allegations were not excessive force in the traditional sense, and the jury could

have been confused that Bearchild had to show excessiveness, malice, and actual physical harm in a sexual abuse case. This is not the law in the 9th Circuit.

While sexual abuse of an inmate falls within the range of excessive force in the most general sense, the instruction was erroneous. The officer was not acting to restore discipline or making split-second decisions to quell a disturbance. These concerns are not present when officers are accused of engaging in conduct for their own sexual gratification or to humiliate or degrade inmates. The majority found two cases most instructive. *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); and *Wood v. Beauclair*, 692 F.3d 1041, 1051 (9th Cir. 2012).

In *Schwenk*, an officer's sexual harassment of a transgender inmate that included propositioning her for sex, in exchange for "girl stuff," stated a claim. Obscene and escalating comments and touchings were sufficient, and "no lasting physical injury" was necessary.

In *Wood*, a female officer "pursued" a relationship with a male prisoner. It became physical, but consent was not a defense. Sexual contact between an officer and an inmate "serves no legitimate role," and it violates the 8th Amendment. 692 F.3d at 1046.

The error in the instruction was not cured by another instruction that incorporated a definition of staff misconduct from the Prison Rape Elimination Act and referred to "intent to abuse, arouse, or gratify sexual desire." The jury could have read the instructions together so that they continued to require constitutional tort elements that are not necessary for this cause of action.

The Court of Appeals specifically holds that "a prisoner presents a viable 8th Amendment claim where he or she proves that a prison staff member,

acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner." The court cites *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015), in addition to *Schwenk* and *Woods*.

There follows an extensive general discussion about prejudicial error in jury instructions. The error here was "plain" because the instruction imposed an unnecessary element to the essential definition of a constitutional tort. *Hoard v. Hartman*, 904 F.3d 780, 790 (9th Cir. 2018).

This case was before the 9th Circuit for 2-½ years. During this time, the court appointed counsel, the parties tried mediation, briefing was extended, and the decision (with dissent) was not issued for over nine months after argument.

Judge Callahan's dissent objects to the majority's finding plain error in use of a model jury instruction. Moreover, Judge Callahan does not believe that the instruction required a jury to find "actual force" or "physical injury." Callahan writes that the proof was "weak" and that the instructions – although imperfect – did not likely have affect the verdict. Her characterization of Bearchild's claim as arising from "brief touching of the groin area," probably says it all. ■



Federal Judge Slams Door on Transgender Inmate Falsely Accused of Sexual Misconduct and Beaten by Gang

By William J. Rold

According to the *pro se* complaint, “openly” transgender inmate Corey Bason was talking to a cisgender inmate (Neal) near the wall of a housing unit when rumors started that they had a sexual encounter. Neal is a member of a transphobic and homophobic gang, and he became involved in a fight with another gang member as a result of the rumors. A correction counselor, Ryan Stover, came to the unit to cuff Neal for fighting; and Stover said (directing his comment to Bason): “This is what happens when you get caught sucking dick on the back wall.” The remark was heard by three-fourths of the inmates on the unit. By lunch, it was widely disseminated. Bason was subsequently beaten by the gang on three occasions.

Bason sued Stover, the warden, and CoreCivic, the private contractor that operates Lake Erie Correctional Institution for Ohio. In *Bason v. Stover*, 2019 WL 7282093, 2019 U.S. Dist. LEXIS 221605 (N.D. Ohio, Dec. 27, 2019), newly appointed U.S. District Judge Pamela A. Barker dismissed the complaint prior to service for failure to state a claim and certified that any appeal would not be taken in good faith. Judge Barker allowed no opportunity to amend.

The refusal to allow Bason to amend, as more fully explored below, alone should require reversal. It is the general rule in the Sixth Circuit that leave to amend should be freely granted under F.R.C.P. 15(a)(2). *Parchman v. SLM Corp.*, 896 F.3d 728, 736 (6th Cir. 2018). Moreover, when, as here, dismissal amounts to a finding that amendment would be futile, the Court of Appeals reviews *de novo*, rather than on abuse of discretion grounds. *Williams v. City of Cleveland*, 771 F.3d 945, 949 (6th Cir. 2014).

The Complaint, as is, says that Bason’s unit manager reviewed videotape and confirmed that no sexual incident occurred. Nevertheless, Stover’s remarks added credence to the rumors.

Bason said that “all eyes turned” to her when the statements were made – a fact corroborated by declarations (attached to the Complaint) from two other inmates on the unit. The other inmates said Stover singled out Bason as the recipient of the comments (“looked directly at Bason when said it”; “made comment to Corey Bason”). Bason sought and was denied a “retraction” by Stover, after the “rumors” were shown to be unfounded.

Judge Parker wrote: “Bason does not claim that Stover started the original rumor and, when Stover came to Bason’s housing unit to handcuff Neal for fighting, he did not name or identify Bason who was not involved in the fight.” Nothing in the progeny of *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), requires that a defendant “start” a rumor that places a plaintiff in danger. It is the response to the danger (however it starts) that matters. 511 U.S. at 835-38. One does not have to start a fire to be responsible for pouring gasoline on it.

The second finding (that Bason was not “identified”) is contrary to the pleadings. It is a common feature of spoken behavior that, when the speaker pointedly looks at someone when making an announcement, she is connecting the announcement with the object of the stare. Bason should have been given this reasonable inference.

Under Sixth Circuit rules, the inmate declarations are incorporated into the Complaint for purposes of F.R.C.P. 12(b) (6), without converting to summary judgment standards. *Fulton v. Enclarity, Inc.*, 907 F.3d 948, 953 (6th Cir. 2018), citing F.R.C.P. 10(c). Bason also attaches her own declaration, explaining why she did not report her beatings and detailing the gang threats she received warning her to keep silent. There is no indication that Judge Parker considered any of these attached declarations.

Judge Parker also faults Bason for not detailing her injuries from the beatings. This is curable by an amended pleading.

Judge Parker also dismisses claims against CoreCivic and the warden, citing *O’Brien v. Mich. Dep’t of Corrections*, 592 F. App’x 338, 341 (6th Cir. 2014) (absence of “pattern and practice” allegations against CoreCivic); and *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984) (no showing that warden “authorized, approved, or knowingly acquiesced in Stover’s alleged unconstitutional conduct”). Bason did allege that she was never interviewed about her need for protection, even though she was the reason for the fight between two other inmates. She also alleges that she never got a “retraction” and that Stover was later fired for his “white supremacy” sympathies – which is never explored. Bason also alleges that CoreCivic and the warden tolerated gang activity without sufficient control and that LGBT prisoners were not protected, despite Ohio official policy to the contrary. It is not clear to this writer that amendment would be futile.

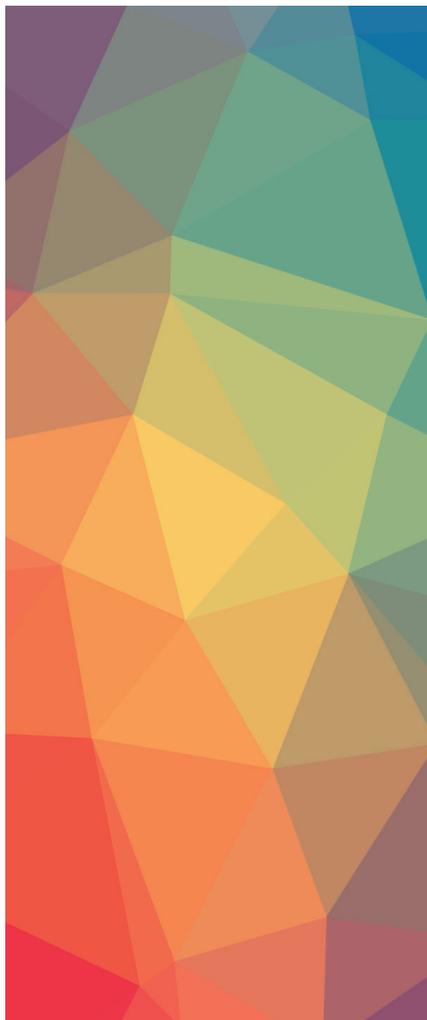
Finally, Judge Parker dismisses Bason’s equal protection claim, writing that Bason “does not identify any non-gay prisoners that are similarly situated in all relevant respects.” This conclusory language is bookended by criticisms of Bason for being conclusory. Judge Parker recognizes that the Sixth Circuit considered LGBT prisoners an “identifiable group” in *Davis v. Prison Health Services*, 679 F.3d 433, 441 (6th Cir. 2012), where an inmate stated an equal protection claim on allegations that he was denied a community services job because of his sexual orientation.

Davis focused not on the requirements of the outside job but on the exclusion of LGBT inmates from a category of jobs based on sexual orientation. It does not support the equal protection framing here. The question is not whether transgender inmates have the same need for protection as cisgender inmates (Judge Parker’s focus on similarly situated “non-gay prisoners”) but whether inmates with a

need for protection are being denied it based on their sexual orientation.

This standard is capable of being met in an amended pleading. In *Lucas v. Chalk*, 2019 U.S. App. LEXIS 24561, 2019 WL 3889720 (6th Cir., Aug. 19, 2019), reported in *Law Notes* (Sept. 2019 at page 33), the Sixth Circuit ruled that denying mental health services “on the basis of a prisoner’s sexual orientation . . . could not survive even rational basis review.” See also, Tenth Circuit’s equal protection decision on accommodations for both transgender prisoners and cisgender inmates with PTSD – both of whom needed private showers in *Thompson v. Lengerich*, 2019 U.S. App. LEXIS 38237 (10th Cir., Dec. 23, 2019), reported in the January issue of *Law Notes*.

Bason has written a pretty good *pro se* pleading. In this writer’s view, it should have been given more of a chance. ■



Minnesota Court of Appeals Rules Hate Crime Law Covering “Gender” Does Not Apply in the Case of a Transgender Victim

By Filip Cukovic

In November 2018, the State of Michigan appealed the Wayne County trial court’s order granting Deonton Autez Rogers’ motion to quash several counts of information, including charges of discharging a firearm causing physical injury, as well as the charge of ethnic intimidation of a transgender victim. The Court of Appeals of Michigan held on January 7 that although Minnesota’s ethnic intimidation statute imposes criminal penalties for hate crimes committed because of the victim’s gender, the word gender cannot be construed so broadly as to encompass people who identify as transgender. *People v. Rogers*, 2020 WL 86535, 2020 Mich. App. LEXIS 169 (Jan. 2020). The 2-1 decision was announced in an opinion by Judge Michael F. Gadola, joined by Judge James Robert Redford. Judge Deborah A. Servitto dissented.

The case arises out of an altercation between Rogers and the victim, Kimora Steuball, on the night of July 23, 2018. Steuball was assigned as male at birth, but now identifies as a woman. She lives her life presenting herself as such in society. On the night of the incident, Steuball went to a gas station in Detroit to make a purchase. Upon arrival at the gas station, she saw Rogers inside the gas station with a woman. Steuball got in line and Rogers began talking to her, using derogatory terms. At one point, Rogers called her the “n” word, to which Steuball responded that “n” can only be someone who identifies as a man. Since she is transgender and identifies as a woman, according to Steuball, the “n” characterization could not describe her.

This statement sparked Rogers’ interest and he asked Steuball about her sex organs and asked Steuball if he could see “it.” Steuball tried to ignore Rogers, but he continued to make derogatory remarks. Rogers then

pulled out a gun and threatened to kill her. Rogers subsequently walked in close proximity to Steuball, gun in hand, moving toward the exit. Steuball testified that she feared that Rogers would turn around and shoot her before leaving the gas station. Steuball further testified that transgender people are often attacked and harmed and she feared for her life.

Reacting to the threat from Rogers, Steuball grabbed at defendant’s hand as he came near her in an attempt to get the gun away from him. A struggle between the two ensued. During this struggle, Rogers kept his finger on the trigger, and at some point, the gun fired into Steuball’s left shoulder. Steuball was then able to grab the gun from Rogers. The woman who was with Rogers took the gun from Steuball and moved toward the exit. Rogers ran away from the station. Steuball was taken to the hospital, where she spent several days being treated for a shattered shoulder, including undergoing surgery. Rogers was subsequently arrested.

The trial court convicted Rogers for various felonies, but dismissed the prosecution’s charge that Rogers violated the state’s ethnic intimidation statute (MCL 750.147b.). The statute provides, in pertinent part, that a person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person’s race, color, religion, gender, or national origin, does any of the following: (a) Causes physical contact with another person. (b) Damages, destroys, or defaces any real or personal property of another person. (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

The trial court concluded that although the statute in question guards against gender-inspired hate crimes, the transgender category fell outside the statutory definition of “gender” for purposes of the ethnic intimidation charge.

Judge Gadola’s opinion asserts that the most important goal of statutory interpretation is to discern and give effect to the intent of the Legislature. If a statute’s language is clear and unambiguous, it must be enforced as written, and judicial construction is not required or permitted. However, since the word “gender” was not specifically defined within MCL 750.147b, some judicial construction was necessary. Thus, the court’s analysis was centered around the question of whether the word “gender” in MCL 750.147b includes transgender people. In other words, the Court of Appeals had to determine whether intimidation on the basis of a person’s “gender” in the ethnic intimidation statute, which was enacted in 1988, includes intimidation because the victim is transgender.

Lacking an express statutory definition, the court consulted dictionary definitions of the word “gender” as well as legislative history. The court stated that relying on a dictionary in order to understand the ordinary meaning of the word is not a simple matter of merely picking up a contemporary dictionary. Instead, courts must consider dictionaries that were in use during the time when the relevant statute was passed. To do otherwise would allow a statute’s meaning to change not as a result of statutory amendment, but rather by judicial fiat based upon evolving societal understandings of a statutory term or terms. This approach would be particularly problematic in the area of criminal law, where it would pose serious due process concerns.

Thus, the court considered the definition of the word “gender” by looking into Webster’s Collegiate Dictionary, published in 1990, and The Random House College Dictionary, published in 1988. Both dictionaries give the same one-word definition for the word “gender”: “sex”. Both

dictionaries then illustrate this meaning by using the word in a phrase involving “the feminine gender.” Based on this, the court concludes that the word “sex” was at that time strictly associated with the biological roles of males and females. Thus, the court concluded that there is simply no indication that the term gender would have been understood when the statute was enacted to encompass the category of transgender persons. Furthermore, in order to back up its conclusion, the court considered the legislative history behind the enactment, finding that the issues regarding transgender people were not discussed in the legislative record when the statute was enacted. The majority concluded that the trial court did not err when it dismissed ethnic intimidation charges against defendant Rogers.

Judge Servitto vigorously dissented on the issue of whether transgender people are protected under MCL 750.147b. She recognized that while there is no binding authority stating the exact purpose of the ethnic intimidation statute, it can be gleaned from the language of the statute that the statute was intended to criminalize harassing and intimidating behavior when the behavior is based on a victim’s specific characteristics. According to Judge Servitto’s interpretation, the Legislature sought to redress crimes motivated by a person’s intolerance of another’s characteristics specifically listed in MCL 750.147b (race, color, religion, gender, or national origin). In this matter, the victim was targeted specifically because she was identified as biologically male at birth, but now is living a female gender identity. Therefore, Judge Servitto concluded that this incident is a classic example of harassment based on the victim’s gender, making it appropriate for the prosecution to bring charges under Minnesota’s ethnic intimidation statute, which was specifically designed to protect victims against gender-inspired harassment. ■

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

Maryland District Court Holds That Use of the Wrong Pronouns Does Not Establish a Hostile Work Environment

By Timothy Ramos

The extent to which Title VII of the Civil Rights Act of 1964 protects employees on the basis of gender identity is still up in the air. On October 8, 2019, the U.S. Supreme Court heard oral arguments for *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, in which the Supreme Court will address whether Title VII prohibits discrimination against transgender employees based on either their transgender status or the sex-stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Until the Supreme Court rules, the lower courts have been left to their own interpretations, which has resulted in a spectrum of outcomes. On January 13, 2020, the U.S. District Court for the District of Maryland dismissed a transgender woman’s Title VII hostile work environment claim without prejudice, but allowed her to continue with her claims of discriminatory termination and retaliation against her employers. *Milo v. CyberCore Technologies, LLC*, 2020 WL 134537 (D. Md. Jan. 13, 2020). In doing so, U.S. District Judge Stephanie Gallagher essentially held that the use of wrong pronouns and the criticism of a transgender individual’s attire are not severe or pervasive enough to give rise to an actionable claim of hostile work environment under Title VII.

Megan Milo was hired as a Senior Software Engineer by CyberCore Technologies LLC (CyberCore), with the approval of Northrop Grumman Corporation (NGC), on or about December 2, 2012. After four months of work—during which Milo was promoted to Task Lead—Milo began living full-time as a woman. Although managers

from Cybercore, NGC, and the federal government instructed employees on Milo's floor to refer to Milo with "she" and "her" pronouns and to treat Milo with dignity and respect prior to Milo's gender transition, Milo was subjected to a number of humiliating incidents based on her transgender status and gender expression, including but not limited to: (a) being misgendered by male managers and co-workers; (b) being told by a male co-worker that her heels were too high; (c) being told by "Ms. Anderson," a Cybercore Manager, that her skirt was too short, even though another female employee wore a shorter skirt; and (d) being told by Theresa Olsen, who worked under the direction of NGC, that Olsen hated transgender people because Olsen's ex-husband is transgender. An NGC manager even told Milo to "lay low" and to stop complaining of such instances because he knew she was being targeted and would be in worse trouble if she continued to complain. Ultimately, Milo was placed on a 30-day probationary period on or about October 15, 2013, because a male NGC employee complained that he felt as if he was "walking on eggshells" around Milo. Although Milo had made it through the probationary period, her employment was terminated by NGC in February 2014 after she complained again about misgendering by other employees. NGC cited Milo's "bad attitude" as reason for her termination.

Judge Gallagher first addressed Milo's claim of hostile work environment. To establish a claim for hostile work environment under Title VII, a plaintiff must show that there was (1) unwelcome conduct; (2) that is based on the plaintiff's sex; (3) which is sufficiently severe or pervasive enough to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015). An employer is strictly or vicariously liable if the harasser is a supervisor. *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 333 (4th Cir. 2018). Otherwise, if the harasser is an employee, an employer is liable under a negligence standard

if the employer knew or should have known of the harassment and failed to take prompt remedial action. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 422-23 (4th Cir. 2014).

Judge Gallagher then concluded that neither CyberCore nor NGC could be held strictly liable, because Milo failed to sufficiently plead facts demonstrating sufficiently severe or pervasive conduct. In doing so, the judge found that the allegation regarding Anderson's comment about Milo's skirt amounted to only one instance of harassment by a supervisor, and that Milo's other allegations of Anderson's attire-related criticisms were not sufficiently specific to form a factual predicate for a claim of hostile work environment. Specifically, the judge found that Milo did not adequately allege what Anderson's criticism of her workplace attire entailed nor did she link the comments to her gender identity or sex. This author remains baffled as to how the judge could reach this conclusion. A reasonable person could find that Anderson's criticism of Milo's skirt pointed to the longstanding stereotype that skirts and dresses are traditionally female garments and that transgender women cannot participate in what is traditionally female. Furthermore, Anderson's additional criticisms of Milo's attire point to a pattern of animosity towards Milo's gender identity and self-expression.

Judge Gallagher also concluded that neither CyberCore nor NGC could be held liable for hostile work environment under the negligence standard because Milo failed to specify how she described the harassment she experienced to CyberCore and NGC; thus, the court could not determine whether either defendant should have acted to stop it. Specifically, Judge Gallagher noted that Milo merely pleaded that she "notified Ms. Anderson on many occasions of the constant harassment she was experiencing," and that, during the meeting in which she was placed on probation, Milo told Anderson and the NGC Human Resources manager that "Mr. Davis's conduct was discriminatory." This part of Judge Gallagher's opinion appears to conflate

the "severe or pervasive" factor of a hostile work environment claim with the notice requirement for liability under the negligence standard. A sliding scale is used to determine whether conduct is sufficiently severe or pervasive; thus, a plaintiff must allege specific facts showing that the complained-of conduct rises to the level needed to establish a hostile work environment. Meanwhile, the initial question under the negligence standard simply asks whether the defendants were on notice. Here, it is clear that CyberCore and NGC were on notice of the harassment that Milo experienced because she had complained of it. Furthermore, the facts restated in Judge Gallagher's opinion allege that both defendants knew what type of harassment Milo experienced; they expected that Milo would be targeted because of her transgender status, and thus, they held a meeting prior to her transition to notify their employees on what pronouns to use and how to treat Milo. Yet, when the defendants' employees failed to comply with the meeting's guidelines, neither CyberCore nor NGC took prompt remedial action reasonably calculated to end the harassment. Instead, the defendants appeared to punish Milo for voicing her complaints. Judge Gallagher herself appears to accept this last point, and thus found that Milo sufficiently pleaded plausible claims of discriminatory termination and retaliation that survive the defendants' motion to dismiss.

Milo is represented by former LeGaL board member Jillian Todd Weiss, *pro hac vice*, of the Law Office of Jillian T. Weiss, PC, located in New York City, and Janet L. Eveland of the Law Office of Janet L. Eveland located in Baltimore, Maryland. CyberCore is represented by Todd James Horn and Karel Mazanec of the Baltimore and D.C. offices of Venable LLP. NGC is represented by Todd James Horn of the Baltimore office of Venable LLP and Joseph P. Harkins and Steven E. Kaplan of Littler Mendelson PC of Washington, D.C. ■

Timothy Ramos earned a J.D. from NYLS in 2019.

Federal Magistrate’s Scholarship Questionable in Ruling on Female Inmate’s Challenge to Housing of Transgender Women in the Prison

By William J. Rold

Pro se prisoner Jamesetta Guy, a cisgender female confined at the Central California Women’s Facility, sued for herself and for “500 Jane Does” to challenge the incarceration of post-surgical transgender women at the same prison. U. S. Magistrate Judge Erica P. Grosjean had previously dismissed the case for lack of standing, with leave to refile (which Guy did). Now, in *Guy v. Espinoza*, 2020 WL 309525 (E.D. Calif., Jan. 21, 2020), Judge Grosjean dismisses with prejudice.

At first glance, the decision seems comprehensive. Upon closer scrutiny, the scholarship fades.

Judge Grosjean begins by holding that Guy had constitutional standing in an Article III sense (because she has PTSD and she claims to have been threatened), but she cannot assert claims on behalf of Jane Does.

The judge next rules that there is no clearly established law “determining the appropriate classification and housing of transgender inmates,” so Guy’s damage claims are dismissed on qualified immunity grounds. (This may be questionable in light of the 9th Circuit’s exhaustive decision in *Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019) (*passim*.) Judge Grosjean allows injunctive claims to be analyzed further, citing *Pounci v. Tilton*, 704 F.3d 568, 576 (9th Cir. 2010).

Judge Grosjean next observes: “Plaintiff’s claims rely on her assumptions that a post-operative male-to-female transgender inmate is not a female inmate and should not be classified as a female inmate. The Court finds it unnecessary to address or consider the validity of Plaintiff’s assumptions.”

It is all downhill from here. Judge Grosjean discusses classification decisions at length, confusing gender identity and sexual orientation, eventually conflating the two and misquoting the 9th Circuit decision

distinguishing them. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). Judge Grosjean concludes this section by writing: “Plaintiff’s challenge to the classification of other inmates with which Plaintiff is housed does not, in and of itself, state a cognizable claim for relief.” Wrong; housing incompatible prisoners together may violate the rights of both groups – see *Redman v. County of San Diego*, 942 F.2d 1435, 1445-8 (9th Cir. 1991 (*en banc*)) (housing mentally ill with sane and aggressive with victims; failing to segregate sexual predators).

Judge Grosjean next looks at Fourth Amendment privacy and finds that allowing cisgender and transgender inmates to be housed together does not violate privacy because their interaction is “extremely limited,” despite the 9th Circuit’s recent declaration that seeing inmates at the toilet or in the shower is “frequent and up close.” *Byrd v. Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 923 (9th Cir. 2017).

Judge Grosjean then turns to Eighth Amendment claims, which she perplexingly analyzes in terms of excessive force by staff. She returns to a kernel of analysis when she looks at the right of inmates to be protected from each other, finding that Guy had failed to allege more than her generalized fear, mostly of transgender people. This is short-lived, however, as the opinion devolves into dicta about no constitutional rights to a female-only environment, or no “right to not come into contact with males” – neither of which Guy claims.

Judge Grosjean continues: “[E]ven assuming that Plaintiff comes into contact with these inmates, and that this contact may exacerbate Plaintiff’s PTSD, does not give rise to a constitutional claim in the prison setting any more than it would if she was a member of the general public and came into such contact outside the prison setting.”

Falling completely off the cliff, she adds: “More than a million people freely live in the Central Valley [of California] and many of them contract Valley Fever each year.”

Finally, Judge Grosjean addresses Equal Protection – without mentioning recent 9th Circuit rulings on level of scrutiny: *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (military transgender ban); and *Smith Kline Beecham Corp. v. Abbott Labs*, 740 F.3d 472, 483 (9th Cir. 2014) (sexual orientation and jury challenges). What remains is confusing. Guy loses on this point, too, because she is not treated differently from those to whom she is similar (that is the best this writer can do).

There is little sympathy for Guy’s attempt to obtain judicial imprimatur for her transphobia, but the wide swings in this opinion are not justified. It would have been better to have merely ruled that California can house post-op transgender women in the women’s prison so long as it has a classification system reasonably calculated and responsive to the need for protection from harm of all prisoners. ■



Gay Couple Sues for Marriage Recognition in India

By Eric J. Wursthorn

A married gay couple, both of whom are citizens of India, have filed a writ petition with the High Court of Kerala seeking to have their marriage registered under the Special Marriage Act, 1954. Although the law does not specifically exclude same-sex marriages, petitioners argue that the law is discriminatory and prevents “equal access to the institution of marriage for homosexual couples” because it utilizes heterosexual nomenclature.

Petitioners are named Nikesh Pushkaran and Sonu MS. They are described in press reporting as the first married gay couple from Kerala. According to the petition, the couple met in May 2018 and quickly fell in love. After two months together, they decided to get married but were discouraged from doing so by unspecified persons based upon religious objections. Petitioners further claim that they feared violence and backlash. As a result, petitioners decided to marry in a secret ceremony. It has been reported that neither relatives nor friends were present at the wedding.

Believing that “religious/temple authorities” would not solemnize their marriage, petitioners thereafter sought to register their marriage under the Special Marriage Act, 1954, a special secular marriage route. However, because the law describes the marriage as an “affair between a male and a female or between bride and bridegroom”, petitioners have not been able to register their marriage accordingly. Indeed, the forms authorized under the Special Marriage Act employ such heterosexual terms.

Petitioners argue that their inability to register a same-sex marriage under the Special Marriage Act, 1954, violates Article 15(1) of the Constitution of India in that it is “based on irrational and discriminatory stereotype gender roles,” contending: “The majoritarian morality that dictates that a marital union shall be that of only a man and woman and never be comprised of a man and a man OR a woman and a woman . . . fails the test of discrimination” under India’s Constitution.

They further argue that the Special Marriage Act violates their freedom of expression and association under Article 19(1)(a) and (c) of the Constitution of India as well as their right to privacy under Article 21.

Petitioners further contend that the Special Marriage Act, 1954 runs afoul of recent India Supreme Court cases, including the landmark decision in *Navtej Singh Johar v. Union of India*, W. P. (Crl.) No. 76 of 2016, D.No. 14961/2016 [2018], which decriminalized consensual sex between same-sex partners. The petitioners maintain that the inability to register a same-sex marriage under the Act is contrary to *Navtej*, which held that “[m]embers of the LGBT community are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution.”

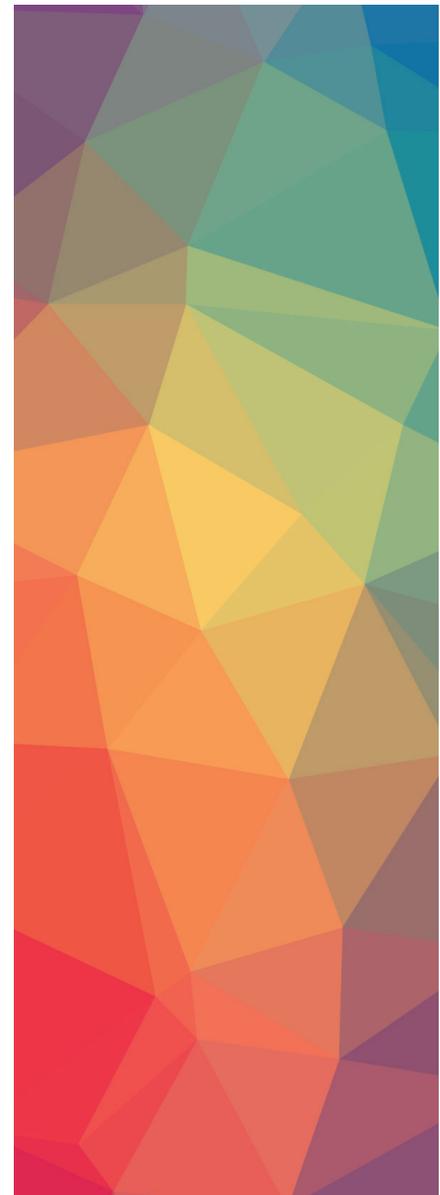
Petitioners also rely on *National Legal Services Authority v. Union of India*, WP (Civil) No 400 of 2012 (2014), a landmark transgender rights case which held that transgendered persons have a right to self-identify as male, female or third-gender. Petitioners argue that logical extension of the right to determine one’s own gender is a “natural pre-cursor to one’s right to choose one’s own partner”. According to petitioners, *Navtej* and *National Legal Services* would be “meaningless and incomplete unless the sexual minorities are afforded equal access to the institution of marriage and by enabling them to profess love in the way they deem fit.”

Finally, petitioners point to other countries, including the United States, which recognize the right to same-sex marriage. Petitioners cite, *inter alia*, *Obergefell v. Hodges*, 135 S. Ct. 2584 [2015]).

According to LIVELAW NEWS NETWORK, Justice Anu Sivaraman admitted the writ petition and issued notices to the governments of Centre and Kerala seeking responses. Respondents names on the Petition include the Union of India, the State of Kerala, the Kerala Department of Law, the Kerala

Registrar General of Births, Deaths and Marriages, the Inspector General for the Department of Registration, and the Marriage Office for Thrissur District. Advocates for the Petitioners from the firm of M/s George Varghese Perumpallikuttiyil are A. R. Dileep, P.J. Joe Paul, Manu Srinath, and Rajan G. George. ■

Eric J. Wursthorn is a Principal Court Attorney for the New York State Unified Court System, Chambers of the Hon. Lynn R. Kotler, J.S.C.



9th Circuit Judge Protests Rejection of Gay Haitian's Refugee Claim

By Arthur S. Leonard

A panel of the U.S. Court of Appeals for the 9th Circuit rejected a gay Haitian man's petition for review of the Board of Immigration Appeals' (BIA) dismissal of his appeal from the Immigration Judge (IJ) decision denying his application for asylum, withholding of removal or relief under the Convention against Torture. Senior Circuit Judge Dorothy W. Nelson dissented from the *per curiam* decision issued by the two other members of the panel, Circuit Judge Johnnie B. Rawlinson and Senior Circuit Judge Carlos Bea. *Bossa v. Barr*, 2020 U.S. App. LEXIS 529, 2020 WL 68395 (Jan. 7, 2020).

The IJ based an adverse credibility determination on inconsistencies between the Petitioner's testimony at his hearing, compared to his prior sworn statement and his statements in his initial reasonable-fear of persecution interview. In his initial interview with a border patrol agent, which took place in an open room with other Haitian refugees present, Petitioner stated that he did not fear returning to Haiti and that he would not be harmed if he returned. At the subsequent hearing before the IJ, he claimed fear based on his sexual orientation and described incidents he experienced in his native Haiti and in Brazil, where lived for two years before finally arriving in the United States. He discussed an "important incident" at a soccer game in his credible fear interview, but did not mention it in his written asylum application, and then included information about this incident in his declaration with more detail than he provided in the credible fear interview.

These inconsistencies are the sort of thing that IJ's tend to focus on in resolving credibility determinations against asylum applicants, unfortunately without reference to the circumstances under which the initial interviews take place. In this case, the Petitioner's language is Creole, he claimed that the interview was not conducted in a language he understood. There was some indication that at least part of the interview was conducted in Creole through a telephone interpreter supplied by an agency contractor.

When the IJ questioned Petitioner about the inconsistencies, he provided what the majority of the 9th Circuit panel described as "shifting explanations." He explained that "he gave false information to the border patrol agent because there were many other Haiti immigrants in the room and it was too public, but later stated it was because he had difficulty with the interpreter. The IJ pointed out that the sworn statement expressly notes the interview may be the only opportunity for an alien to explain his fear of returning and that he did not mention any concerns related to the interpreter at that time." The Petitioner responded that no one read him the notices, but later stated that he had difficulty working with the interpreter. "The IJ did not find these explanations credible, noting that Bossa had completed other portions of the form correctly. The IJ was not required to accept Bossa's explanations for these inconsistencies," says the *per curiam* decision. The BIA basically channeled the IJ's analysis in upholding the decision to deny relief to the Petitioner.

Judge Nelson, dissenting, wrote, "In my view, neither the IJ nor the BIA provided a specific and cogent reason to disregard Bossa's explanation regarding his fear of disclosing his sexual orientation in public during the border patrol interview." Although the IJ rejected his explanation for why he was afraid to respond truthfully in that setting as "unconvincing," Nelson wrote, "the IJ never provided a cogent reason to disbelieve it. The IJ only suggested the explanation was somehow implausible given 'the two-month journey to reach the United States for protection.' If anything, Bossa's reluctance to publicly divulge his sexual orientation after a lengthy journey simply confirms the intensity of his fear. Given the hostility he experienced from his family, homophobia from Haitians in Haiti and Brazil, and particularly after being attacked and injured by a mob in Haiti, it seems reasonable for Bossa to be afraid that if a large group of Haitians found out that he was gay,

he would be attacked." Judge Nelson found the adverse credibility finding to be "improper."

She also found the record did not support dismissing Bossa's claims that he had troubles with the interpreter during his interview. "For example," she wrote, "Bossa repeatedly answered the border patrol's open-ended questions with a non-sensical 'yes' or 'no.' Such 'unresponsive answers by the witness provide circumstantial evidence of translation problems,'" she continued, quoting from *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000). She also questioned the BIA's assertion of a "presumption of regularity" as a basis to dismiss Petitioner's claim that part of his interview did not have Creole translation. She expressed doubts that such a presumption should "extend to an apparent contractor with AT&T who offered telephone interpretation services, especially in light of the language difficulties noted above . . . In any event, Bossa's consistent testimony on this point during his credible fear interview, and his declaration and testimony before the IJ, provides 'clear evidence' to overcome that presumption."

Her conclusion sums up her objections clearly: "The majority construes these as 'shifting' rather than simply additional explanations for Bossa's omission. But it was not contradictory for Bossa to consistently explain that – in addition to his fear of persecution – these language barriers provided an additional impediment to him publicly disclosing his sexual orientation. Bossa's explanation for his omission is grounded in the same fear of persecution on which his asylum application relies. Lacking a specific and cogent reason to reject that explanation, the BIA's adverse credibility determination is not supported by substantial evidence."

Petitioner is represented by Matt Adams, of the Northwest Immigrant Rights Project, Seattle, together with Vanessa Orion Arno Martinez, of the same organization's office in Wenatchee. ■

European Human Rights Court Faults Lithuania on Failure to Investigate Anti-Gay Hate Speech

By Matthew Goodwin

A Chamber of the European Court of Human Rights (ECtHR) ruled on January 14 that the Lithuanian authorities' failure to investigate online hate speech against a gay couple violated the couple's rights to private and family life and constituted discrimination on sexual orientation grounds under the European Convention on Human Rights (ECHR). *Beizaras and Levickas v. Lithuania*, Application No. 41288/15.

In particular, the court found that this was a violation of Article 14 of the ECHR (prohibition of discrimination), Article 8 of the ECHR (right to respect for private and family life), and Article 13 of the ECHR (right to an effective remedy).

Pijus Beizaras and Mangirdas Levickas are Lithuanian men in their 20s who are in a romantic relationship. In the winter of 2014, Beizaras posted a picture of them kissing on Facebook. The picture generated approximately 800 comments, most of which expressed hatred for homosexuals in general and Beizaras and Levickas specifically. Many of the comments could be characterized as attempting to incite violence against homosexuals or Beizaras and Levickas themselves. Some of the comments suggested the men should be beaten, hung, exterminated, or killed.

Following the posting of the threatening comments, Beizaras and Levickas requested help from the Lithuanian National Lesbian, Gay, Bisexual, Transgender Rights Association (LGL Association). On their behalf, the LGL Association requested that Lithuanian prosecutors "initiate criminal proceedings for incitement to hatred and violence against homosexuals."

The Lithuanian prosecutors refused, stating that some of the comments posted on Facebook were unethical but that they did not rise to a level that would warrant prosecution.

The Association and the men sought redress in the Lithuanian courts, which sided with the prosecutors. In adopting the prosecutors' arguments, the Lithuanian courts characterized the behavior of Beizaras and Levickas as displayed in the Facebook photo "eccentric" and "provocative." The courts went so far as to claim both men should have foreseen that publicly sharing the post on Facebook—rather than privately with selected "like-minded people"—would "not contribute to social cohesion" or "the promotion of tolerance in Lithuania, a country where 'traditional family values were very much appreciated.'"

The ECtHR ruled that the comments posted in response to Beizaras's posting did impact his and Levickas's emotional and psychological well-being, which meant that they were properly brought under Articles 8 and 14 of the ECHR. In doing so, the court rejected the Lithuanian Government's claim that the prosecutors' refusal to start a criminal investigation was not based on the men's sexuality. Here the court pointed to the Lithuanian courts' emphasis on what it had termed Beizaras's and Levickas's "eccentric behavior" in upholding the decision of the prosecutors not to investigate. In essence, by implicitly referring to Beizaras's and Levickas's sexual orientation as undergirding their criminal court decisions, the Lithuanian Government demonstrated an impermissible bias. This was buttressed by the criminal court's pointing out what they viewed as behavior misaligned with "family values" of great importance to Lithuanians.

In turn, this discrimination and refusal to initiate criminal proceedings left the men vulnerable to physical violence and attacks on their dignity.

In finding that the two men had been denied an effective remedy under Article 13 of the ECHR, the court again focused on and was troubled by the Lithuanian Government's apparent

position that Beizaras and Levickas had a duty to "respect the views and traditions of others" when they exercised their own rights.

This finding was apparently not novel to this case, but was embodied in much of Lithuania's case law respecting criminal behavior toward homosexuals. The court received evidence on this point showing that out of approximately 30 pre-trial investigations opened in Lithuania pertaining to homophobic hate-speech during the years 2012-2015, all were discontinued. In this particular case, the criminal court's decision upholding the prosecutor held that criminal proceedings would have been a "waste of time and resources."

Lithuania was ordered under Article 41 of the ECtHR to pay each man EUR 5,000 in damages and EUR 5,000 in costs.

The Chamber decision can be appealed by Lithuania to a Grand Chamber. It will become final if not appealed. The Chamber in this case was made up of seven judges and the Second Section Registrar.

The men were represented before the ECtHR by Robert W. Wintemute, a lawyer and professor who is a leading writer and advocate on European Human Rights law, and R. V. Raskevicius, a representative of the LGL Association. ■

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York City, 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. SUPREME COURT – The petitions for certiorari in *Fulton v. City of Philadelphia*, No. 19-123, and *Arlene’s Flowers v. State of Washington*, No. 19-333, were distributed for three conferences of the Court during January, but no decision on the petitions was announced. They were rolled over to the agenda for the Court’s next scheduled cert conference, February 21. *Fulton* presents the issue whether a Catholic foster care agency suffered a violation of constitutional rights because Philadelphia officials terminated the agency’s role in certifying foster parents in response to their refusal to state that they would provide equal services to same-sex couples as required by city policy. *Arlene’s Flowers* contests the Washington Supreme Court’s determination, on remand from the U.S. Supreme Court, that *Arlene’s* constitutional rights were not violated by a finding that its denial of wedding floral design services to a gay couple violated the state’s public accommodations law and that *Arlene’s* was not excused from compliance under the 1st Amendment. The Petition contests the state court’s conclusion that the “neutrality towards religion” requirement articulated by the Court in *Masterpiece Cakeshop* applies only to state adjudicators, not to the Attorney General acting in his law enforcement capacity. A certiorari grant would likely be announced on the afternoon of February 21, a denial the following Monday. Meanwhile, the Court had not announced a decision in three pending Title VII cases argued on October 8, presenting the question whether Title VII of the Civil Rights Act of 1964 can be construed to ban

employment discrimination because of an individual’s sexual orientation or gender identity under the ban against discrimination because of an individual’s sex. The Court’s Winter Break ends February 24, when it resumes hearing oral arguments and releasing opinions.

U.S. COURT OF APPEALS, 2ND CIRCUIT – In *Ismail v. Barr*, 2020 U.S. App. LEXIS 1423 (Jan. 16, 2020), a man from Ghana who claimed to be subjected to persecution because he was perceived to be gay was unable to persuade the court to review a decision by the Board of Immigration Appeals and an Immigration Judge to deny him asylum withholding of removal, or relief under the Convention against Torture. On reviewing the record, the court found no basis to discredit the administrative ruling against *Ismail* on credibility grounds, based on findings that he had lied about various facts during his reasonable fear interview, and had failed to provide corroboration, including original documents, concerning various of his claims. The opinion, as not uncommon in summary orders in such cases, alludes to various facts without giving a coherent narrative, making it difficult to figure out what exactly were *Ismail’s* factual claims. The Petitioner is represented by Megan E. Kludt, Northampton, MA.

U.S. COURT OF APPEALS, 8TH CIRCUIT – In *Naca v. Macalester College*, 947 F.3d 500 (Jan. 16, 2020), the 8th Circuit affirmed *per curiam* a ruling by the District Court in Minnesota rejecting claims under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and the Minnesota Human Rights Act. Kristin Naca was an assistant professor at Macalester College up for tenure. She was diagnosed with various ailments that required work accommodations. She was discharged when evidence surfaced that she had

put sexual moves on her former work-study assistant and student, identified as “Jane Doe” in the court’s opinion. While Doe was about a week and a half before graduation, Naca invited Doe to her home and discussed “their potential mutual sexual attraction” and she asked Doe, “Do you want me to make a pass at you?” Three days after Doe graduated, they began a sexual relationship. Due subsequently brought the issue to the college’s attention. The provost then recommended terminating Naca for violating the school’s policy against student-teacher sexual relationships. The faculty personnel committee, the president, and five layers of administrative review later, Naca was terminated and brought her lawsuit. The court affirmed the district court’s conclusion that the reason given for the discharge was not pretextual. The district judge wrote: “The Court does not believe that Naca has established a *prima facie* case of discrimination. Nothing about the circumstances of this case gives rise to an inference of discrimination. In May 2015, when Doe made her complaint, Macalester was beginning the process of approving Naca for tenure. Up to that point, Naca’s career was progressing smoothly. What changed after May 2015 was not Doe’s race/ancestry, sex, sexual orientation, or religion; what changes is that a former student made a formal complaint of sexual misconduct.” Even if Naca had alleged a *prima facie* case, the court of appeals found, “Macalester articulates a legitimate, non-discriminatory reason for termination – her sexual relationship with Doe – that Naca does not counter with sufficient evidence of pretext.” The court also affirmed rejection of the Rehabilitation Act and ADA claims, noting that Naca “admitted that with the accommodations provided, she was performing the essential functions of an assistant professor, which, on *de novo* review, defeats her claim as a matter of law.” Naca is represented by Peter J. Nickitas of Minneapolis.

CIVIL LITIGATION *notes*

U.S. COURT OF APPEALS, 10TH CIRCUIT

– The Petitioner in *Barrera v. Barr*, 2020 WL 207087, 2020 U.S. App. LEXIS 1183 (Jan. 14, 2020), a transgender woman from El Salvador, sought review of a decision by the Board of Immigration Appeals (BIA), which dismissed her appeal from a removal order by an Immigration Judge (IJ). While the 10th Circuit found that some elements of the review sought were outside its jurisdiction in such cases, it was appropriate to remand the case to the BIA for further proceedings. The IJ hearing was conducted by video-conference. Petitioner had applied for admission into the U.S. and filed a timely application for asylum, claiming past persecution and a fear of future persecution due to her “alleged identity” as a transgender woman. During the hearing at which she had legal representation, counsel for the Department of Homeland Security (DHS) questioned her about inconsistencies between her testimony and the notes taken by an immigration officer during her “credible fear interview” as well as with her recorded sworn statement supporting her asylum application. These documents had not been produced before the hearing and Barrera did not get to see them during the hearing. Counsel described the inconsistencies to her and she confessed on the stand that the documents accurately recorded “several lies” that she told to government officials, but she challenged “whether the documents accurately reflected other statements she allegedly made that conflicted with her testimony.” The IJ ordered the government to provide copies of the documents to Petitioner “immediately” after the hearing and gave her eleven days to lodge objections to the documents and make any request she might have to provide further testimony. Petitioner objected to admission of the documents and asked for a follow-up evidentiary hearing to provide “additional re-direct testimony and closing argument” but

suggested, in the alternative, that the IJ consider a written argument “in lieu of an additional hearing.” There was no additional hearing, but the IJ considered Petitioner’s written submission. The IJ found Petitioner not credible and rejected the past persecution claim, further rejecting the claim of a well-founded fear of future persecution, noting that “the evidence does not establish that the unique hardships transgendered women in El Salvador face amount to persecution.” In appealing to the BIA, Petitioner emphasized due process violations, and complained that the IJ failed to make a competency assessment. In backing up the IJ on the fear of persecution claim, the BIA “affirmed the IJ’s conclusions that while the record establishes that transgender women in El Salvador are subjected to pervasive discrimination, harassment, and some violence, it does not establish the likelihood of the respondent being subjected to persecutory harm is sufficient to support a grant of asylum.” While asking for an affirmance in this case, the government conceded it would be appropriate to remand “so that the BIA can clarify the following aspect of its decision with respect to Barrera’s alleged well-founded fear of future prosecution: “Whether it was affirming the IJ’s conclusion that Ms. Barrera would not be subject to harm rising to the level of persecution in El Salvador, or if it understood the IJ’s decision to be a ruling that Ms. Barrera failed to establish the requisite likelihood that she will be subjected to persecutory harm.” We confess to some bafflement here. The IJ acknowledged that transgender women in El Salvador face “pervasive discrimination, harassment, and some violence.” The BIA did not reverse that finding. So how could the asylum claim be denied if it is accepted that Petitioner is a transgender woman? The court rejected the claim that Petitioner’s minimal due process rights had been denied by confronting her at the hearing with documents she had not been shown

in advance, or that the IJ erred in failing to order a competency determination. The Petitioner is represented by Tania Linares Garcia and Keren Zwick of the National Immigrant Justice Center, Chicago, and Gavin Tisdale and Karen Walker, Kirkland & Ellis, Washington, D.C.

U.S. COURT OF APPEALS, 11TH CIRCUIT

– Eric Watkins was ordered to leave a Broward County (Florida) park by a park police officer after complaints were received that he was loudly singing songs that advocated violence against gay people. He filed suit *pro se* against Broward County Regional Park, the Park managers, and a police officer. He claimed that his removal and banning from the park violated his 1st and 14th Amendment rights. Various earlier stages of this litigation were reported in past issues of *Law Notes*. Watkins admitted that he “sang that song to deter gay people from being around him,” reported the *per curiam* opinion for the 11th Circuit Court of Appeals in *Watkins v. Central Broward Regional Park Managers and Co-Workers*, 2020 U.S. App. LEXIS 38, 2020 WL 40152 (Jan. 3, 2020). The court affirmed the district court’s decision dismissing the case, finding no merit to the claim that a person has a free speech right to loudly advocate violence against gay people in a public park, and that the managers enjoyed qualified immunity from Watkins’ claims.

ARIZONA

– Playing catch-up. In preparing for the LGBT Bar Association’s annual Year in Review CLE program, we discovered that we inadvertently omitted to report on an important decision by the Arizona Supreme Court issued on September 16, 2019, in *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 448 P.3d 830, so we wanted to summarize it briefly here. This is the case in which

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Alliance Defending Freedom (ADF) filed suit against the City of Phoenix on behalf of a custom stationary business, seeking declaratory and injunctive relief to preserve the ability of their client to refuse to make wedding invitations for same-sex marriages and to advertise their policy to potential customers. The city's anti-discrimination ordinance both prohibits businesses from discriminating against customers because of their sexual orientation or to publish any communication that "states or implies" that a facility or service will be refused because of somebody's status. When the case was filed, nobody had ever asked the plaintiffs to make such invitations, and the trial court questioned their standing, but the court of appeals granted summary judgment to the city on the merits. The plaintiffs attached to their suit papers copies of invitations they had made, to demonstrate that the invitations were celebratory in nature, thus reinforcing their argument that requiring them to make such invitations was a form of prohibited compelled speech and also inconsistent with Arizona's statutory protection of free exercise of religion. In its decision, the Arizona Supreme Court, noting that a lower court had already ruled that the provision about communications was unduly vague, reversed the court of appeals on the merits of the speech and religion claims. A bare majority of the court concluded, based largely on the examples of wedding invitations in the record, that the state's constitutional protection for freedom of speech, as well as its Religious Freedom Act, would be violated were the city's civil rights agency to bring a proceeding against the plaintiffs for refusing to make wedding invitations for same-sex couples. They held that custom invitations "constituted pure speech entitled to full First Amendment protection," so the ordinance would be subject to strict scrutiny on a compelled speech claim, and that a governmental interest to protect people

against discrimination was insufficient to justify such compelled speech. Furthermore, in terms of the Free Exercise of Religion Act, enforcing the ordinance in such circumstances would substantially burden the plaintiffs' free exercise of religion, and the ordinance was not the least restrictive means of further the government's interest in preventing discrimination. Three members of the court filed dissenting opinions. The court was careful to say that it was ruling only with respect to the evidence in the record concerning the nature of the wedding invitations, and was not ruling regarding other products of the plaintiff, including wedding-related products. The case is in line with an emerging trend in the clash between same-sex marriage rights, anti-discrimination laws, and freedom of speech and religion, to draw a distinction between goods or services that are obviously expressive – such as printed invitations or wedding videos – and other wedding-related services as to which the expressive argument is strained, such as wedding cakes or floral arrangements. The Arizona case will likely go no further, because the court based its ruling on the state constitution and statute, insulating it from U.S. Supreme Court review. Certiorari petitions pending in the U.S. Supreme Court as of the end of January would, if granted, bring this clash back to the Court in the 2020-21 Term in the context of wedding floral arrangements, and would also bring into play the claims of religiously-affiliated social services agencies straining against the anti-discrimination requirements of municipal policies.

CALIFORNIA – U.S. Circuit Senior Judge A. Wallace Tashima, sitting in the District Court for the Central District of California, granted a motion for summary judgment in favor of the City of Pasadena (the City) and the Western Justice Center (the Center) to dismiss

a lawsuit by the Pasadena Republican Club (the Club). The Club claimed that its constitutional rights were violated when the Center, a private non-profit organization that rents and operates a City-owned building where public events are held, cancelled a program sponsored by the Club featuring as its speaker Dr. John Eastman, a constitutional law scholar of conservative bent. After the Center had booked the event, its board met and decided that in future it would not book any political events, due to the "heightened political rancor these days." At first, the Center communicated to the Club that it would allow the Eastman event to go on, since it had already been publicized and "it also helped that you have a recognized legal scholar as your speaker." But then the heat got to the Center as opposition was expressed because Eastman is President of the National Organization for Marriage (NOM). In writing to the Club on the date the Eastman talk was scheduled to take place, the Executive Director of the Center explained, "NOM's position on same-sex marriage, gay adoption, and transgender rights are antithetical to the values of the Western Justice Center. Western Justice Center exists to build a more civil, peaceful society where differences among people are valued. WJC works to improve campus climates with a special focus on LGBT bias and bullying. We work to make sure that people recognize and stop LGBT bullying. Through these efforts we have built a valuable reputation in the community, and allowing your event in our facility would hurt our reputation in the community. We will return the fee that you have paid immediately." In the event, the Club was able to make last-minute arrangements to hold the speech elsewhere, but attendance was much smaller than it would have been at the Center. Granting the summary judgment motion of the Center and the City, Judge Tashima found that no constitutional claim could be asserted here against the defendants because the

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Center is a private institution, so there was no state action. The fact that it leased the building from the city (for \$1 a year) did not make it a state actor, and the city had nothing to do with the decision to cancel the event or adopt a policy going forward of not renting the Center's meeting space to political groups. The court also rejected the claim that there was some sort of actionable conspiracy here to deprive the Republican Club of its constitutional rights. *Pasadena Republican Club v. Western Justice Center*, 2019 WL 7488990, 2019 U.S. Dist. LEXIS 224096 (C.D. Calif., Dec. 30, 2019).

CALIFORNIA – Reversing a grant of summary judgment to the employer in *Brome v. California Highway Patrol*, 2020 Cal. App. LEXIS 71, 2020 WL 429035 (Jan. 28, 2020), the California 1st District Court of Appeal found that plaintiff Jay Brome, an out gay former California Highway Patrol trooper, should have an opportunity to establish that he suffered a constructive discharge and is entitled to equitable tolling of the statute of limitations in his case, in which he alleges that he was subjected to unlawful discrimination and harassment because of his sexual orientation. The opinion for the court by Justice Gordon B. Burns sets out in detail Brome's allegations of a continuous pattern of hostile environment harassment of extraordinary severity and pervasiveness at several successive postings in different counties. While this did not prevent Burns from doing a good job – he won the Solano Area Officer of the Year Award in October 2013 – eventually the stress he was under was so severe that he took medical leave and filed a workers' compensation claim based on work-related stress in January 2015. He had not suffered in silence, complaining to supervisors about the harassment in all his postings, but to little effect. As an example of the pettiness he encountered, after he won

the Officer of the Year Award, "the Patrol never displayed his photograph, in a break from office practice," and the photo of the previous year's Officer of the Year remained up in the Solano office throughout 2014. Shortly after he took his leave, his captain sent a letter to him expressing "concern" regarding his allegations of harassment and hostile work environment and writing: "I genuinely hope you allow us the opportunity to work together to resolve your work-related issues." But it was not to be. The workers compensation claim was decided in his favor on October 25, 2015, and he took industrial disability retirement on February 29, 2016. On September 15, 2016, he filed his administrative discrimination complaint with the Department of Fair Employment and Housing and the next day filed his lawsuit in Solano County Superior Court. The Highway Patrol moved to dismiss, citing the statute of limitations, and also contesting Brome's claim of constructive discharge. Judge Michael Mattice found that the allegations of the complaint did not support a claim of constructive discharge and that, in any event, the claim was time-barred. If the time that his workers compensation claim was pending tolled the running of the statute, his claim would be timely, he argued on appeal. He also contended that the pattern of continuous harassment should allow him to invoke the "continuing violation" doctrine, so that he would not be limited to the factual allegations during the last period of his active duty prior to his filing of the compensation case. The Court of Appeal agreed that there were material facts relevant to the tolling issue and the constructive discharge issue that should have precluded summary judgement, reversed, and sent the case back to the trial court with instructions to deny Brome his costs on appeal. Brome is represented by the firm of Rosen Bien Galvan & Grunfeld, LLP. The court

received a joint amicus brief from the National Center for Lesbian Rights, GLBTQ Advocates & Defenders, Lambda Legal, the National Center for Transgender Equality, and the San Francisco LGBT Center.

CALIFORNIA – In *Sheena J. v. Mari K.*, 2020 Cal. App. LEXIS 618, 2020 WL 477877 (1st Dist., Jan. 28, 2020), a custody dispute between lesbian mothers, the court of appeal affirmed a decision by Alameda County Superior Court authorizing the birth mother to move to Florida and relocate the child with her, while upholding continued joint custody and a visitation schedule providing that the child would be in Florida when school was in session but in California with her second mother for various vacation and holiday periods. In this case, Sheena gave birth to their son, identified in the opinion as Z.K.J., in 2012, and the women married in 2013, separated after several months, and divorced in 2015. Sheena and Mari had discussed Sheena's idea of moving to Florida to be near her birth family in 2014, without resolution. In the stipulated judgement of dissolution, Mari was named as Z.K.J.'s "other parent" and the court awarded joint legal and physical custody, with a set visitation schedule. In early 2016, Sheena offered Mari a fifty-fifty custody timeshare schedule, to which Mari agreed, but this only lasted about six months, when "conflict over custody exchanges erupted," according to the opinion for the Court of Appeal by Justice Carin Fujisaki. After Mari had not seen the child for about three months due to a bug infestation at Mari's residence, Sheena asked the court to order Mari to submit to a psychological or psychiatric assessment, claiming Mari was not adequately supervising the child and had become increasingly unstable. Mari opposed the request and the parties stipulated resuming the equal co-parenting schedule. In January 2017, Sheena notified Mari of her plan

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to move to Florida with the child. Before Sheena could move, Mari went to court seeking to modify the child custody order to give her sole legal and physical custody, and also sought temporary sole custody while the case was pending, claiming the child had been “strangled” by Sheena’s stepfather during a prior family visit to Florida (which Sheena denied and was never established). Sheena sought continued joint custody and an order that would authorize Z.K.J. to move to Florida, making Sheena the “school year parent,” and she asked for appointment of a child custody evaluator to make a study and recommendation. The court appointed an evaluator when the parties could not agree on one, and the evaluator recommended essentially what Sheena sought. The evaluator’s report was delayed several months due to lack of cooperation from Mari, who was representing herself in the proceedings until shortly before a hearing on the evaluator’s report, when she finally obtained counsel. But her counsel had to withdraw for medical reasons and she sought to delay the court’s hearing pending finding new counsel. The court denied successive motions for delay, Mari obtained new counsel, the court held a hearing, heard witnesses, and approved the arrangement sought by Sheena, with slight modification. During this time, the child was residing with Mari on a temporary basis pending the court’s order. On appeal, Mari sought to have a new trial, arguing that the court erred in denying her motions to delay the trial, in excluding some of her proffered witnesses, and of limiting her cross-examination of the evaluator. The bulk of the court of appeal opinion is devoted to explaining why none of Mari’s objections were viable, emphasizing the urgency of making a decision on the merits for the sake of stability for the child. The court also found the trial judge did not commit an abuse of discretion regarding witnesses, having concluded that proffered testimony was irrelevant or cumulative.

LOUISIANA – In *Harris v. Rivarde Detention Center*, 2020 U.S. Dist. LEXIS 12593, 2020 WL 419299 (E.D. La., Jan. 27, 2020), U.S. Magistrate Judge Janis van Meerveld rejected a motion by Jefferson Parish, the government entity that is the real defendant in the case, to dismiss sexual harassment and constructive discharge charges by a bisexual former female detention officer, claiming of being subjected to severe or pervasive hostile environment harassment by a supervisor. Harris’s current counsel, Joseph Rome of New Orleans, was not her original attorney in the case, and pleading errors in her original complaint resulted in repeated efforts to amend the complaint to put it into a form that would be accepted by the court clerk for filing. The county’s motion to dismiss was based on lots of cases that arguable support the county’s argument that the conduct described in Harris’s complaint is not sufficiently severe to justify her claims. Magistrate van Meerveld pointed out that those opinions all arose from summary judgments. She found that the factual allegations of the complaint were sufficient to withstand summary judgment on the substantive claims, but not on a sex discrimination claim distinct from the harassment and constructive discharge claims. The court also found the pleadings insufficient to sustain a Title VII retaliation claim, or various other criminal and tort claims. The court had earlier dismissed the abusive supervisor from the case as a defendant, noting that the Title VII claim ran only against the employer; furthermore, the employer was the county, not the detention center, which the court found not to be an entity that could be sued. Although the plaintiff self-identifies as bisexual and some of the allegations relate to harassment because of her sexual orientation, the bulk of the claims would suffice for a straightforward sexual harassment case, and the court’s decision does not dwell on sexual orientation.

MARYLAND – *Law Notes* previously reported on *Bethel Ministries, Inc. v. Salmon*, 2019 U.S. Dist. LEXIS 197264, 2019 WL 6034988 (D. Md., Nov. 14, 2019), in which U.S. District Judge Stephanie A. Gallagher refused to dismiss a lawsuit by Bethel Ministries, which operates a private school that was excluded from a Maryland state scholarship program for students attending private schools because the board running the program concluded that Bethel’s policies violated a sexual orientation non-discrimination requirement. In moving to dismiss, Bethel had argued that it does not inquire into the sexual orientation of applicants, and thus was in compliance with the non-discrimination policy. Since material facts were disputed and Bethel’s complaint stated a constitutional claim on its face, the state’s motion to dismiss was denied. But, Bethel, thus bolstered in confidence, moved for a preliminary injunction to order the state to keep it in the program, and pushed its luck too far. On January 21, Judge Gallagher denied the motion for preliminary injunction in *Bethel Ministries, Inc., v. Salmon*, 2020 WL 292055, 2020 U.S. Dist. LEXIS 9789. Applying the standard test for preliminary relief, Judge Gallagher concluded that Bethel failed to show that a preliminary injunction granting the relief it sought would address its claim of irreparable harm, finding, among other things, that Bethel’s contention that the preliminary injunction restoring them to the scholarship program would encourage students needing scholarships to transfer to Bethel was unduly speculative. Furthermore, what is at issue at this point is Bethel’s ability to meet newly-enacted requirements, as the legislature has added gender identity to the prohibited grounds of discrimination and has expanded the non-discrimination requirement for participating schools to go beyond admissions to all aspects of participation in a school’s educational programs. Turning to likelihood of success on the merits, a necessity for

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the granting of preliminary injunctive relief, the judge found flaws in each of Bethel's substantive legal claims. As to free exercise of religion, the court rejected Bethel's contention that it was being targeted by defendants because of its religious doctrines, because the legislature adopted the non-discrimination requirement when it enacted the program, applied it to all participating private schools, secular and sacred. Furthermore, the court did not find favor with Bethel's allegations regarding "hostility to religion" by the board that voted to revoke Bethel's participation in the program, noting that the board voted to continue participation by two other religious schools holding similar views on the day it rejected Bethel's participation. Furthermore, Bethel has not proven "express discrimination," since the board clearly did not have an express policy of denying participation to religious schools as such. Neither did the court find merit to Bethel's free speech and viewpoint discrimination claims, or their unconstitutional conditions claim. At bottom, the court found Bethel's request for preliminary injunctive relief to be "extraordinary" as it was asking the court to render unenforceable for the duration of this litigation all enforcement of the anti-discrimination rules governing the ongoing administration of the scholarship program, at a time when the legislature had not even authorized the budget for the program going forward.

NEW JERSEY – Jionni Conforti, a transgender man, is suing St. Joseph's Healthcare System, Inc., on a claim of discriminatory denial of services in connection with Conforti's transition. U.S. Magistrate Judge Cathy L. Waldor's January 22 decision in *Conforti v. St. Joseph's Healthcare System*, 2020 WL 365100, 2020 U.S. Dist. LEXIS 11575 (D.N.J.), concerns the defendants' Rule 35 Motion demanding that Conforti

submit to an independent medical examination. This would be conducted by psychiatrist Donald Raymond Reeves, Jr., to include "a mental status examination, a developmental history, a psychiatric history (including treatments for psychiatric and psychological conditions), a family history, an education and work history, and the history of Plaintiff's alleged gender dysphoria." The purported reason for this demand is that Conforti is claiming damages for emotional distress as a result of St. Joseph's refusal to perform a hysterectomy on Conforti, in accord with its Ethical Guidelines as a Catholic hospital that preclude it from performing such a procedure as a part of gender transition. In denying the motion, Judge Waldor found that Conforti had not placed his mental health "at issue" in the lawsuit, because the claim for emotional distress related to the ordinary emotional distress caused by a discriminatory denial of services. The judge pointed out that defendants already had access to extensive medical records of Conforti and had been able to depose his health care providers. Furthermore, she wrote, "Defendants similarly have not demonstrated that Plaintiff's gender dysphoria diagnosis is 'in controversy' for purposes of adjudicating Plaintiff's discrimination claims and Defendants' affirmative defenses. Plaintiff correctly notes that at no point – either at the time that Defendants denied the hysterectomy or in the course of their defense of this action – have Defendants asserted that they refused to perform a hysterectomy because Plaintiff does not suffer from gender dysphoria. Rather, the liability determination in this matter turns on whether Defendants denied Plaintiff treatment for impermissible discriminatory reasons – namely, cause the Ethical and Religious Directives prevented Defendants from performing a hysterectomy for gender reassignment purposes." She characterized as a "novel argument" the Defendants suggestion at oral argument that "whether Plaintiff's

hysterectomy was truly medically necessary is a 'threshold issue,' because Plaintiff 'would have no standing if there was no medical necessity.'" She pointed out, "in their Answer, Defendants assert that Plaintiff lacks standing because his subsequent hysterectomy renders his claim for injunctive relief moot, not because a hysterectomy was not medically necessary to treat Plaintiff's gender dysphoria." She noted that the relevance of Conforti's "complex history of depression and anxiety, his gender dysphoria diagnosis, and potential contributing factors to Plaintiff's emotional distress other than Defendants' conduct" was not disputed, but that was an insufficient basis for finding good cause to require Conforti to submit to a new examination when his full medical records and treating physicians were involved in the discovery process. Conforti is represented by Isaac Nesser, Jaclyn Marie Palmerson, and Margaret Anne Schmidt, of Quinn Emanuel Urquhart & Sullivan LLP, New York, NY.

NEW YORK – In *Nachmany v. FXCM, Inc.*, 2020 WL 178413, 2020 U.S. Dist. LEXIS 7161 (S.D.N.Y., Jan. 9, 2020), Senior U.S. District Judge Deborah A. Batts granted the employer's motion to dismiss a sexual harassment claim under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law, brought by a heterosexual male employee complaining about the conduct of two male co-workers towards him. Alon Nachmany, a native-born American who was raised in Israel and served in the Israeli military before returning to the United States, was employed by FXCM as a systems engineer in the IT Department for about two years between 2012 and 2014. He asserted that two employees, Ryan Leonard and Seth Lyons, had subjected him to a hostile environment as a heterosexual man. The harassment did not involve requests for

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sexual favors. The complaint also stated a claim for civil assault/battery, based on an incident in which Lyons, according to the complaint, “seeking to ‘show off’ what he had learned in hand-to-hand combat classes, grabbed Plaintiff’s hand without consent, and ‘during the ensuing struggle,’ broke Plaintiff’s finger.” This tort claim was dismissed due to the statute of limitations; Plaintiff should not have waited until exhausting administrative remedies on his discrimination claim before filing this claim, as the court found that the administrative proceedings before EEOC did not toll the one-year statute as to the tort claim. Turning to the discrimination claim, Judge Batts granted the motion to dismiss on the pleadings, finding that the complaint failed to allege the necessary facts for a *prima facie* case under the Supreme Court’s same-sex harassment precedent, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). The judge noted that although typically a plaintiff need not allege all the elements of a *prima facie* case to survive a motion to dismiss, courts have regularly treated the elements spelled out in *Oncale* as pleading requirements. While rejecting the defendants’ argument that Plaintiff failed to exhaust administrative remedies by not expressly stating he was filing a sexual harassment claim on the EEOC complaint form, since he had checked the sex discrimination box and described the facts underlying the claim in his charge, the judge observed that Nachmany’s complaint failed to allege any facts going to the underlying issue of discrimination: whether he was targeted because of his sex. Title VII, the NYSHRL, and the NYCHRL, are all anti-discrimination statutes. In order to survive dismissal, Plaintiff would have to allege facts supporting an argument that he was targeted for harassment because of his sex, a prohibited ground of discrimination, and there were no relevant factual allegations going to this point. Plaintiff is represented by

Stephen McQuade, of Certilman, Balin, Adler & Hyman LLP, East Meadow, NY. * * * We sadly note that **Judge Batts**, the first out lesbian or gay federal district judge, appointed by President Bill Clinton in 1993, passed away less than a month after issuing this decision, early in February as this issue of *Law Notes* was being prepared. She was a trailblazer for LGBT representation on the federal bench, and a high respected judge in the district, as well as a long-time member and supporter of LeGaL, a professor at Fordham Law School, and former assistant U.S. attorney, and a founding member of the NY City Bar Association’s Special Committee on Lesbians and Gay Men in the Profession.

NEW YORK – U.S. District Judge Frank P. Geraci, Jr. (W.D. N.Y.) granted a motion by a transgender Social Security Disability applicant for reconsideration of a decision denying her disability benefits, in *Spellman v. Commissioner of Social Security*, 2019 U.S. Dist. LEXIS 12277, 2020 WL 408269 (Jan. 24, 2020). Gender dysphoria, by itself, has not necessarily been considered a disabling condition qualifying the individual for Social Security disability benefits. As in any disability case, the plaintiff must show that she is not able to perform work available in the national economy, in order to qualify for the benefits. In this case, Spellman presented evidence of her treating physician and various health evaluators that tended to support her claim that various mental health issues accompanying her transition (which included gender confirmation surgery) rendered her unable to work. Her doctor found that her mental state would cause moderate limitations on her ability to carry out detailed instructions, maintain attention and concentration for extended periods, and perform activities with a schedule. Beyond that, the doctor opined that she would have “marked limitations in her ability to: interact appropriately with the

public, ask simple questions or request assistance, accepting instructions and respond appropriately to criticism, get along with coworkers or peers, and maintain socially appropriate behavior.” He also found she was likely to be absent from work more than three times per month. While acknowledging the doctor’s assessment, the ALJ afforded it “little weight,” asserting that his own interpretation of the doctor’s treatment notes and Spellman’s testimonial description of her daily activities showed “greater ability to function.” Judge Geraci disagreed with the ALJ’s characterization of the notes and the testimony, and found some of the ALJ’s conclusions to be flatly contradicted by the record, such as the ALJ’s “finding” that Spellman had actually worked for several months during a time she claimed to be incapacitated. Furthermore, the ALJ discounted the opinions of two consultative evaluators, which had been largely consistent with the opinions of Spellman’s doctor. “The ALJ, therefore, did not assign significant weight to any mental health opinion evidence, despite the record being replete with opinions – from treating sources and consultative evaluators alike – which show that Spellman would be more limited in social functioning than the RFC [residual functional capacity] would allow. To be sure, an ALJ is not required to give substantial weight to any opinion,” Geraci observed, “but the rejection of all the mental health opinion evidence leaves the Court to question how the ALJ could have formulated the RFC, especially where, as here, the discredited opinion evidence was largely consistent.” The court pointed out that the vocational expert at the hearing testified that if the treating physician’s opinion was adopted as the RFC, there would be no jobs in the national economy that Spellman could perform. “It is obvious that the ALJ wanted to get a particular result and tailored his opinion in an attempt to reach that result,” concluded Geraci, remanding the case

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for further administrative proceedings. The plaintiff, Tatiana Aaliyah Spellman, is represented by Eddy Pierre Pierre, of Pierre Pierre Law, P.C., New York.

NEW YORK – U.S. Magistrate Judge Stewart D. Aaron issued an Opinion and Order on January 15, finding that Section 230 of the Communications Decency Act (CDA) immunizes Vimeo, Inc., a video-sharing on-line community, from any liability to James Domen, a professional ex-gay and promoter of conversion therapy, who was agitated by Vimeo's decision to bar his material from its platform. *Domen v. Vimeo, Inc.*, 2020 U.S. Dist. LEXIS 7935, 2020 WL 217048 (S.D.N.Y.). The CDA in general, and Section 230 in particular, were adopted during the 1990s when the internet was new and Congress was urged to protect the newly-emerging communications medium from the impediment of lawsuits that would require interactive service providers to exert expensive and intrusive censorship of third-party postings in order to avoid potential tort or civil rights liability. Arguments pro and con about Section 230 have flourished ever since, but few would contest the value of allowing a site such as Vimeo to exclude materials promoting conversion therapy without the fear of being sued on First Amendment or state anti-discrimination law claims. Damon argued that exclusion of his materials violated his rights under New York and California law to be free of discrimination because of his religious views or sexual orientation. Judge Aaron opined that any such claims he might assert under state anti-discrimination laws would be preempted by Section 230.

OHIO – At the request of the parties in *Glardon v. Speedway, LLC*, 2020 U.S. Dist. LEXIS 4300 (S.D. Ohio, Western Div., Jan. 10, 2020), U.S. District Judge Thomas M. Rose agreed

to delay ruling on defendant's motion to dismiss plaintiff's Title VII claim, which alleges a hostile environment due to his sexual orientation, until after the Supreme Court announces its decisions in *Bostock* and *Altitude Express*, cases argued on October 8, 2019.

OHIO – A gay man who was employed as a clinical fellow in the allergy fellowship program at UC Health, a private hospital with a contractual relationship with the University of Cincinnati College of Medicine, suffered summary judgment of his constitutional and Title VII retaliation claims arising from his discharge, in *Schwartz v. University of Cincinnati College of Medicine*, 2020 U.S. Dist. LEXIS 14594, 2020 WL 470280 (S.D. Ohio, West. Div., Jan. 29, 2020). The fellowship program coordinator forwarded to Schwartz an email invitation sent by Finity Group, a private financial services company, to attend an informational dinner for new physicians at a restaurant. Schwartz and his same-sex partner arrived late, and were not allowed to enter the private room where the dinner was being held, instead being seated in the restaurant proper. Schwartz claimed that a later-arriving heterosexual couple were seated in the private room. Representatives of Finity Group did come to the table where he was sitting with his partner and provided them with information, and Finity Group picked up the tab for their dinner. Schwartz later protested to officials at UC Health and the College of Medicine, asserting that he had been the victim of sexual orientation discrimination by Finity Group and urging them not to be associated with Finity Group in the future. The persons to whom he complained insisted that they were just forwarding the invitation and had no relationship to Finity Group. Schwartz alleges that his protests raised hackles and that his subsequent termination from the program without any hearing was

a violation of his First and Fourteenth Amendment rights of free speech, equal protection, and due process, and furthermore that defendants violated Title VII's anti-retaliation provision by dismissing him for complaining about employment discrimination. Defendants asserted various defects in Schwartz's performance as a resident and also in his research as non-discriminatory reasons for dismissing him. In granting defendants' summary judgment motion, Judge Timothy S. Black found that UC Health, a non-governmental entity, was not bound by constitutional requirements, and that to the extent Schwartz was seeking damages against University officials, they were shielded by sovereign immunity because the University was a unit of the state government. Furthermore, the court found that any discriminatory action by Finity Group was not connected with UC Health or the College, which had merely forwarded Finity Group's invitation. Protesting Finity Group's discrimination was thus not protected activity under Title VII, because it did not arise from Schwartz's employment by UC Health. (His relationship to the College was as a student, not an employee.) Schwartz is represented by Brian Joseph Butler and Marc David Mezibov, of Cincinnati, OH.

TEXAS – U.S. District Judge John McBryde granted summary judgment in favor of Nicholas Watson, a gay man who was sued for defamation by the Estate of Thomas Klocke, which contended that Watson, then a fellow student of Klocke at the University of Texas, defamed Klocke by reporting homophobic statements made by Klocke, first on his Facebook page and then to the University administration, which investigated and imposed disciplinary action on Klocke, who within days shot himself to death. *Klocke v. Watson*, 2020 U.S. Dist. LEXIS 13591, 2020 WL 438114 (N.D. Tex., Jan. 28, 2020).

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The Estate's problem was that it could not credibly contest any of the elements of a defamation claim, based on the findings of the neutral administrator assigned by the University to investigate Watson's report, which was supported in various particulars by other students. While sitting in class with his laptop open, Watson typed on his Facebook.com page, "The guy sitting next to me just typed into his computer 'gays should die.' Then told me I was a 'faggot' and that I should 'kill myself.' I haven't felt this uncomfortable in a long time." Watson told Klocke he should leave the classroom, and another student sitting next to Klocke noted that something tense was going on. Klocke left, then took a different seat when he returned to class, and later told the investigator that he had moved "to alleviate any tension." Watson emailed the professor about what happened, and the professor advised him to report to the University, which had him put his information in writing. The investigator found Watson's account credible and that Klocke was guilty of harassment, imposing disciplinary probation and a requirement that Thomas not attend that class, although arrangements would be made for him to work with the professor to earn the necessary credit for the course. The classroom event took place on May 19, 2016, Klocke was informed of the investigation into his conduct on May 20, the same day he purchased the gun he used to kill himself on June 2. The Estate's attempt to pin liability on the University for his death was unsuccessful, with the case going up to the 5th Circuit and attorney fees awarded against the Estate in that case. Judge McBryde found that the summary judgment record showed that Watson's report was truthful, that there was no explanation by plaintiff how the statements could be construed as defamatory *per se*, that Watson believed the statements he made regarding Klocke were true and did not know or have reason to know they were false,

and that no evidence of compensable damages was presented. The court concluded that "an award of mental anguish damages must be supported by direct evidence of its nature, duration, and severity, in addition to causation," and in this case plaintiff's entire evidence was that Klocke committed suicide, relying on the court to draw an inference that Watson's reporting of false, defamatory information about Klocke must have caused sufficient mental anguish to cause Klocke to kill himself. The court found that neither Watson's posting to Facebook nor his report to the University were actionable on a defamation claim. Watson was represented by Darren G. Gibson of Littler Mendelson PC, Austin, with other attorneys from Littler's Dallas and Austin offices.

TEXAS – U.S. District Judge Robert Pitman, finding that the 5th Circuit has "unequivocally" reiterated its view that Title VII does not ban sexual orientation discrimination, refused to delay ruling on an employer's motion to dismiss such a claim in *Davis v. United Health Services*, 2020 U.S. Dist. LEXIS 1578, 2020 WL 33597 (W.D. Tex., San Antonio Div., Jan. 2, 2020). Plaintiff September Davis, a 58-year-old lesbian nurse at Meridell Achievement Center (owned by United Health Services) the time in question, was discharged last year after a surveillance camera picked up an image of her sitting at a desk with her head down, which was interpreted by management as sleeping during her overnight shift. At the time she had been employed there for 23 years, with a "mixed" evaluation record. She claimed she was discharged due to her age and sexual orientation, having spoken out at a "town-hall" type meeting about the need to be "sensitive to people that have other sexual orientations" and noted that the then-CEO, who "didn't really respond to the suggestion of being gay," had a "look on his face" that she construed as "taken

aback." The employer replaced her on the night shift with a 71-year-old, so the claim under the Age Discrimination in Employment Act (ADEA) went nowhere. She claimed she wasn't sleeping when she put her head down, just resting due to pain from a sinus headache. But the medical center recited several reasons for the discharge, including failure to supervise a co-worker on the shift and falsely certifying that required rounds were properly recorded and deleted, when video surveillance failed to show that she and her co-worker were circulating as scheduled. Conveniently for the employer, the video record was "recorded over" during a subsequent shift and not available as best evidence, but the court rejected the claim that it should exclude evidence in the form of testimony by hospital managers about what the video showed. The court emphasized that the reason for the employer's action was at issue, and sworn testimony was sufficient on that point. In analyzing the ADEA claim, Judge Pitman observed that the defendant had stated legitimate non-discriminatory reasons for the discharge. Davis's complaint improperly asserted her sexual orientation claim under ADEA, which pertains solely to age discrimination, but the court and defendant both treated it as an attempted Title VII claim, which she not only asserted under the wrong statute, but within the wrong federal circuit. Such claims have been recognized to date only by the appeals courts in the 2nd and 7th Circuits. Davis argued that the Supreme Court's cert grant in *Bostock v. Clayton County* (argued October 8, not decided at the time of Judge Pitman's ruling) signified that the question whether Title VII covers sexual orientation claims was "open," and she was making her claim "based on a good-faith argument for an extension, modification or reversal of existing law" and that the court should hold off ruling on the defendants' motion for summary judgment until the Supreme Court rules. "Davis's argument may very well be made in good faith and

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call for a modification or reversal of the Fifth Circuit's stance," wrote the judge. "But that standard is only germane in the context of sanctions based on improper representations to the Court, which are not at issue here. The Court must render rulings based on the current state of the law as explicated by the courts above it, regardless of the possibility of future change – even if, as the Supreme Court's grant of certiorari on this issue shows, the concern at issue here is effectively an open question of law. As a result, the Court does not reach Title VII's burden-shifting analysis. Meridell [the employer] is entitled to judgment as a matter of law in its favor on Davis's sexual-orientation-related discrimination and retaliation claims." Davis is represented by John Judge of Judge Kostura & Putnam, P.C., Austin, TX.

TEXAS – U.S. Magistrate Judge Elizabeth S. Chestney issued a Report and Recommendation in *Garcia v. Randolph-Brooks Federal Credit Union*, 2020 WL 364133, 2020 U.S. Dist. LEXIS 10254 (W.D. Tex., San Antonio Div., Jan. 22, 2020), recommending that a lesbian employee's sex discrimination charge under Title VII be dismissed on summary judgment because the 5th Circuit does not recognize sexual orientation discrimination claims under that statute, and plaintiff's allegations would not support a sex-stereotyping claim. However, the magistrate recommended *not* dismissing plaintiff's hostile environment sexual harassment claim because "RBFCU advances no arguments regarding its entitlement to summary judgment on this claim." The magistrate emphasized that in making the recommendation that Garcia be allowed to bring her hostile environment harassment claim to trial, "the undersigned expresses no opinion as to whether there is in fact evidence to support all essential elements of this claim, only that RBFCU failed to carry its summary judgment burden."

Jennifer Garcia is represented by S. Tyler Rutherford, The Rutherford Law Firm, PLLC, San Antonio, TX.

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

NEW YORK – On January 21, Nicholas Ferlenda, 28, pleaded guilty to two hate crimes, assault and criminal mischief for an August 24 attack on a gay male couple in a parking lot at the New York State Fair. The victims were leaving a rock concert when one of the men slung an arm over his boyfriend. This triggered an attack by Ferlenda, shouting gay slurs as he punched one man in the face and shattered a window on the car belong to the other man. The victims tried to escape the situation by walking away, but Ferlenda pursued them to keep up his attack. The Hate Crime law was used to accelerate what would have been misdemeanor charges into felonies. Onondaga County Supreme Court Justice Gordon Cuffy offered a plea deal which Ferlenda accepted: 6 months in jail and five years on probation, restitution for the broken window (if it was not covered by insurance), and diversity training. If Ferlenda violates the terms of his probation, which includes avoiding any criminal charges for the five-year period, he would be subject to between 2-2/3 and 8 years in prison. Formal sentencing his prison term will commence in April. *Syracuse.com*, Jan. 22.

OREGON – A Lincoln County Court found Fred Costanza, 37 guilty on January 29 of a first-degree bias crime, second-degree assault, and harassment, for an August 24 attack on Lauren Jackson, a transgender woman, when she attempted to use a women's restroom at a park on the Oregon coast. Jackson suffered a shattered jaw and fractured skull as a result of the attack.

Costanza was scheduled for sentencing on February 7. *The Oregonian*, Jan. 30.

MICHIGAN – The Court of Appeals of Michigan, ruling on the appeal of a conviction of a gay man on counts of "uttering and publishing a false instrument" and "receiving or concealing stolen property with value of more than \$1,000.00," remanded the case "for the trial court to articulate its reasons for denying *voir dire* concerning anti-LGBT bias." *People of Michigan v. Six*, 2020 Mich. App. LEXIS 431, 2020 WL 360610 (Jan. 21, 2020, unpublished opinion). The defendant was charged with having participated in a fraudulent scheme to obtain payments from a state fund, and an important part of his defense was to attempt to shift the blame to another gay man with whom he was in a relationship at the time the scheme was purportedly carried out. The other man was to be called as a witness, and the nature of their relationship was sure to come out at the trial. During *voir dire*, which was to be conducted by the court based on questions submitted by counsel, defense counsel apparently asked that potential jurors be questioned about their attitudes on LGBT issues. During a sidebar conversation with counsel off the record, the judge refused this request. No question on LGBT issues was posed to potential jurors during *voir dire*. After the jury was sworn, the defense counsel stated on the record: "This is not to contradict or argue with you, your Honor, but I requested to do *voir dire* on LGBT issues. You denied me that opportunity. And I need [sic] make a record that at this point there could be a member of the American Family Association on this jury and I have no way of knowing that because of a lack of *voir dire*." There is no indication in the written record of the trial as to why the trial judge denied counsel's request. "Neither party offered a synopsis of any reasons the trial judge gave for the preclusion of that area of questioning,"

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wrote the Court of Appeals in its *per curiam* opinion. As a result, the court said it was unable to determine whether the trial judge's decision against such questioning was an abuse of discretion or otherwise a basis for overturning the verdict and ordering a new trial. The solution imposed by the court was to remand the case to the Circuit Court in Wayne County, with an order that within 56 days of the clerk's certification of the order, proceedings on the remand should commence, "and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case for the trial court to articulate its reasons for denying defendant *voir dire* to question the jury for any anti-LGBT bias." The opinion does not identify counsel.

OREGON – A Lincoln County Court found Fred Costanza, 37 guilty on January 29 of a first-degree bias crime, second-degree assault, and harassment, for an August 24 attack on Lauren Jackson, a transgender woman, when she attempted to use a women's restroom at a park on the Oregon coast. Jackson suffered a shattered jaw and fractured skull as a result of the attack. Costanza was scheduled for sentencing on February 7. The news report described Costanza as an unemployed man from Idaho. *The Oregonian*, Jan. 30.

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.

U.S. COURT OF APPEALS, 11TH CIRCUIT – This case, involving protection from harm of a transgender prisoner, is notable for its painstaking

attention to detail on Eighth Amendment liability of a warden, deputy warden, and lieutenant for a razor assault, when they receive mixed messages from the victim prior to the assault. The unanimous opinion is written by Elizabeth L. Branch (Trump), for herself and Circuit Judges Gerald Bard Tjoflat (Ford) and Robin S. Rosenbaum (Obama), in *Green v. Hooks*, 2020 WL 57329, 2019 U.S. App. LEXIS 834 (11th Cir., Jan. 6, 2020). (Before taking senior status in November 2019, Judge Tjoflat was the longest-serving circuit judge in the country.) The Court of Appeals affirmed the summary judgment granted by Chief U.S. District Judge J. Randal Hall, of the Southern District of Georgia. Only a summary of the facts can be made here, but practitioners in Georgia, Florida and Alabama may find the detail helpful in protection from harm cases against supervisors. Darius Green has been on hormones since she was a teenager, and she has feminine secondary characteristics. A PREA screen classified her at intake as neither a "victim" nor an "aggressor" and designated minimum security. Her eventual assailant (Ricard) had a similar PREA score (although he had a violent sex crime conviction), and he was medium security. PREA does not prohibit housing minimum and medium security inmates together, and it does not automatically deem all sex offenders "aggressive." A sexual relationship developed between Green and Ricard, which Green said was extorted and coercive. She wrote her mother, who called the warden, who interviewed Green. Green denied she was being sexually harassed and never mentioned Ricard out of fear, saying she "did not want to alarm [the warden] into investigating." The warden, with the deputy, called Green's mother during the interview, and Green denied the danger again. Green testified that she "hoped that they would be able to help me without having to tell them what was going on." Green said she wrote

letters to the warden and one to the deputy (telling about the extortion), but these defendants said they never got the letters. (The Circuit declines to adopt a presumption for the prison mail system that a "posted" letter is received.) Later, when inmates in population objected to Green's presence, she was moved to administrative segregation, and ended up in a cell with Ricard, where the razor attack occurred. Defendants admitted the attack, which was twice referred to a grand jury for criminal charges; but the grand jury refused to indict. Green alleged that the lieutenant colluded with Ricard to place the two together. The Circuit panel first rejects Green's argument that she never should have been placed in a dormitory setting in general population, because she received PREA screening. It likewise rejects the argument that the warden and deputy "should have known" she was lying when they met with her, despite her denials. While an inmate need not specifically identify her feared assailant in order to claim deliberate indifference to her safety – see *Rodriguez v. Secretary for Department of Corrections*, 508 F.3d 611, 621 (11th Cir. 2007) – she must provide enough details to satisfy the requirement of showing that prison personnel had reason to be aware of a serious risk to her safety. There is a dispute as to whether the lieutenant arranged for the double-celling, but even if she did, "there is no evidence that [the lieutenant] was aware of any threat posed by Ricard to Green." Finally, the evidence is insufficient that the prison was itself so dangerous that "serious inmate-on-inmate violence was the norm," citing *Harrison v. Culliver*, 746 F.3d 1288, 1300 (11th Cir. 2014) (33 incidents over three and one-half years is not enough). Here, there were 28 incidents over 5 years, with a larger census, and Green offered no evidence of "pervasive staffing issues." Green was represented on the appeal by Mario Bernard Williams and Julie Johanna Oinonen, NDH, LLC, Atlanta.

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ILLINOIS – *Pro se* inmate Leon Jackson alleged that he was denied medical treatment for HIV/AIDS by a John Doe physician and a Jane Doe nurse practitioner at two prisons: Illinois’ Shawnee and Lawrence Correctional Centers. In *Jackson v. Baldwin*, 2020 WL 230607, 2020 U.S. Dist. LEXIS 6663 (S.D. Ill., Jan. 15, 2020), U.S. District Judge Staci M. Yandle divides the complaint into four “counts”: one for Eighth Amendment deliberate indifference to treatment for HIV/AIDS and one for medical malpractice under state law as to each prison. Judge Yandle allows the claims to proceed in this filing as to Lawrence; but she severs the claims as to Shawnee and directs that they be filed and proceed under a separate docket under the authority of *Owens v. Hinsley*, 635 F.3d 950, 952 (7th Cir. 2011), because they involve different defendants, prisons and occurrences months earlier – as to which a doctor at Lawrence allegedly told Jackson “you have a lawsuit.” At this point, the warden stays in the Lawrence case as well, not because he denied Jackson’s grievance, but because the grievance may have placed the warden on notice that Jackson was being denied constitutionally required care under *Perez v. Fenoglio*, 792 F.3d 768, 781 (7th Cir. 2015). In this writer’s view, Jackson’s complaint, as characterized by Judge Yandle, may not have survived screening by many district judges. It is conclusory and does not specify what care he was denied. He seems to have survived screening largely on the authority of the Lawrence doctor’s telling him he “had a lawsuit.” Judge Yandle sets up a means of discovery of the identity of the John Doe defendants. According to PACER, she is assigned to the separated case, as well.

ILLINOIS – Last month, *LawNotes* reported on Chief U.S. District Judge Nancy J. Rosenstengel’s opinion in *Monroe v. Baldwin*, 2019 WL 6918474,

2019 U.S. Dist. LEXIS 217925 (S.D. Ill., Dec. 19, 2010), “Federal Judge Preliminarily Enjoins ‘Unqualified’ Transgender ‘Committee’ in Illinois Prison System . . .” (January 2020 at pages 12-13.) Judge Rosenstengel found that the state’s Transgender Committee was essentially practicing medicine without a license. She ordered state officials to read the hearing record and directed them to report on their efforts to address the deficiencies found by the court and to submit a plan to meet certain criteria, including removing the “Committee” from medical decision-making, hiring medical professionals qualified to treat gender dysphoria, providing timely hormone treatment, and allowing social transitioning. It was unclear whether the state would appeal. Illinois Department of Correction [IDOC] officials submitted a seven-page report to Judge Rosenstengel on January 22, 2020, outlining their efforts. They included: removal of the Committee’s medical determination role; contracting with Wexford for training and policy development for transgender patients; arranging for dysphoria “experts”; issuance of a new policy on hormones that places decision-making in the hands of facility medical directors; providing for monitoring of patients under hormone treatment; ceasing the policy of denying social transition; and providing for staff training. The Committee will continue to have a role in housing decisions. On January 20, 2020, the IDOC moved for modification of the preliminary injunction in two respects: standards for hormone therapy; and qualification of medical staff. As to hormones, IDOC noted that: (1) all named plaintiffs are receiving hormones and were receiving them at the time of entry of the preliminary injunction; and (2) no class has been certified. Thus, per IDOC, there is no jurisdiction to order hormones for someone whose rights are not properly before the court; and the order violates the narrowly tailored requirements

of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1) [PLRA]. As to qualifications, Judge Rosenstengel directed that primary physicians be certified by WPATH. IDOC (or maybe Wexford) challenges this requirement as exceeding constitutional requirements. The motion addresses no other provisions of the preliminary injunction. Another aspect of the PLRA, which came up in *Edmo v. Corizon*, 935 F.3d 757, 782 (9th Cir. 2019), involves 18 U.S.C. § 3626(a)(2), which provides that preliminary injunctions dissolve after 90 days unless made permanent by the district judge under the “narrowly tailored” standard. Thus, it appears there are several ways this matter could be litigated in the Court of Appeals. In this writer’s view, it would make sense for Judge Rosenstengel to certify the class before this happens.

NEW JERSEY – *Pro se* inmate Abdul Wali Saleem received “pictures depicting homosexuals” through the prison mail room. An officer informed the prison imam, defendant Yusuf, who prohibited Saleem from attending prayer services. In *Saleem v. Bonds*, 2020 U.S. Dist. LEXIS 4331, 2020 WL 113986 (D. N.J., Jan 10, 2020), U.S. District Judge Robert B. Kugler denied Yusuf’s motion to dismiss Saleem’s lawsuit. A defense motion (seemingly badly litigated) raised three grounds for dismissal: exhaustion under the Prison Litigation Reform Act; preclusion by state law, and abstention. On PLRA exhaustion, Judge Kugler found that Saleem contested exhaustion issues and that the state did not file a reply. This matter cannot be resolved under F.R.C.P. 12(b)(6), because PLRA exhaustion is an affirmative defense, as to which the state has the burden under *Jones v. Bock*, 549 U.S. 199, 216 (2007). Judge Kugler charitably characterizes the remaining arguments as “conflated.” Yusuf argues that the federal court subject matter jurisdiction is precluded under F.R.C.P. 12(b)(1) because New

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Jersey law vests review of prison decisions in the Appellate Division of the New Jersey Superior Court. Judge Kugler found that “such an assertion ignores the tenets of federalism and is completely without merit.” Yusuf “appears to argue” for “abstention” under *Younger v. Harris*, 401 U.S. 37 (1971), not because of interference with an “ongoing” state court proceeding but because there should have been an ongoing state court proceeding. This is likewise rejected. As the case goes forward, Saleem may be barred from “compensatory damages on a free exercise claim for purely emotional or mental injuries, [but he] may pursue nominal and punitive damages,” under *Allah v. Al-Hafeez*, 226 F.3d 247, 251–53 (3d Cir. 2000). Judge Kugler concluded: “Ultimately, the Court is troubled by Defendant’s drafting in the instant motion, and its apparent use of case law language, taken out of context, to serve Defendant’s purpose. If Defendant undertook any inquiry to determine whether these contentions have merit, such efforts are well concealed from this Court.” Yusuf was represented by the New Jersey Attorney General.

NEW JERSEY – *Pro se* inmate Demetrius Minor is gay, transgender, and a jailhouse lawyer. (Minor’s complaint uses male pronouns.) Minor sued New Jersey prison officials for retaliation against him and for deliberate indifference to his safety. U.S. District Judge Renée Marie Bumb screened the complaint and allowed Minor to proceed on claims that he was endangered by prison personnel deliberately “outing” his sexual orientation and transgender status, thus creating a hostile environment, in *Minor v. Dilks*, 2020 WL 133278 (D.N.J., Jan. 13, 2020). Upon arrival he was closeted. Minor was given the standard questions under the Prison Rape Elimination Act [PREA] about his risks as a “victim.” He alleges that questions of potential “aggressors”

were not adequate. Moreover, after he was “outed,” he said that his risk profile changed and that his self-report of his fears should have resulted in enhanced protection under 28 C.F.R. § 115.242(d). Minor alleges that officials refused to increase his protection, so he had no choice but to disobey a “lock-in” order and to be placed in administrative segregation. Minor believes that he was “targeted” because of his advocacy work. While there is no right to perform legal work for other inmates, a jailhouse lawyer can assert claims for violation of his own rights. *Wisniewski v. Fisher*, 857 F.3d 152, 156-57 (3d Cir. 2017). There is enough here for Minor to proceed. The protection from harm case can also proceed, but Judge Bumb denies Minor a preliminary injunction. It is not clear that he will prevail, and the administrative segregation – while not a long-term solution – renders preliminary relief unnecessary. Judge Bumb appoints *pro bono* counsel for Minor in a *sua sponte* ruling because “factual investigation will be required.”

OHIO – *Pro se* prisoner Demarco Armstead is HIV-positive. His complaint alleges many claims, including several regarding his health care – but the decision of U.S. Magistrate Judge Kimberly A. Jolson in *Armstead v. Baldwin*, 2020 WL 204252 (S.D. Ohio, Jan. 14, 2020), addresses only his request for preliminary injunctive relief for HIV medication. Judge Jolson recommends that the motion be denied. Armstead sued 24 defendants and has filed 28 separate motions, with “numerous” exhibits. Before litigating, Armstead filed over a hundred medical grievances. The crux of the claim involving preliminary injunctive relief is the alleged denial of antiretroviral medication on some sixteen occasions between March and December of 2019. Judge Jolson finds Armstead’s medical condition to be “serious,” but finds that Armstead failed to establish a subjective

deliberate indifference to it, at least sufficiently to justify a preliminary injunction. There is a good discussion of the standards for an affirmative preliminary injunction and problems with medication. During the period reviewed, Armstead received over 230 doses of antiretroviral medication. The denials are attributable to three factors: out-of-stock medications in the pharmacy; “refusals” of medication by Armstead, and “no-shows” for medication call-out. Armstead says the latter instances (about four times) were related to his fasting for Ramadan and the institution’s failure to accommodate his religious practice. Judge Jolson finds that Armstead is unlikely to prevail on the merits of showing deliberate indifference on these facts. There is no evidence that defendants actively tried to prevent Armstead’s receipt of medication. Defendants’ failure to take more proactive steps to maintain pharmacy stock amounted to “no more” than non-actionable negligence under the 8th Amendment standard. See *Owens v. O’Dea*, 149 F.3d 1184 (6th Cir. 1998). Judge Jolson, noting that Armstead continues to protest denials of HIV medication, orders defendants to produce Armstead’s medication records since December of 2019.

OHIO – *Pro se* prisoner Thomas M. Smith is transgender. She has been on hormone therapy for four years and has undergone some gender reassignment surgery. Ohio correctional officials originally incarcerated her in a female prison, but she is now in federal custody in a facility for men. She filed a habeas corpus action under 28 U.S.C. § 2241, seeking transfer to a women’s facility. In *Smith v. United States*, 2020 U.S. Dist. LEXIS 10237 (N.D. Ohio, Jan. 22, 2020), Chief U.S. District Judge Solomon Oliver, Jr., dismissed her case without prejudice. Judge Oliver found that Smith’s legal claims involved conditions of confinement that had to

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be brought in a civil rights action under *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973). Without citation, he also ruled: “This Court cannot convert a habeas petition into a civil rights action. The action must be dismissed without prejudice.” This sweeping statement is not entirely true. See *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (petitioner’s habeas filing “may also be read to plead causes of action under the Civil Rights Acts”); *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (reversing dismissal with prejudice of § 2241 habeas action to allow case requesting transfer for medical reasons to proceed as § 1983 claim).

PENNSYLVANIA – In this case, a transgender jail inmate, Autumn (Brian) Rubino, sought emergency relief to continue hormone treatment. U.S. District Judge Robert D. Mariani held an expedited telephone conference call, at the end of which plaintiff’s attorneys agreed to provide confirmation of Rubino’s diagnosis and medication from a physician, upon receipt of which the defendants’ attorney agreed their jail clients would provide that medication. It turns out that the physician statement confirming this information was second hand, as the physician relied upon a nurse practitioner’s diagnosis when he continued the medication prior to incarceration and did not himself make the primary diagnosis. Defendants moved for sanctions under F.R.C.P. 11, including preclusion of evidence of any physician’s diagnosis of gender dysphoria at trial. Judge Mariani denied such relief in *Rubino v. Lackawanna County*, 2020 U.S. Dist. LEXIS 6285, 2020 WL 241571 (M.D. Pa., Jan. 14, 2020). Judge Mariani found that Rubino’s attorneys reasonably relied upon information in Rubino’s medical records and the physician’s own notes, which confirmed the medication and diagnosis and did not indicate that the physician had relied upon the nurse

practitioner’s initial diagnosis. Since nurse practitioners can diagnose and prescribe in Pennsylvania, there was nothing remiss in the physician’s deference to the diagnosis or in Rubino’s attorneys’ reliance on the deference, particularly since they did not know at the time they forwarded the physician’s confirmation that it was a deferential diagnosis. There was no litigation “abuse,” and sanctions like those sought are justified only in “exceptional circumstances,” citing *Ario v. Underwriting Members of Syndicate 53*, 618 F.3d 277, 297 (3d Cir.2010). In this writer’s experience, the use of physician extenders such as nurse practitioners is common in both HIV/AIDS practice and in Corrections. It is unclear why defense counsel thought they could get sanctions here or why they did not seek a less sweeping remedy of just precluding the one doctor’s evidence. Rubino is represented by Curt M. Parkins and Matthew Thomas Comerford, of Comerford Law, Scranton.

TENNESSEE – *Pro se* inmate John Clark wrote a letter to federal court complaining that an officer was sexually harassing him. It was treated as a § 1983 complaint and referred to Senior U.S. District Judge James D. Todd, who dismissed the case upon screening without service or leave to amend in *Clark v. Madison County*, 2020 WL 185180 (W.D. Tenn., Jan. 13, 2020). Clark complained that an Officer Reed made suggestive remarks, leered at him while showering, commented about his anatomy, gave him special “privileges,” and called him his “lover.” According to Clark, once they “almost kissed.” A sergeant remarked that the jail might need to put a “Rainbow Sign” over Clark’s cell. Clark complained in writing to jail officials, to no avail. Judge Todd found that the “defendant” in the letter (Madison County Sheriff’s Department) is not a suable entity, citing *Jones v. Union Cnty., Tennessee*,

296 F.3d 417, 421 (6th Cir. 2002). Construing the case as one against the county, Judge Todd finds insufficient allegation of county policy to plead liability under *Monell v. Dep’t. of Soc. Serv.*, 436 U.S. 658, 691-92 (1978). Clark also fails to state a claim against Reed or the sergeant because their actions were verbal, which are not actionable, even if “utterly unprofessional.” As to equal protection, while there is some “rational basis” protection under *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012), Clark “does not allege that he was treated differently than similarly situated inmates of a different sexual orientation.” The opinion, however, does not state Clark’s (or the defendant officers’) sexual orientation – or offer any explanation as to why Reed “hit on” Clark. Instead, Judge Todd writes: “[Clark] alleges only that two officers made inappropriate or suggestive comments towards him. These allegations do not amount to a Fourteenth Amendment equal protection claim.” Clark was released from custody a few days after sending the letter to court. He was given a non-prisoner *in forma pauperis* packet by hand by the Clerk of Court when he presented himself at the courthouse to change his address. This is in accord with *McGore v. Wriggleworth*, 114 F.3d 601, 612 (6th Cir. 2997), *overruled on other grnds, LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013). In overruling *McGore*, the Circuit specifically authorized district judges to allow *pro se* inmates to amend, even when the case is dismissed for failure to state a claim. Nevertheless, Judge Todd holds that any amendment here would be futile. He also rules that any appeal would be in bad faith, and he assesses a strike under the Prison Litigation Reform Act. Clark missed not being a “prisoner” by a few days when he initially wrote the court. He might have avoided application of the Prison Litigation Reform Act entirely if he had waited those days – something to consider for inmates

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about to be released. The Western District of Tennessee had a “prisoner track,” for *pro se* cases. It seems like all of them go to Senior Judge Todd for screening; and he issues, on average, more than one decision per business day, per GoogleScholar. His calendar on the Western District of Tennessee website has no cases on it for 2020. On its face, Clark’s complaint meets the definition of “sexual harassment” under the regulations to the Prison Rape Elimination Act. 28 C.F.R. § 115.6. Had Clark made his report to a recognized sexual crisis hotline, the jail would hear of it under 28 C.F.R. 115.54 (“the agency shall establish a method to receive third party reports of sexual abuse and sexual harassment”). It is ironic that the same information loop would not apply to a report made to a federal judge.

TEXAS – *Pro se* prisoner Bobbie David Haverkamp filed an original action for mandamus in the 13th Court of Appeals of Texas seeking a writ of mandamus to compel treatment of gender dysphoria. Judge Gina M. Benavide, for herself and Judges Leticia Hinojosa and Jaime E. Tigerina, dismissed for want of jurisdiction in *In re Haverkamp*, 2020 Tex. App. LEXIS 792 (13th Tex.App., Jan. 29, 2020). There was no final lower court judgment or agency decision from which an appeal can be taken. Treating the matter as a petition for a writ of mandamus, the treating providers and those responsible for the challenged health care are not among the narrow group of respondents against whom mandamus can be sought in this court – nor are any of them before the court or the court below. Finally, Haverkamp has not shown entitlement to the extraordinary writ, since there is no record. The Supreme Court of Texas has written that a driver cannot circumvent proper remedies for refusal to renew a driver’s license by seeking a writ of mandamus against the department of motor vehicles permitting driving

without a license. *Boston v. Garrison*, 256 S.W.2d 67, 69 (Tex. 1953).

TEXAS – U.S. District Judge Xavier Rodriguez grants state officials summary judgment in the *pro se* case of transgender inmate Perzia Bakari Armstrong, in *Armstrong v. Connolly Unit*, 2020 WL 230887, 2020 U.S. Dist. LEXIS 6593 (W.D Texas, Jan. 15, 2020). Armstrong has lived as a woman since childhood and has been receiving hormones in the Texas prison system for years. She has a diagnosis of gender dysphoria. Claiming hormone therapy is “insufficient,” Armstrong sought referral for gender confirmation surgery. In *Gibson v. Collier*, 920 F.3d 212, 217 (5th Cir. 2019) (where *certiorari* was recently denied – see lead story in January 2020 issue of *Law Notes*), the Fifth Circuit issued a sweeping denial of an Eighth Amendment basis for sex confirmation surgery that Judge Rodriguez found controlling. The Circuit panel wrote that the “undisputed medical controversy over sex reassignment surgery” precluded entry of an injunction. (The Ninth Circuit ruled to the contrary in *Edmo v. Corizon*, 835 F.3d 757 (9th Cir. 2019).) Judge Rodriguez also held, as did the majority in *Gibson*, that denial of confirmation surgery could not be “unusual” under the Eighth Amendment because it is usual to deny it. In this writer’s view, transgender inmates’ demands for surgery are going nowhere in the states of the Fifth Circuit (Texas, Louisiana, and Mississippi). Armstrong also claimed that defendants delayed prescribed hormones over several months. Judge Rodriguez did not believe her, accepting defendants’ characterization of lab tests as confirming therapeutic dosage levels, as well as medical chart entries showing continuing development of female secondary characteristics. Armstrong lost this claim on summary judgment on the medical “facts.” Even if there were “some delays,” they were not actionable

because of absence of “real and substantial harm” from the delays under *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006). On her claim of denial of equal protection (because cisgender female inmates can get vaginoplasty for disfigurement), Judge Rodriguez finds that Armstrong is not similarly situated, begging the question by finding that she is not a woman and is not disfigured. He applied the same analysis to a claim of denial of female commissary products, citing *Longoria v. Dretke*, 507 F.3d 898, 904–05 (5th Cir. 2007), which held that a male prison’s grooming policies did not violate equal protection rights based on different policy at a female prison. Finally, Judge Rodriguez holds that all defendants are entitled to qualified immunity, since Armstrong has not shown a constitutional violation. Judge Rodriguez, a former Texas Supreme Court justice, was appointed to the district court by President George W. Bush.

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. GOVERNMENT – Various media sources reported on efforts by the Trump Administration to turn back all Obama-era and earlier regulations, guidelines and rules protecting LGBTQ people from discrimination by faith-based organizations that receive federal funding or contracts. Some of these efforts are likely to be challenged in court. This administration has a practice of ignoring the requirements of the Administrative Procedure Act, which has provided the basis for some injunctions blocking newly announced policies from going into effect.

FLORIDA – The House Subcommittee on Local, Federal and Veterans Affairs voted 10-5 on party lines on January

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28 to approve H.B. 305, a preemption measure that would effectively invalidate municipal and county civil rights ordinances to the extent they included prohibited grounds of discrimination not specified in the state's civil rights law, which does not include sexual orientation or gender identity. Florida is one of many states in which the Republican Party's rural dominance has produced state legislative majorities that are not in tune with the political alignments in many of the state's municipalities. In several such cases around the country, the legislature has considered – and in some cases passed – laws to overturn local LGBT rights protections. A bill titled the Florida Competitive Workplace Act, that would ban such discrimination, is pending in the legislature but given little change of passage. *Equality Florida* news release, Jan. 28.

ILLINOIS – Associated Press (Jan. 15) reported that Illinois is “updating” its birth certificate system to affirm the gender identities of transgender parents. The move came when a transmasculine person who had given birth to a child asked to be recognized as the child's father on its birth certificate. Myles was born female but is masculine in gender expression. Myles, who uses they/them pronouns, carried and gave birth to the child, and sought to be identified on the father on the child's birth certificate. Myles is married to Precious Brady-Davis, a transgender woman who is the baby's mother. Sound complicated? Not if you think it through and realize this child has two parents, one of whom identifies as masculine, one as feminine, and they seek to be identified as such on the birth certificate, even though it was the masculine one who gave birth to the child. Lambda Legal approached the Illinois Department of Public Health to get an appropriate birth certificate. Lambda attorney Kara Ingelhart explained that a birth

certificate is usually a person's primary form of identification until they receive a driver's license as a teenager. Were Myles to be identified as the child's mother on the birth certificate because he gave birth to her, he would be “outed” as transgender every time the document was used for their daughter, such as enrolling in school, joining a youth athletic program, or starting treatment with a new doctor. Lambda argues that Myles and Precious, the child's parents, should have control to decide if and how they wish to disclose their trans identity. The Department is updating their system to allow a father to be listed as a birth parent. No announcement was made about how long it will take to effectuate this change.

IOWA – A bill introduced by House Republicans to amend the Civil Rights Act to remove the ban on discrimination because of gender identity was introduced late in January and promptly declared dead on arrival by Republican Rep. Steven Holt, chair of the House Judiciary Committee, who said he would not assign it to a subcommittee for consideration because it would have had “many unintended consequences.” *Associated Press*. We can think of one such consequence: It might set off a deluge of discrimination against cisgender Republican legislators, who, in light of their political views, are really asking for it

KENTUCKY – A bipartisan group of Kentucky state senators announced on February 19 the introduction of Senate Bill 130, called the Statewide Fairness Law, which would ban sexual orientation and gender identity discrimination in employment, housing, and public accommodations. Sponsors include Minority Floor Leader Morgan McGarvey (D-19) and Majority Caucus Chair Julie Raque Adams (R-36). Three Republicans are co-sponsors.

Seventeen municipalities and one county in Kentucky already ban such discrimination. Statewide measures have been introduced for the past twenty years without success. * * * Woodford County Fiscal Court voted 5-3 on January 14 to approve a Fairness Ordinance prohibiting discrimination because of sexual orientation or gender identity in employment, housing, and public accommodations. Two incorporated cities in the county, Midway and Versailles, previously approved such ordinances. Woodford County is the first county in Kentucky to pass a Fairness Ordinance in twenty years, according to a news release from the Fairness Campaign.

NEW JERSEY – On January 21, Governor Phil Murphy signed into law A1796, which prohibits the use of “gay or trans panic” defenses in criminal homicide cases. Primary legislative sponsors of the measure included Assemblymembers John Mckee and Joann Downey and Senators Joe Lagana and Vin Copal. *Official Website of the State of New Jersey*, Jan. 21. * * * A new New Jersey law streamlines the process for married or civil union couples to obtain a confirmation of their parentage in order that they have a court document that can command full faith and credit when going outside New Jersey. Because some jurisdictions will not accord preclusive effect to a listing on a birth certificate, in some states same-sex couples are encouraged to undergo a formal adoption by the non-biological parent, in order to have a court order that will command recognition when traveling or moving across state lines, but that is a time-consuming and sometimes expensive process. Under S3528/5396, a simplified process will produce the necessary document without the need for a formal adoption. Garden State Equality issued a factsheet prepared by two leading NJ LGB practitioners, Bill Singer and Deb Guston, providing a full

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explanation. Copies can be found on the website: GardenStateEquality.org.

OKLAHOMA – Responding to a California ban on nonessential state-funded travel to Oklahoma because of the state’s laws deemed discriminatory to LGBTQ people and ultra-restrictive on reproductive freedom, Governor Kevin Stitt signed a retaliatory executive order banning nonessential state-funded travel to California. Stitt’s office said that the signing of the order was timed to coincide with the annual National March for Life, at which persons opposed to reproductive freedom demonstrate at the Supreme Court to signal their disapproval of constitutional protection for reproductive choice. *Oklahoman.com*, Jan. 23. This year, President Trump made history by being the first president to speak personally at the National March. Some of his Republican predecessor sent pre-recorded presidential greetings.

SOUTH CAROLINA – The Greenville City Council passed a hate crimes ordinance on January 27, under which “bias-motivated intimidation” is a punishable offense, closely mirroring a hate crime law enacted in Charleston. South Carolina is reportedly one of only four states that lack some sort of hate crimes legislation. The Greenville ordinance provides that courts can impose a maximum of 30 days in jail and a \$500 fine, on top of whatever penalty is imposed for the underlying criminal act, defining the offense as the intent to cause harm, injury or damage to the victim or the victim’s property based on “actual or perceived ethnicity, national origin, color, religion, sexual orientation, gender identity or physical or mental disability.” *Greenvillejournal.com/news*.

SOUTH DAKOTA – In January, the House of Representatives approved H.B.

1057, which would make it a crime for doctors to provide transitional health care to transgender minors. It awaited consideration in the state Senate during February. Also, at the end of January a new bill was filed that would prohibit the state from enforcing, endorsing, or favoring policies that prevent discrimination because of sexual orientation, gender identity, or same-sex marital status. Such a bill would be a redundancy, since the likelihood that the South Dakota legislature would enact laws to protect LGBTQ people and same-sex couples from discrimination approaches zero. *Lgbtqnation.com*, Jan. 31.

TENNESSEE – Governor Bill Lee signed into law H.B. 836, a bill that will allow taxpayer-funded adoption and foster care agencies to turn away qualified individuals seeking to care for a child in need if the agency has religious objections to serving them. The bill would implicitly authorize discrimination against LGBTQ individuals and couples, single parents, interfaith couples, married couples of whom one or both was previously divorced, or anybody to whom a religiously-affiliated agency might have a religiously-based objection. *Human Rights Campaign* press release, Jan. 25.

UTAH – Utah adopted regulations protecting LGBTQ youth from the performance of conversion therapy. Unlike states that have specifically legislated to provide such protections, Utah regulatory authorities over health care practice achieved the same result by regulatory reform. Republican Governor Gary Herbert initiated the policy change. Utah is the 19th state to ban conversion therapy performed on minors. The discredited practice purports to change the individual’s sexual orientation or gender identity, or at least to condition them to abstain from engaging in same-sex conduct or gender

transition. *Human Rights Campaign* press release, Jan. 22.

VIRGINIA – The newly-empowered Democratic legislators of Virginia wasted little time in advancing an LGBTQ rights agenda that had been stalled under Republican control. The Virginia Senate approved four measures on January 21: SB 245, which prohibits health care providers from practicing conversion therapy; SB 161, requiring school boards to adopt policies to ensure transgender students have equal access to school facilities and get appropriate identification cards, as well as addressing harassment issues; S.B. 657, allowing transgender Virginians to update their name and sex on their birth certificate; S.B. 17, would repeal the state’s statutory same-sex marriage ban. Still pending at month’s end was S.B. 868, to add sexual orientation and gender identity to the state’s anti-discrimination law. *Washington Blade*, Jan. 21.

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By Arthur S. Leonard

The **HUMAN RIGHTS CAMPAIGN** published its annual corporate equality index (CEI), which rates corporate personnel policies based on a checklist of LGBTQ personnel policy issues. It reported that a record high number of corporations – 686 – had achieved a 100% score. This included findings that 91% of the Fortune 500 largest American businesses now protect transgender employees and applicants as well as lesbian and gay applicants, showing the enormous progress that corporate America has made in formal acceptance of gender diversity. 65% of the Fortune 500 now cover transgender health care, a number that was 0 as recently as 2002. Over 570 major businesses have adopted gender transition guidelines for employees. 93%

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of Fortune 500 companies ban sexual orientation discrimination and every Fortune 500 company that responded to HRC's survey has such a ban in place. Many Fortune 500 companies publish press releases bragging about their high ranking on the CEI, and emphasize it in their recruiting at major universities and business schools.

INTERNATIONAL NOTES

By Arthur S. Leonard

BALI – The island resort, long favored by LGBT tourists, gave reason for pause in January, when a news website reported on January 10 that a villa in the resort town of Seminyak was under investigation by the Public Order Agency after “allegations surfaced” that it was catering to an LGBT crowd. The article on the website *Coconuts* reported: “Authorities on the island have since expressed their disapproval based on their belief that homosexuality is against cultural norms in Bali.” The head of the Agency issued a statement indicating that it would be cracking down on businesses listed in gay travel guides (a lot of them), claiming that the existence of a gay bathhouse, for example, was “tainting Bali’s tourism.” On January 13, *PinkNews* reported that three other villas catering to gay guests were under investigation. Scrub Bali from your bucket list. If they don’t want LGBT tourist dollars, they shouldn’t get them.

BELIZE – A three-judge bench of the Court of Appeal has confirmed a ruling by the Chief Justice that Section 53 of the Belize Criminal Code – which criminalized gay sex – violates the constitutional rights to dignity, equality, privacy, freedom of express, and non-discrimination on the ground of sex. An incidental benefit of the ruling is a precedential holding that sexual

orientation discrimination if a form of sex discrimination that violates the country’s constitution and anti-discrimination laws. *Humandignitytrust.org/news*, Jan. 15.

BRAZIL – In a victory against censorship, the Supreme Court on January 9 issued an order that allows Netflix to stream a satirical film depicting Jesus as a gay man and affirming Brazilians’ right to freedom of speech. Netflix had filed an official complaint decrying a Rio de Janeiro judge’s order that the film be withdrawn from Netflix’s platform, following a petition from a Catholic organization arguing that the honor of millions of Brazilian Catholics was at stake. Supreme Court President Jose Antonio Dias Toffoli wrote: “It is not to be assumed that a humorous satire has the magic power to undermine the values of the Christian faith, whose existence goes back more than two thousand years.” *Associated Press*. * * * The Independent Medical Regulator announced new rules for treating transgender patients, including lower the age when trans people can have gender reassignment surgery from 21 to 18. The Brazilian Federal Council of Medicine also published guidelines for the use of puberty blockers for trans children, dropping the age requirement from 18 to 16 years for hormone therapy.

CHILE – The Chilean Senate approved a debate for a “preliminary” marriage equality bill on January 15, reported the *Buenos Aires Times*. The vote was 22-16 to approve “the idea to legislate” a bill to legalize same-sex marriages. If the legislation passes, it will go to the Chamber of Deputies, where strong opposition is anticipated from conservative lawmakers allied to President Sebastian Pinera.

CROATIA – Disregarding a decision by the Croatian Administrative Court in

December, holding that same-sex life partners, Ivo Segota and Mladen Kozic, are entitled to be foster parents, the Social Welfare Center in Zagreb rejected their application again in January. They intend to appeal. *TotalCroatiaNews.com*, Jan. 28.

DENMARK – A rule adopted in 1988 excluding sexually-active gay men from being blood donors has been modified to allow gay men to donate if they have not been sexually active for the prior four months, according to the latest reports from the country, where a change of government has raised concern about how existing policies would be implemented. A letter by Minister of Health Magnus Heunicke to a number of parliamentary committees noted that the size of the waiting period after having sex has been lowered in light of scientific evidence, the old requirements now being deemed overly restrictive in light of current treatment modalities and evidence that those with undetectable viral load don’t transmit the virus through blood contact. *TheLocal.dk*, Jan. 20.

FRANCE – The Senate voted on January 22 to allow single women and lesbian couples get access to in vitro fertilization, which heretofore has been available only to marriage heterosexual couples, even though France has had marriage quality for several years. However, the legislation would not authorize the social welfare system to pay for the cost of in vitro, which is prohibitive for anybody without substantial means to pay for it. Opponents warned that ultimate passage of the bill would also open the door to gestational surrogacy, currently prohibited in France. *Reuters*, Jan. 22.

INDIA – Three days prior to a Pride 2020 March scheduled for February 1

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in Mumbai, police denied permission for the event, in light of “the political situation prevailing in the city” as a result of large-scale demonstrations against the governments transgender bill. Officials claimed that the situation was such that political activists might hijack the parade and there was a possibility of violence, and that the Pride organizers had agreed to substitute a stationary festival in a public place instead of the planned parade. *MumbaiMirror*, Jan. 29.

IRELAND – Failure by the contend Northern Irish political parties to form a government by the deadline set by the UK Parliament last year means that marriage equality has arrived in Northern Ireland. In mid-January, it was announced that marriages will become available for same-sex couples in mid-February, and Irish couples who married elsewhere were entitled to recognition of their marriages effective in mid-January. (The delay for formation of new marriages is due to requirements under local law to announce the intention to marry and obtain necessary documents a month in advance. No spontaneous marriages are allowed in Northern Ireland. It’s not like Las Vegas.)

ISRAEL – Haaretz (Jan 22) reported that the Israeli government signed an agreement, formalizing an existing de facto understanding, that Israel will not allow same-sex couples to adopt children brought into the country for adoption from Russia. Russia has banned any adoption by same-sex couples, and has banned foreigners from countries that allow such adoptions to adopt Russian children. The agreement does not change the status quo.

MAURITANIA – Prosecutors detained ten young men who were pictured in a

video that prosecutors claimed depicted a “gay marriage party.” The ten were allegedly involving in a ceremony on January 11, with video circulating on social media that came to the attention of prosecutors. *Timeslive.co.za* (Jan. 31) reported that Police commissioner Mohamed Ould Nejjib stated in a television interview that actually investigators had determined that the filmed event was a birthday party, not a marriage ceremony.

MEXICO – Mass wedding ceremonies on St. Valentine’s Day are a tradition in some parts of Mexico. Rex Wockner reported on January 31 that on February 14 there would be mass weddings in Tijuana and Ciudad Juarez at which same-sex couples will participate. Even though the cities are located in states that have not legislated yet for marriage equality, the city of Tijuana announced that it would follow Supreme Court of Mexico jurisprudence recognizing the right of same-sex couples to marry, and the state of Chihuahua, in which Ciudad Juarez is located, is not enforcing its statutory ban on same-sex marriage by gubernatorial fiat. * * * In a ruling on cases from the states of Chihuahua and Guanajuato, the Supreme Court of Mexico issued “jurisprudence” (i.e., a binding precedent) that all judges in both states must allow transgender people to update their birth certificates by a simple administrative process at a civil registry. The ruling came to resolve conflicting decisions by federal appeals courts from the two states, in a case filed by Mexico Igualitario and local LGBT rights activists, reported Rex Wockner on January 30.

SOUTH KOREA – The *NY Times* (Jan. 22) reported that the South Korean military decided to discharge a soldier who had gone through gender confirmation surgery and wanted to continue service in consistent with

her female gender identity. The nation requires all able-bodied men to serve, and Byeon Hee-su was eager to fulfill that national duty. Sergeant Byeon held press conference after a military panel upheld her discharge, stating: “I know the military is not ready yet to accept transgender soldiers like me. But I hope that sexual-minority soldiers like me will be able to perform their duty without discrimination. I want to show that I can be an excellent soldier who helps defend this country regardless of my sexual identity. Please give me that chance.” A military hospital she checked in for post-surgery treatment concluded that she was “handicapped” due to the loss of genitalia from surgery, and thus disqualified from serving. No explanation was given about how the absence or presence of genitalia was related to performing the essential functions of a soldier.

UNITED KINGDOM – With the U.K. scheduled to begin departure from the European Union on January 31, the question arises whether the Equality Act 2010, which implements EU anti-discrimination directives, might be vulnerable to revision or repeal by the U.K. Parliament. In an article published January 26 on the website of *Forbes* magazine (noted below), Jamie Wareham discussed this question with Jonathan Cooper, a lawyer who had published an article on the subject in *Gay Star News*. Cooper noted that EU law remains U.K. law (UK = England, Wales, Scotland and Northern Ireland) during a transitional year, but that period ends December 31, 2020, after which the U.K. Parliament can go its own way. It is noteworthy that marriage equality was legislated by the U.K. and Scottish Parliaments, and is not at present required under rulings of the European Court of Human Rights, but since it was enacted under a Conservative government, it seems unlikely that it would be repealed. More at risk might

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be the anti-discrimination measures regarding sexual orientation and gender identity, which are partly the result of an EU directive (in the case of sexual orientation) or the result of a judgment of the EU's Court of Justice (in the case of gender identity). There might also be a question whether there would be pressure to cut back protection at the instance of the Church of England, which is an established church and some of whose clergy and members are unhappy with the current state of the law. Cooper indicated there were signs that the Johnson government is not particular committed to reforms of the Gender Recognition Act 2004 that his predecessor had committed to seeking. Overall, the situation for LGBTQ rights in the U.K. after Brexit does not appear imminently dire, but continuation of the present level of protection for LGBTQ rights cannot be absolutely presumed in the long run, at least in terms of the restraining influence of European law on political trends in the U.K.

PROFESSIONAL NOTES

By Arthur S. Leonard

GLBTQ LEGAL ADVOCATES AND DEFENDERS' Executive Director **JANSON WU** announced January 24 that **GARY BUSECK**, who has been involved with the organization in many different capacities, most recently as Legal Director, will be stepping down from that position later this year, but will retain an affiliation with GLAD as a senior advisor. With Buseck's participation and leadership, GLAD became a legal powerhouse for LGBTQ rights throughout New England and also plays an important role nationally, leading or joining in some of the most consequential litigation, including toppling the Defense of Marriage Act, challenging the former Don't Ask Don't Tell military policy and now playing a leading role in the challenge to Trump's

transgender military ban, and being a key player in winning marriage equality (which was achieved in New England several years before the Supreme Court's 2015 *Obergefell* decision, for which GLAD shares a large part of the responsibility). GLAD maintains an active docket in all areas of LGBTQ rights, and is also a leader in defending the rights of people living with HIV/AIDS, having won a key Supreme Court victory under the Americans with Disabilities Act in *Bragdon v. Abbott*. GLAD will undertake a nationwide search for a new Legal Director. Details about the position are available at the organization's website: glad.org. A timeline for submitting applications was not specified in Janson Wu's January 24 announcement.

Registration is now open for the 2020 edition of the **SUMMER SCHOOL ON SEXUAL ORIENTATION & GENDER IDENTITY IN INTERNATIONAL LAW** (The Hague & Amsterdam, 22-31 July 2020). See www.universiteitleiden.nl/en/education/study-programmes/summer-schools/sexual-orientation-and-gender-identity-in-international-law-human-rights-and-beyond. This program is one of a long line of programs on LGBTQ legal issues held in the Netherlands going back many years. Leading academics and practitioners participate as lecturers, and the program draws students from around the world. The classes are taught in English.

The **NATIONAL LGBT BAR ASSOCIATION** 2020 Out & Proud Corporate Counsel Awards comes to New York City on April 23, when the Association will honor **STEPHEN SIMCOCK, GENERAL COUNSEL FOR CHASE CONSUMER AND COMMUNITY BANKING**. The event will be held from 6 to 8 p.m. at the Kimpton Hotel Eventi, Veranda S,

Eventi Suite, 851 6th Avenue, Manhattan. Registration and tickets for the event are available at lgbtbar.org.

DWAYNE BENSING, an out gay lawyer formerly with the Office of Civil Rights in the U.S. Department of Education, was forced out late last year after leaking emails to the *Washington Blade* about Alliance Defending Freedom's attempt to get the Education Department to adopt an interpretation of Title IX under which transgender girls would not be permitted to compete in women's athletics. ADF contends that trans women are really just boys seeking to compete unfairly in girls' athletic competition. Bensing, who also played an internal role in trying to get Education Secretary Betsy DeVos not to rescind Obama Administration guidance protecting transgender students from discrimination, but the effort was unsuccessful, although lgbtqnation.com reports that DeVos sent Bensing a note thanking him for standing up for "vulnerable students." Bensing has joined the ACLU of Delaware as a staff attorney.

ALEXANDER CHEN has left the legal staff of **NATIONAL CENTER FOR LESBIAN RIGHTS**, where he was an Equal Justice Works Fellow, to become Founding Director of the new **HARVARD LAW SCHOOL LGBTQ+ ADVOCACY CLINIC**. He will also be teaching a course on Gender Identity and the Law at HLS.



PUBLICATIONS NOTED

1. Abrams, Jamie R., and Nickole Durbina, *Citizen Soldiers and the Foundational Fusion of Masculinity, Citizenship, and Military Service*, 11 *ConLawNOW* 75 (2020).
2. Antognini, Albertina, Naomi R. Cahn, Kaiponanea T. Matsumura, and Emily J. Stolzenberg, *Nonmarriage*, 58 *Fam. Ct. Rev.* 142 (January 2020).
3. Archibald, Catherine Jean, *Transgender and Intersex Sports Rights*, 26 *Va. J. Soc. Pol’y & L.* 246 (Winter 2019).
4. Culhane, John G., *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples’ Real Relationships*, 58 *Fam. Ct. Rev.* 145 (January 2020).
5. Diller, Paul A., *The Political Process of Preemption*, 54 *U. Rich. L. Rev.* 343 (January 2020) (including the currently hot topic of conservative states legislating to preempt political subdivisions – cities, counties – from legislation against discrimination because of sexual orientation or gender identity).
6. Donnelly, Tom, *Popular Constitutional Argument*, 73 *Vand. L. Rev.* 73 (January 2020).
7. Eichert, David, *“It Ruined My Life”*: FOSTA, Male Escorts, and the Construction of Sexual Victimhood in American Politics, 26 *Va. J. Soc. Pol’y & L.* 201 (Winter 2019) (Cornell law student describes how a federal anti-sex-trafficking law has adversely affected male escorts in the San Francisco Bar Area).
8. Goldfarb, Sally F., *Legal Recognition of Plural Unions: Is a Nonmarital Relationship Status the answer to the Dilemma?*, 58 *Fam. Ct. Rev.* 157 (January 2020).
9. Grant, Melissa Gira, *War in the Workplace: Inside the Court Battle Over Trans Employment Discrimination*, *The New Republic*, Jan-Feb 2020, pages 20-29.
10. Graves, Timothy J., *Breaking the Binary: Desegregation of Bathrooms*, 36 *Ga. St. U. L. Rev.* 381 (Winter 2020) (that’s sexual desegregation, if you hadn’t guessed).
11. Hossain, Adnan, *Section 377, Same-sex Sexualities and the Struggle for Sexual Rights in Bangladesh*, 20 *Australian J. Asian L.*, No. 1, Article 9 (2019).
12. Kim, Suzanne A., *Transitional Equality*, 53 *U. Rich. L. Rev.* 1149 (2019) (discussing legal issues raised by transitional periods in the law regarding personal status, such as the availability of legal same-sex marriage for couples who have previously been living together in marital-type relationships).
13. Kreis, Anthony Michael, *Policing the Painted and Powdered*, 41 *Cardozo L. Rev.* 399 (December 2019) (Is homophobia also sexism?).
14. Machalow, Deborah, *The Equal Rights Amendment in the Age of #METOO*, 13 *DePaul J. for Soc. Just.* 1 (Winter 2019).
15. Pomerance, Benjamin, *The King in His Court: Chief Justice John Roberts at the Center*, 83 *Alb. L. Rev.* 169 (2019-2020).
16. Wareham, Jamie, *This is How U.K. LGBTQ Rights Change After Brexit This Week*, *Forbes*, Jan. 26, 2020.
17. Whetten-Goldstein, Leah, *Building Up Families by Breaking Down Marital Status as a Barrier to Adoption*, 54 *U.S.F. L. Rev.* 373 (2020).

EDITOR’S NOTES

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.

