

L G B T  
**LAW NOTES**

June 2019



**SCOTUS Leaves Win for  
Trans Students In Effect**

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# United States Supreme Court Refuses to Review Transgender Bathroom Case from Boyertown, PA

By Arthur S. Leonard

The Supreme Court announced on May 28 that it will not review a decision by the Philadelphia-based 3rd Circuit Court of Appeals, which had rejected a constitutional and statutory challenge by cisgender students at Boyertown (Pennsylvania) Senior High School, who were upset that the School District decided to let transgender students use facilities consistent with their gender identity. *Doe v. Boyertown Area School District & Pennsylvania Youth Congress Foundation*, 897 F.3d 518 (3<sup>rd</sup> Cir. 2018), cert. denied, 2019 WL 2257330 (May 28, 2019).

The federal lawsuit stemmed from a decision in 2016 by the School District to permit transgender students to use restrooms and locker rooms consistent with their gender identity. Alliance Defending Freedom (ADF) and local attorneys affiliated with the Independence Law Center in Harrisburg filed suit on behalf of several cisgender students, proceeding under pseudonyms, contending that this decision violated their rights on three theories: constitutional right of bodily privacy under the 14th Amendment, creation of a “hostile environment” in violation of Title IX of the Education Amendments of 1972, which bans sex discrimination by schools that get federal funds, and violation of the right of privacy under Pennsylvania state common law. Upon filing their complaint, the plaintiffs asked U.S. District Judge Edward G. Smith (E.D. Pa.) to issue a preliminary injunction to block the school district’s policy while the case was pending.

Lawyers for the American Civil Liberties Union of Pennsylvania and the ACLU’s National LGBT Rights Project joined the case, representing the Pennsylvania Youth Congress Foundation, which intervened as a co-defendant to help the School District defend its policy.

This case is part of a national campaign by ADF to preserve and

defend restrictions on restroom and locker room use by transgender students, part of ADF’s overall goal – consistent with the Trump Administration’s anti-transgender policies – to deprive transgender people of any protection under federal law. So far, ADF has lost a succession of “bathroom” cases, and the 3rd Circuit’s ruling in this case was one of its most notable defeats. At the same time, however, the Education Department under the leadership of Trump’s appointee, Betsy DeVos, has reversed the Obama Administration’s policy and now refuses to investigate discrimination claims by transgender students under Title IX, leaving it up to individuals to file lawsuits seeking protection under the statute.

Judge Smith refused to issue the requested preliminary injunction on August 25, 2017, 276 F. Supp. 3d 324, writing an extensive decision that concluded that the plaintiffs were unlikely to prevail on the merits of any of their theories, and that mere exposure to transgender students was not going to impose an irreparable injury on them anyway. Judge Smith was appointed by President Barack Obama in 2013, but it was noteworthy that at his Senate confirmation vote, he received more votes from Republican Senators than Democratic Senators.

Plaintiffs appealed to the 3rd Circuit, and suffered a loss before a unanimous three judge panel, which issued its decision on June 18, 2018. The opinion was written by Circuit Judge Theodore McKee, who was appointed by President Bill Clinton. The other judges on the panel were Circuit Judge Patty Shwartz, who was appointed by President Obama to fill the vacancy created by Circuit Judge Marion Trump Barry, President Trump’s sister, when she took senior status; and Senior Circuit Judge Richard Nygaard, who was appointed by President Ronald Reagan.

Judge McKee’s opinion set the stage with an extended discussion of gender identity based on the expert testimony offered by defendants in opposition to the motion for preliminary relief, including a much-cited amicus brief by the American Academy of Pediatrics and the American Medical Association, which stated that policies excluding transgender students from “privacy facilities” consistent with their gender identities “have detrimental effects on the physical and mental health, safety, and well-being of transgender individuals.” Judge McKee also quoted from an amicus brief filed by National PTA and Gay-Lesbian-Straight Education Network (GLSEN), that forcing transgender students to use bathrooms or locker rooms that don’t match their gender identity causes “severe psychological distress often leading to attempted suicide.” In other words, the starting point for the court’s discussion was that the School District’s policy was responding to a serious problem faced by transgender students.

The court noted that as part of its policy the School District had renovated its “privacy facilities” to increase the privacy of individual users, and had provided single-user restrooms open to any student so that students who did not want to share facilities with others because of their gender identity would not be forced to do so. The District also required that students claiming to be transgender meet with counselors trained to address the issue, and go through a process of being approved to use facilities consistent with their gender identity. “Once a transgender student was approved to use the bathroom or locker room that aligned with his or her gender identity,” wrote Judge McKee, “the student was required to use only those facilities,” although any student was allowed to use the single-user restrooms. “The student could no longer use the facilities corresponding to that student’s birth sex.”

The plaintiffs claimed that their right to privacy was violated because the school's policy permitted them to be viewed by members of the opposite sex while partially clothed. The 3rd Circuit found that Judge Smith "correctly found that this would not give rise to a constitutional violation because the School District's policy served a compelling interest – to prevent discrimination against transgender students – and was narrowly tailored to that interest." The court pointed out that privacy rights under the Constitution are not absolute. Furthermore, wrote McKee, "the School District's policy fosters an environment of inclusivity, acceptance, and tolerance," and that, as the National Education Association's amicus brief "convincingly explains, these values serve an important educational function for both transgender and cisgender students."

While the court empathized with cisgender students who experienced "surprise" at finding themselves "in an intimate space with a student they understood was of the opposite biological sex" – an experience specifically evoked in the plaintiffs' brief in support of their motion – the court said, "We cannot, however, equate the situation the appellants now face with the very drastic consequences that the transgender students must endure if the school were to ignore the latter's needs and concerns." And, the court pointed out, cisgender students "who feel that they must try to limit trips to the restroom to avoid contact with transgender students can use the single-user bathrooms in the school." The court rejected plaintiffs' argument that the best solution to the issue was to require transgender students to use the handful of single-user restrooms, finding that this would "significantly undermine" the District's compelling interest in treating transgender students in a non-discriminatory manner.

The court also pointed out that the plaintiffs' privacy arguments sought to push that doctrine far beyond anything supported by existing case law. The court rejected analogies to cases involving inappropriate strip

searches and peeping toms. "Those cases involve inappropriate conduct as well as conduct that intruded into far more intimate aspects of human affairs than here. There is simply nothing inappropriate about transgender students using the restrooms or locker rooms that correspond to their gender identity" under the School District's policy, insisted the court, which also found that the "encounters" described by the plaintiffs did not involve transgender students doing "anything remotely out of the ordinary" while using the "privacy facilities" at the school.

As a result of these findings, the court concluded that the plaintiffs were unlikely to succeed on the merits of their privacy claims under Title IX, the Constitution, or Pennsylvania tort law. Further, looking to "hostile environment sex discrimination" claims under Title IX (and the more developed hostile environment case law under Title VII of the Civil Rights Act of 1964, which covers employment discrimination and serves as a resource for courts interpreting Title IX), the court found that the possibility of encountering transgender students in a restroom failed to meet the high test set by the courts of "sexual harassment that is so severe, pervasive, or objectively offensive and that so undermines and detracts from the victims' educational experience that he or she is effectively denied equal access to an institution's resources and opportunities." The possibility of occasionally encountering one of a handful of transgender students in a "privacy facility" fell far short of meeting that test.

Furthermore, the court found that the District's policy was "sex-neutral" in that it applied to everybody, and asserted that plaintiffs had not "provided any authority" for the proposition that a "sex-neutral policy" would violate Title IX. "The School District's policy allows all students to use bathrooms and locker rooms that align with their gender identity," wrote McKee. "It does not discriminate based on sex, and therefore does not violate Title IX."

The court drew support for its conclusion from the Chicago-based 7th Circuit Court of Appeals ruling in *Ash Whitaker's* lawsuit against the Kenosha, Wisconsin, school district, where the court found that excluding a transgender boy from using the boys' restroom facilities did violate Title IX. *See Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017). Consistent with that ruling, the Boyertown School District's policy could be seen as mandated by its obligation under Title IX to provide equal educational access and opportunities to transgender students. The court also noted transgender rights rulings by the 1st, 6th, 9th and 11th Circuits, concluding that anti-transgender discrimination in a variety of contexts violates federal laws forbidding sex discrimination. There is an emerging consensus among federal courts of appeals along these lines. The validity of this reasoning will be up for Supreme Court debate next Term when the Court reviews the 6th Circuit's decision in favor of Aimee Stephens, the transgender employment discrimination plaintiff in the *Harris Funeral Homes* case, to be argued in the fall.

The plaintiff's petition to the Supreme Court to review the Boyertown decision posed two questions to the Court: "Whether a public school has a compelling interest in authorizing students who believe themselves to be members of the opposite sex to use locker rooms and restrooms reserved exclusively for the opposite sex, and whether such a policy is narrowly tailored," and "Whether the Boyertown policy constructively denies access to locker room and restroom facilities under Title IX 'on the basis of sex.'" These questions were phrased by ADF to incorporate its religiously-based beliefs seeking to discredit the reality of transgender existence, similar to attempts by the Trump Administration in its proposed regulations and policy statements. If the Court had been tempted to grant this petition, it would likely have reworded the "Questions Presented," as it pointedly did when

it granted ADF's petition to review the Harris Funeral Homes decision on April 22.

Although the decision not to review a court of appeals case does not constitute a ruling on the merits by the Supreme Court and does not establish a binding precedent on lower courts, it sends a signal to the lower courts, the practicing bar, and the parties. In this case, the signal is important for school districts to hear as they try to navigate between the rulings by courts in favor of transgender student claims and the Trump Administration's reversal of Obama Administration policy on this issue. The question whether Title IX mandates the Boyertown School District's access policy was not squarely before the Court in this case, and the justices may have denied review because they were already committed to consider whether federal sex discrimination laws cover gender identity discrimination in the Harris Funeral Homes case.

The Court normally provides no explanation why it grants or denies a petition for review although, interestingly, in another announcement on May 28, the Court did provide such a rare explanation in *Box v. Planned Parenthood of Indiana and Kentucky*, 2019 WL 2257160 (Sup. Ct., May 28, 2019). In *Box*, the Court denied review of a decision by the 7th Circuit striking down on constitutional grounds an Indiana law that prohibits health care providers from providing abortions that are motivated solely by the sex, race or disability of the fetus, stating: "Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." The implication for the Boyertown case is that the 3rd Circuit opinion may have been denied review because it was the only federal appeals court ruling to address the precise question before the Court. ■

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## U.S. House of Representatives Approves Equality Act in Largely Party-Line Vote

*By Arthur S. Leonard*

On May 17, the U.S. House of Representatives voted 236-173 to pass the Equality Act, a measure that would amend existing federal civil rights laws by adding "sexual orientation" and "gender identity or expression" to the list of forbidden grounds for discrimination in, among other things, employment, housing, public accommodations and services, federal jury service, credit and banking transactions, educational opportunity and a host of federal programs. The measure would also add "sex" to the forbidden grounds of discrimination under the Civil Rights Act of 1964's titles other than Title VII, which already includes "sex" as a forbidden ground for employment discrimination. (When The CRA was being considered by Congress in 1964, a floor amendment added "sex" to Title VII without amending the other titles.)

This was the first time that the sweeping Equality Act has come to the floor in either chamber of Congress for a full vote. A narrower measure focusing solely on employment, the Employment Non-Discrimination Act (ENDA), in a form that addressed both sexual orientation and gender identity, was endorsed by one House during the Obama Administration. A version of ENDA that addressed only sexual orientation discrimination passed the House in its last session during the George W. Bush Administration. An earlier version of ENDA failed to achieve passage in the Senate by one vote during the 1996 consideration of the Defense of Marriage Act.

Passage of the Equality Act in the House was an important symbolic accomplishment, but staunch opposition by the Republican leadership in the Senate makes it unlikely that the measure will advance further during this session of Congress, and the opposition of the Trump Administration makes it even more likely that the

president would veto the measure if it passed the Senate – although the president's rhetoric on LGBT issues is so changeable and unpredictable that . . . Who knows?

Among the more controversial aspects of the measure, drawing the fire of House Republicans, is the lack of a broad exemption from compliance on grounds of religious belief. Spurred on by fealty to the party's Christian Evangelical base, Republican legislators argued that passage of the measure would result in substantial burdens on free exercise of religion. There were also arguments that adding gender identity to Title IX of the Education Amendments of 1972 would impose a substantial burden on women, who would be forced to compete in athletic programs and share privacy facilities in schools with transgender women whom some conservatives consider to be men. Similarly, some Republicans argued that applying a gender identity discrimination ban to public restroom facilities would endanger children as well as women, conveniently overlooking the evidence of numerous states and localities whose addition of this coverage has not produced that result.

If the Equality Act were to be enacted, it could override numerous actions undertaken by the Trump Administration to reverse LGBT equality gains accomplished through administrative action (regulations, guidelines, and policy statements) during the Obama Administration. By one accounting, the Trump Administration's anti-LGBT actions include: overturning the Obama Administration's decision to allow transgender people to serve in the military, overturning the Obama Administration's broad interpretation of discrimination because of sex prohibited by the Affordable Care Act, authorizing religious health care workers to refuse

services to LGBT people based on the workers' religious beliefs, overturning Obama Administration policies to allow federally funded shelters to deny access to transgender people or force transgender women to use shelters designated for men, overturning the Obama Administration's interpretation of Title IX to protect transgender students from discrimination by educational institutions, changing an Obama Administration policy concerning the housing of federal prisoners consistent with their gender identity. Passage of the Equality Act may affect many of these issues, which increases the likelihood that the president would veto it, even if it were to be approved by the Republican-controlled Senate. There is speculation that if the measure could get to the floor of the Senate, it might pass with the assistance of a handful of Republican senators. (The House measure drew eight Republican votes in addition to almost all of the Democrats in that chamber.) However, the likelihood that Majority Leader Mitch McConnell would allow it to come to the floor seems remote. ■



## Federal Court Rejects Challenge to Discriminatory Communications Ban in State Civil Rights Law

By Ryan Nelson

In *303 Creative, LLC and Smith v. Elenis*, 2019 U.S. Dist. LEXIS 83662, 2019 WL 2161666 (May 17, 2019, D. Colo.), U.S. District Judge Marcia S. Krieger considered the case of a graphic design company that allegedly planned on expanding its business to include designing custom wedding websites, but sought to publish a statement on its website refusing to create websites for same-sex weddings or any other weddings that are not between one man and one woman. The company's owner, Lorie Smith, averred that her religious convictions prohibit her from promoting any such weddings, even though she claimed that she would nonetheless provide services regardless of sexual orientation (e.g., presumably 303 Creative, LLC and Smith would design a website purchased by a lesbian woman so long as the website promoted someone else's opposite-sex wedding).

However, Colorado law prohibits any person from publishing any communication that indicates that the full and equal enjoyment of the goods and services of a place of public accommodation will be denied because of a potential customer's sexual orientation. Colo. Rev. Stat. § 24-34-601(2). Accordingly, even though the Colorado Civil Rights Commission (CCRC) "has not given any formal opinion regarding the legality of Ms. Smith's proposed Statement nor threatened her with prosecution if she posts it," Smith and her company (represented by Alliance Defending Freedom and Statecraft PLLC) sued the Director of the Colorado Civil Rights Division and all seven commissioners of the CCRC, all in their official capacities (collectively represented by the Colorado Attorney General's Office), and moved for summary judgment, alleging that Colorado's

law, as-applied, violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and the Free Speech, Free Press, and Free Exercise clauses of the First Amendment (as incorporated against the states via the Fourteenth Amendment). Despite the absence of a formal opinion or any actual or threatened prosecution, the court assumed without deciding that plaintiffs have Article III standing to assert these claims. Moreover, all parties agreed that the proposed communication would violate state law. Thus, the court tackled the merits.

First, the court denied Smith's Equal Protection Clause challenge because she failed to identify any similarly-situated comparators. Instead, Smith only identified situations where the CCRC allegedly prosecuted companies that refused to provide services to certain groups of individuals (e.g., the cake shop in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S. Ct. 1719 (2018)), whereas her challenge lies solely with the state law prohibiting discriminatory communications. Furthermore, the court noted that Smith's identification of a photography company's website praising same-sex weddings was not evidence that the photography company actually communicated that it would deny services to opposite-sex weddings, which is what state law would actually prohibit. Indeed, the "comparator" photography company's online gallery showed photos of numerous opposite-sex weddings.

Second, the court denied Smith's Due Process Clause challenges. Smith alleged that the state law prohibiting advertisements indicating that a putative customer's patronage "is unwelcome, objectionable, unacceptable, or undesirable" was void for vagueness,

but the court rightly noted that this portion of the law was not at issue because Smith and 303 Creative, LLC would violate the unrelated part of the state law prohibiting communications indicating that services will be denied because of sexual orientation. The court also dismissed Smith's argument that the state law deprived her of a liberty interest by denying her the "right to own and operate her own expressive business" (which sounds more like a Free Speech argument than a Due Process argument), noting that such an interest has never been recognized as part of the Fourteenth Amendment. Finally, the court dismissed Smith's novel argument that she has constitutional protection for "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and belief" in the same way that *Obergefell v. Hodges* confirmed that the fundamental right to marry extends to same-sex marriages. Here, the court dismissed Smith's argument on the grounds that any such rights are found not in the Due Process Clause, but in the Religion Clauses of the First Amendment and its jurisprudence.

Third, the court denied Smith's many arguments based on the First Amendment's Free Speech and Free Press Clauses. Foremost, the court noted that the state's ban on communications is not compelled speech because it prohibits speech, not requires it. Next, in response to the argument that the state law is an unconstitutional, content-based restriction on free speech, Judge Krieger cited the U.S. Supreme Court's holding in *Pittsburgh Press Co. v. Human Relations Commission* that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. 376, 378-80 (1973). The court also denied Smith's argument that the state law was

overbroad, explaining that Colorado's law does not prohibit her from "creat[ing] speech that accords with" her religious beliefs.

Fourth, concerning the Free Exercise Clause claim, the court cited the hallmark Free Exercise Clause cases of *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and recognized that neutral laws of general applicability—like the Colorado law here—do not violate the Free Exercise Clause. In conclusion, the court denied all plaintiff's claims and ordered them to show cause why the court should not enter judgment in favor of defendants.

Notably tangential to the court's analysis here is the recent decision by the U.S. Supreme Court in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), where the Court avoided a ruling on the merits of a religious exemption claim to Colorado's law prohibiting the denial of goods and services made available to the public based on sexual orientation, instead remanding the case to the lower courts based on a conclusion that the defendant had been denied a neutral forum, largely based on remarks by members of the Commission at a public hearing. In contrast, plaintiffs here challenge only their ability to communicate their intent with regard to providing such services and not their ability to provide such services. As such, this case largely serves to underscore the vitality of *Smith* and *Lukumi Babalu*—cases that, unless and until they are revisited by the U.S. Supreme Court, will uphold neutral and generally-applicable state laws prohibiting discriminatory communications against Free Exercise Clause challenges, notwithstanding such laws' presumed substantial burdens on sincerely-held religious beliefs.

Judge Krieger was appointed by President George W. Bush. ■

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## Texas Appellate Court Declines to Read *Lawrence v. Texas* as Conferring Fundamental Right to Sexual Intimacy

By Matthew Goodwin

On May 9, 2019, a Texas appellate court reaffirmed—or at least declined to revisit—its earlier holding that *Lawrence v. Texas*, 539 U.S. 558 (2003), did not recognize a fundamental right of adults to engage in consensual sex under a Due Process Clause analysis. *Sellers v. State*, 2019 Tex. App. LEXIS 3724, 2019 WL 2042040 (Tex. 13<sup>th</sup> Dist. Ct. App. – Corpus Christi), reaffirming *Ramirez v. State*, 557 S.W. 3d 717 (2018). Chief Justice Dori Contreras wrote for the court in *Sellers*.

Appellant Brian Sellers, a Texas high school teacher, was arrested in January of 2017 following his confession to police that he had a sexual relationship with a female student who was of age at the time. Sellers was criminally charged under a Texas statute making it a crime for an educator and student to have a sexual relationship, regardless of age. Sellers brought a motion to declare the statute unconstitutional on the theory that it impermissibly infringed upon a "fundamental right" of "consenting adults . . . to engage in private, consensual, non-commercial sexual relationships." After his motion was denied, he entered into a plea bargain that renders him a felon, and appealed the court's ruling rejecting his motion.

The court first addressed this issue in 2018 in *Ramirez*, the facts of which were nearly identical to *Sellers*. There, appellant Tanya Ramirez, who was convicted under the same statute as Sellers, argued the statute violated her fundamental constitutional right to engage in sexual contact with another consenting adult. The *Ramirez* court

found that no such fundamental right was created in *Lawrence* and denied Ramirez’s appeal. Technically, therefore, Sellers was asking the court to revisit *Ramirez*, which the court declined to do on *stare decisis* grounds.

Neither *Sellers* nor *Ramirez* involved LGBTQ litigants, but the doctrinal issues raised are significant for LGBT people, as courts continue to confront the question of the precedential scope of *Lawrence*, in which the Supreme Court invalidated a Texas law that made consensual same-sex adult conduct a crime. Both Sellers and Ramirez pointed to Justice Anthony Kennedy’s language in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Supreme Court’s marriage equality decision, to support their argument. Specifically, Kennedy wrote: “In *Bowers [v. Hardwick]*, a bare majority upheld a law criminalizing same sex intimacy . . . That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a *fundamental right* and caused them pain and humiliation . . . That is why *Lawrence* held *Bowers* was ‘not correct when it was decided.’” (*emphasis supplied*).

The *Sellers* court disagreed that this statement in *Obergefell* characterized correctly the holding in *Lawrence*, and reiterated its holding from *Ramirez*, writing, “. . . the only liberty interest asserted in *Obergefell* was the right of same-sex couples to marry. The petitioners in that case did not assert the right to sexual intimacy between consenting adults. Thus, although the *Obergefell* Court may have suggested that *Bowers* ‘in effect’ concerned a ‘fundamental right,’ that statement was dicta.”

Addressing whether *Ramirez* should be overruled or accorded *stare decisis* effect, the *Sellers* court first considered whether *Ramirez* was “poorly reasoned or unworkable” — the standard under Texas precedents for overturning a prior decision. The court held it was not, and pointed to the refusal by

either the Texas Court of Criminal Appeals or the United States Supreme Court to grant Ramirez’s requests for discretionary review.

Justice Contreras went on to write that even if Justice Kennedy’s language in *Obergefell* was not merely dicta, neither was it “an unequivocal declaration that sexual intimacy is a fundamental constitutional right, as appellant contends.” To support this interpretation, the court looked to *Lawrence* and its discussion of *Bowers*, concluding “[*Lawrence*] illustrates that the liberty interest claimed in *Bowers* encompassed more than just sexual behavior — instead, it also implicated the petitioner’s right to be free from government interference in ‘personal relationship[s].’ . . . Accordingly, when read in the proper context, *Obergefell*’s assertion that the statute at issue in *Bowers* ‘in effect . . . denied’ a ‘fundamental right’ does not reveal an intent by the Court to accord ‘fundamental’ status to the right to engage in private, consensual sexual relations.”

Whether the ability to engage in private consensual sexual relations is a “fundamental” right determines what level of scrutiny courts should apply to statutes which purport to forbid or regulate such conduct. To the extent the right is a “fundamental” one, regulations thereof are subject to the highest level of review: strict scrutiny. Alternatively, according to the *Ramirez* court, “[t]he standard under which we would review a challenge to a non-fundamental constitutional right is whether the State has shown a rational basis for the statute.”

The *Ramirez* court held that *Obergefell* protects only the right of same-sex couples to marry, not a right to engage in consensual sexual relations. Instead, wrote the court, “. . . the *Obergefell* Court referred to consensual sex, not as a fundamental right but as an ‘intimate’ association. It quoted language from *Lawrence v. Texas*, describing it as ‘one element in a personal bond that is more enduring.’ . . . We will not broadly construe *Obergefell*’s discussion of intimacy as a

determination that intimacy, particularly sexual intimacy, between consenting adults is a fundamental right . . .”

The court designated this as an unpublished decision, presumably because it broke no new ground, reiterating the holding of *Ramirez*, an officially published decision. Brian Sellers is represented by Christopher J. Gale, Gale Law Group, PLLC, Corpus Christi, TX. ■

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# 2nd Circuit Rejects Municipal Liability for City of Syracuse Based on Police Officers Removing Anti-Gay Activist from Proximity to Gay Pride Event

By Filip Cukovic

On May 8th, the 2nd Circuit affirmed a district court ruling finding that the city of Syracuse could not be held liable for violating the 1st Amendment rights of James DeFerio based on the actions of two police officers who required DeFerio to put some distance between a Gay Pride event held by permit in a public park and his religiously-motivated anti-gay advocacy efforts on the adjoining sidewalk. *DeFerio v. City of Syracuse*, 2019 WL 2062307, 2019 U.S. App. LEXIS 14056 (2nd Cir., May 8, 2019).

CNY Pride, Inc., is a private nonprofit organization that has been organizing and hosting gay pride celebrations in Syracuse for many years. The event is free and open to the public. Since 2012, the Pride Event has taken place in Syracuse's Inner Harbor neighborhood, with the majority of festivities occurring in Inner Harbor Park.

In 2014, the Pride Event took place on June 21st. Previously, CNY Pride applied for and received a Public Assembly Permit. The permit included a section in which CNY Pride requested "no speakers @sidewalks". The city granted the permit without objections. During the event, Mr. James DeFerio, a passionate Christian evangelical, attempted to proselytize from the sidewalk bordering Inner Harbor Park. Mr. DeFerio held a sign that said that ". . . no homosexual shall inherit the Kingdom of God". He also occasionally used a sound amplification device. Police Sergeant Jamey Locastro, who was assigned to supervise the event, approached Mr. DeFerio, and informed him that he was in violation of the permit. Consequently, Sergeant Locastro ordered Mr. DeFerio under the threat of arrest to move away from the sidewalk and to go to the south side of the street.

One year later, in 2015, the Pride Event occurred on June 20th. Once again, CNY Pride received a permit, which in relevant sections stated that

the organization had exclusive use of location and exclusive use of sound amplification in Harbor Park and on sidewalks directly adjacent to the park. Just before the festivities ended, Mr. DeFerio appeared at the event and made generalized statements to the crowd regarding his religious beliefs. His repertoire included the all-familiar provocations that homosexuality is a sin; that homosexuals have a choice of converting to heterosexuality; and that LGBT people must repent their sins. While the overwhelming majority of attendees ignored Mr. DeFerio, at least one person attempted to physically engage him. In response, Captain Joseph Sweeny – who was supervising the event – ordered DeFerio to move away from the sidewalk because DeFerio was in violation of the Permit and his safety was endangered.

In March of 2016, Mr. DeFerio commenced an action against the city police officers, Sergeant Locastro and Captain Sweeny, alleging that Locastro and Sweeny infringed upon his right to free speech when they ordered him to move away from the public sidewalk bordering the entrance to the Pride Festival. In addition to suing the officers, Mr. DeFerio also sued the city, alleging municipal liability. Finally, DeFerio also asked the court to grant permanent injunctive relief, which would bar the city of Syracuse from preventing DeFerio's future "sidewalk protests" during subsequent Pride events.

On January 31, 2018, Judge Lawrence E. Kahn of the U.S. District Court for Northern District of New York held that the two officers had infringed upon DeFerio's First Amendment rights. *See* 306 F. Supp. 3d 492. Judge Kahn rejected the defendants' argument that DeFerio's expressions qualify as "fighting words" and that as such they do not enjoy constitutional protection. Fighting words are a narrow exception to the First Amendment and are generally defined

as expressions which "by their very utterance, inflict injury or tend to incite an immediate breach of public peace". *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). The court reasoned that DeFerio's expressions were not fighting words because they were not targeted at any particular individual, and instead were mere general remarks that reflected DeFerio's beliefs. Additionally, DeFerio's expressions do not qualify as fighting words, wrote Kahn, because an average citizen would not react violently in response to DeFerio's statements. The court supported this argument by noting that out of thousands of attendees, only one attempted to physically assault Mr. DeFerio.

Furthermore, the District Court held that DeFerio's expressions merely reflect his religious views, and that as such, DeFerio's statements enjoy protections offered by the First Amendment. Quoting *Capitol Square Review v. Pinette*, 515 U.S. 753, 760 (1995), the Supreme Court held that "the government suppression of speech has so commonly been directed at religious speech that a free-speech clause without religion would be Hamlet without the prince". Furthermore, the Court reasoned that much political and religious speech may be perceived as offensive to some, but that the offense itself is not the standard by which First Amendment protections are denied. Therefore, the court recognized DeFerio's expressions precisely as the type of controversial speech to which the state must extend the benefits of constitutional protection.

In addition to unsuccessfully arguing that DeFerio's statements qualified as fighting words, the defendants also argued that the CNY Pride permits gave police officers authority to restrict any inflammatory speech uttered on public sidewalks adjacent to the park where the Pride event took place. The court rejected this argument as well, holding that "sidewalk protests" have always

played and continue to play an important role in American public discourse. The court ruled that police officers could restrict sidewalk protests only when restrictions in place are content-neutral and when they are tailored to serve a significant governmental interest. Considering that Mr. Deferio was ordered off the sidewalk because of his anti-gay preaching, the court ruled that Deferio's right to free expression was wrongfully suppressed precisely because of the content of his speech.

Additionally, the government failed to show that it had a compelling interest in restricting Deferio's speech and ordering him to move to another part of the street. The police officers argued that it was necessary to move Deferio due to threats to his safety. However, the court dismissed this argument and ruled that officers may not – as a first reaction in the name of safety – limit a person's protected speech in the face of limited hostilities. Furthermore, considering that there was no evidence of Deferio's attempts to disrupt or impend the Pride event itself, there was no significant interest in ordering Deferio to move away from the entrance to the event. Although Deferio occasionally used a sound amplification device to spread his message, he used the device sporadically and outside the area designated for the Pride events. Moreover, even after Deferio turned off his amplification device, the officer still threatened him with arrest and ordered Deferio to move away from the sidewalk. Considering the non-disruptive nature of Deferio's religiously motivated protests, the court viewed the officers' orders rather as arbitrary and unnecessary. Consequently, the District Court concluded that the officers' actions interfered with Deferio's constitutional rights and that Deferio was entitled to nominal damages as well as an attorney's fees award. Furthermore, the court rejected the officers' claim of qualified immunity, finding that the First Amendment rights they were found to have violated were well-established.

However, to Mr. Deferio's grave disappointment, the District Court dismissed Deferio's municipal liability claim against the city itself, as well as his plea for a permanent injunction. Deferio appealed to the U.S. Court of

Appeals for Second Circuit. On appeal, Deferio argued that (1) the district court erred in concluding that the city was not subject to municipal liability under *Monell* as well as (2) that he was entitled to a permanent injunction. On May 8, the Court of Appeals issued a summary order affirming the lower court's decision.

To establish municipal liability, a plaintiff must demonstrate that the deprivation of his rights was caused by a governmental custom, policy, or usage of the municipality. Under *Monell*, the existence of such liability can be established by Plaintiff's proof (1) of a formal policy endorsed by the municipality; (2) actions directed by the authorized decision-makers; (3) a widespread practice that amounts to a custom, or (4) a constitutional violation resulting from policymaker's failure to train municipal employees. *Monell v. Dep't of Soc. Servs. Of the City of N.Y.*, 436 U.S. 658, 693 (1978). Deferio argued that by issuing permits to CNY Pride, the city of Syracuse created and enforced a policy that allowed a private entity to exercise censorial control over words spoken on public sidewalks. Deferio further argued that this allegedly unconstitutional policy was formalized through the City's training bulletin; that it was ratified by the policy-making officials; and that it was a part of a widespread pattern.

The Court of Appeals dismissed all of Deferio's arguments and held that there was no formal policy that gave CNY Pride power to control speech on the public sidewalks. The training bulletin that Deferio cited as the only evidence of the City's allegedly unconstitutional formal policy merely states that permits are required for any assemblies and parades on streets. The bulletin says nothing about private entities having the right to arbitrarily restrict dissenting voices on public sidewalks.

Furthermore, the court found that there was no evidence that any high-level official with decision-making power endorsed the police officers' misinterpretation of the 2014 and 2015 CNY Pride permits. And while the permits in question allowed CNY Pride to control access to the festival itself as well as the use of sound amplification

devices in the festival, Officers Locastro and Sweeny misinterpreted the permits to mean that CNY Pride had authority to exclude any speaker from the surrounding sidewalk, regardless of the manner and style of his expression. Both Locastro and Sweeny arrived at this wrongful conclusion on their own, without receiving any advice, directive or consultation from any higher-level official. Therefore, it was impossible to attribute the officer's conduct to anyone but themselves.

Finally, Deferio failed to show that the officers' behavior amounted to a municipal custom or a systematic violation of constitutional liberties by the city. The court viewed two occasions in which the officers wrongfully ordered Deferio to move from the sidewalk as mere unfortunate and episodic incidents. Considering that the incidents occurred only twice in the span of many years, the incidents could not be fairly interpreted as part of a repeated, frequent and systematic pattern that amounts to a custom, stated the court. Thus, the Court of Appeals dismissed Deferio's *Monell* argument and concluded that the city was not subject to municipal liability.

Likewise, the Court rejected Deferio's plea that he is entitled to a permanent injunction prohibiting the city of Syracuse from restraining Deferio's future religious expressions during Pride events. To obtain a permanent injunction, a plaintiff must succeed on the merits against the defendant. However, considering that Deferio did not succeed on the merits against the city of Syracuse and that his municipal claim was easily dismissed, Deferio's request for permanent injunction was rightfully denied. Thus, the Court of Appeals affirmed the District Court's decision in entirety.

Defereo is represented by Nathan W. Kellum of the Center for Religious Express, Memphis, TN. The case drew amicus participation from Shannon T. O'Connor of Goldberg Segalla LLP, Syracuse, on behalf of the International Municipal Lawyers Association. Syracuse Corporation Counsel defended the city on the appeal. ■

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

# Federal Court Rejects Christian Agency's Claimed Constitutional Right to Discriminate Against Same-Sex Couples Seeking to Adopt Children

By Arthur S. Leonard

U.S. District Judge Mae A. D'Agostino has rejected a Christian social welfare agency's bid to be exempted from complying with non-discrimination regulations promulgated by the New York Office of Children and Family Services (OCFS). Ruling on May 16 in *New Hope Family Services, Inc. v. Poole*, 2019 WL 2138355, 2019 U.S. Dist. LEXIS 2138355 (N.D.N.Y.), the court rejected a variety of constitutional arguments advanced by the plaintiff in support of its claim of a constitutional right to discriminate against same-sex couples seeking to adopt children.

The plaintiff, New Hope Family Services, is an "authorized agency" with the authority to "place out or to board out children" and "receive children for purposes of adoption" under the New York Social Services Law and regulations adopted by the Office of Children and Family Services. Under the law, the agency must "submit and consent to the approval, visitation, inspection and supervision" of OCFS, which must approve the agency's certificate of incorporation. Pastor Clinton H. Tasker founded New Hope in 1958 "as a Christian ministry to care for and find adoptive homes for children whose birth parents could not care for them," wrote Judge D'Agostino. Because of its religion beliefs, New Hope "will not recommend or place children with unmarried couples or same sex couples as adoptive parents," it states in its complaint. New Hope's "special circumstances" policy states: "If the person inquiring to adopt is single . . . the Executive Director will talk with them to discern if they are truly single or if they are living together without benefit of marriage . . . because New Hope is a Christian Ministry, it will not place children with those who are living together without the benefit of marriage. If the person inquiring

to adopt is in a marriage with a same sex partner . . . the Executive Director will explain that because New Hope is a Christian Ministry, we do not place children with same sex couples."

Prior to 2010, New York's Domestic Relations Law provided that authorized agencies could place children for adoption only with "an adult unmarried person or an adult husband and his adult wife." In September 2010, New York amended the law to allow placements with "an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together." After New York adopted its Marriage Equality law in 2011, OCFS issued a letter on July 11, 2011, stating that the intent of its regulations "is to prohibit discrimination based on sexual orientation in the adopting study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent." In 2013, the adoption regulations were amended to prohibit outright discrimination "against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." OCFS followed this up with an "informational letter" in 2016, advising authorized agencies to formalize their non-discrimination policies consistent with the regulations.

In its complaint challenging these developments, New Hope (represented by Alliance Defending Freedom, the anti-LGBT religious litigation group) claims, according to Judge D'Agostino, that the agency promulgated these regulations "purporting to require adoption providers to place children with unmarried and same-sex couples

in complete disregard for the law, the scope of OCFS's authority, and the rights of adoption providers."

The lawsuit stemmed from action by OCFS, contacting New Hope early in 2018 to inform the agency that "under a new policy implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures," and following up in mid-July with an email to schedule New Hope's program review, including a list of things that had to be reviewed, including New Hope's "policies and procedures." OCFS requested a copy of New Hope's formal policies and procedures as part of this review. Later in 2018, after reading New Hope's procedures, OCFS Executive Director Suzanne Colligan called New Hope, noting the "special circumstances" provision, and informing new Hope that it would "have to comply" with the regulations "by placing children with unmarried couples and same-sex couples," and that if New Hope did not comply, it would be "choosing to close." New Hope ultimately refused to comply after a series of email and letter exchanges with OCFS.

New Hope filed its complaint on December 6, 2018, claiming 1<sup>st</sup> and 14<sup>th</sup> amendment protection for its policies, claiming that OCFS's interpretation of state law "targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices" and also violates New Hope's freedom of speech. The complaint also alleged an equal protection violation, and claimed that the state was placing an "unconstitutional condition" by requiring New Hope to comply with the non-discrimination policy in order to remain an "authorized agency." The complaint sought preliminary injunctive relief against enforcement of the policy.

New Hope tried to escape the precedent of *Employment Division v. Smith*, 494 U.S. 872 (1990), which holds that there is no free exercise exemption from complying with neutral state laws of general application, by relying on a statement in *Hosannah-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), in which the Supreme Court held that the 1<sup>st</sup> Amendment protects religious institutions from government interference in their selection of ministerial personnel. New Hope argued that “cases teach that even a genuinely ‘neutral law of general applicability’ cannot be applied when to do so would interfere in historically respected areas of religious autonomy.” New Hope claimed that the state regulation was adopted “for the purpose of targeting faith-based adoption ministries” and thus was “not neutral or generally applicable as applied.”

Judge D’Agostino was not convinced, referring to a decision by the U.S. District Court in Philadelphia rejecting similar arguments by Catholic Social Services in that city in *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2019), which has been affirmed by the 3<sup>rd</sup> Circuit Court of Appeals, 922 F.3d 140 (April 22, 2019). The judge observed that the courts in the Philadelphia case had found similar requirements under a Philadelphia anti-discrimination ordinance to be “facially neutral and generally applicable” and “rationally related to a number of legitimate government objectives.” And, she noted, “In affirming the district court, the Third Circuit rejected CSS’s claims that the application of the anti-discrimination clause is impermissible under *Smith* and its progeny.” Judge D’Agostino found the 3<sup>rd</sup> Circuit’s ruling persuasive in this case.

“On its face,” wrote the judge, “18 N.Y.C.R.R. sec. 421.3(d) is generally applicable and it is plainly not the object of the regulation to interfere with New Hope’s, or any other agency’s, exercise of religion.” She found that the requirement to comply is imposed on all authorized agencies, “regardless of any religious affiliation,” and that it

is neutral. “Nothing before the Court supports the conclusion that section 421.3(d) was drafted or enacted with the object ‘to infringe upon or restrict practices because of their religious motivation.’” The adoption of the requirement was a natural follow-up to the legislature’s passage of a law that codified “the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity.” The purpose was to prohibit discrimination.

The court also rejected the argument that the regulations are not neutral because they allow agencies to take account of a variety of factors in evaluating proposed adoptive parents, including “the age of the child and of the adoptive parents, the cultural, ethnic, or racial background of the child, and the capacity of the adoptive parent to meet the needs of the child with such background as one of a number of factors used to determine best interests.” As the 3<sup>rd</sup> Circuit found in *Fulton*, there is a significant difference between a policy of outright refusal to place children with unmarried or same-sex couples and the application of an evaluative process focusing on the characteristics described in the regulations. “Further,” wrote D’Agostino, “nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.”

New Hope also argued that the enforcement of the regulation was not neutral, instead evincing hostility against religious agencies such as itself. Rejecting this argument, the judge wrote, “The fact that New Hope’s conduct springs from sincerely held and strongly felt religious beliefs does not imply that OCFS’s decision to regulate that conduct springs from antipathy to those beliefs,” quoting key language from the 3<sup>rd</sup> Circuit: “If all comment and action on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against religious belief itself, then *Smith* is a dead letter, and the nation’s civil rights laws might be as well.”

The court also rejected New Hope’s argument that the regulation violates the Free Speech clause of the 1<sup>st</sup> Amendment “insofar as it forces New Hope to change the content of its message” and to affirmatively recommend same-sex couples to be adoptive parents, in effect imposing an “unconstitutional condition” on New Hope. The essence of the analysis is that designating New Hope an “authorized agency” for this purpose is delegating a governmental function to New Hope, and any speech in which New Hope engages to carry out that function is essentially governmental speech, not New Hope’s private speech as a religious entity. “Therefore,” she wrote, “OCFS is permitted to ‘take legitimate and appropriate steps to ensure that its message,’ that adoption and foster care services are provided to all New Yorkers consistent with anti-discrimination policy set forth” in the regulation, “was and is ‘neither garbled nor distorted by New Hope.’” She concludes that “OCFS is not prohibiting New Hope’s ongoing ministry in any way or compelling it to change the message it wishes to convey. New Hope is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation of the couple.”

The court similarly dismissed New Hope’s claim that applying the regulation violated its right of expressive association, rejecting New Hope’s argument that this case is controlled by the Supreme Court’s decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where the court found that the BSA had a 1<sup>st</sup> Amendment right to dismiss an out gay man from the position of Assistant Scoutmaster, based on the determination by 5 members of the Court that requiring the BSA to allow James Dale to serve would be a form of compelled endorsement of homosexuality. The Court deemed the BSA an expressive association that had a right to determine its organizational

message. By contrast, found Judge D’Agostino, “New Hope has not alleged facts demonstrating a similar harm that providing adoption services to unmarried or same sex couples would cause to their organization. New Hope is not being required to hire employees that do not share their same religious values,” she wrote. “They are not prohibited in any way from continuing to voice their religious ideals.” And even if the regulation worked “a significant impairment on New Hope’s association rights,” she continued, “the state’s compelling interest in prohibition the discrimination at issue here far exceeds any harm to New Hope’s expressive association.”

The court also found no merit to New Hope’s Equal Protection claim based on a spurious charge of selective enforcement, finding no indication that OCFS was allowing other, non-religious agencies to discriminate while cracking down on New Hope. As to the “unconstitutional conditions” cause of action, the judge wrote that the court “views New Hope’s unconstitutional conditions claim as a mere repackaging of its various First Amendment claims and, therefore, the Court similarly repackages its resolution of those claims.”

Consequently, the court denied the motion for preliminary injunction, and granted OCFS’s motion to dismiss the case. ADF will undoubtedly seek to appeal this ruling to the 2<sup>nd</sup> Circuit. ■



## Transgender Student and Student Organization Intervene to Defend their School’s Non-Discrimination Policy from Self-Righteous Professor

By Eric Lesh

Should a transgender student who was disrespected in class and an organization advocating on behalf of trans students be added as co-defendants in an Alliance Defending Freedom (ADF) case challenging their public university’s trans-affirming policies? In *Meriwether v. Trustees of Shawnee State University*, 2019 WL 2052110, 2019 U.S. Dist. LEXIS 78771 (S.D. Ohio), Judge Karen L. Litkovitz considered this question. The motion to intervene concerned a lawsuit brought by a transphobic professor at Shawnee State challenging the constitutionality of the university’s requirement that faculty show basic respect for the gender identity of all students. At this stage of the litigation, with a motion to dismiss pending, Judge Litkovitz rules favorably on the contested motion brought by the student and the organization.

The case begins in August 2016, when the University’s union president informed faculty members that they could face suspension or dismissal if they “refused to use a [student’s] requested name or pronouns” as part of Shawnee’s new non-discrimination and reporting policies. Fast-forward to 2018 when the plaintiff, Professor Nicholas Meriwether, returned from sabbatical and began teaching his Political Philosophy class. Jane Doe, a young transgender woman who had been living as a female in all aspects of her life for a number of years, enrolled as a student in Meriwether’s class.

On the first day of class, when Doe raised her hand, Meriwether incorrectly referred to her as “sir.” Doe approached him after class and “informed him that she is a woman, showed him her driver’s license which states she is a

female and confirms that Ohio legally recognizes her as female, and asked that plaintiff use female honorifics and pronouns when referring to her.” Meriwether nevertheless refused and alleged that Doe “became belligerent” while telling plaintiff, “Then I guess this means I can call you a cunt.” Meriwether reported the incident and was later informed that he would need to comply with the policy. Nevertheless, Meriwether continued to use male honorifics and pronouns or to refer to Doe by just her last name, while at the same time referring to other students by their preferred pronouns. Doe filed a Title IX complaint, and after an investigation, Meriwether was informed that his “disparate treatment has created a hostile environment” for Doe. A written warning was placed in Meriwether’s file.

What happened next is typical for anti-trans litigants represented by ADF. Meriwether sued members of the Board of Trustees of Shawnee State, and various administrative officials, for their roles in developing, implementing, and enforcing the school’s gender identity-inclusive non-discrimination and reporting policies, as well as the Acting Dean and the Chair of the Department of English and Humanities, for their roles in overseeing and disciplining Meriwether. With help from his lawyers, Meriwether alleges that the defendants violated his First Amendment rights, rights to due process and equal protection under the Fourteenth Amendment, and his rights of conscience and free exercise of religion under the Ohio constitution by forcing him to comply with the policy which he believes to be “a University-mandated ideological message

regarding gender identity” and which “contradicts” and would force him to violate) his “sincerely held religious beliefs.”

Now comes Doe and, SAGA, a student-led organization at Shawnee of which Doe is a member, in a motion to intervene in this action as of right so as to defend the university’s policies. Judge Litkovitz considers four factors in evaluating whether a third party has a right to intervene in an action: (1) whether the motion to intervene is timely; (2) whether they have substantial legal interests in this case; (3) whether denial of intervention would impair the legal interests of Doe and the transgender members of SAGA; and (4) whether defendants will not adequately represent those interests.

First, the court quickly concludes the motion was timely. With respect to Doe and SAGA’s substantial legal interest, they argue that their concrete interest in the litigation is an interest in being treated in a non-discriminatory manner and in defending the constitutionality of Shawnee State’s anti-discrimination policy. Meriwether asserts that Doe and SAGA would not benefit from his discipline, and that they do not have a concrete interest in prohibiting the expression of ideas that are offensively subjective to some who hear them. The court finds this element is satisfied because Doe was the student whose complaint gave rise to the lawsuit, and much like SAGA and their members, has a “substantial interest in seeing that the policy as applied to plaintiff is not struck down in the face of his constitutional challenges.”

With respect to impairment of their substantial legal interest, Doe and SAGA argue that to “invalidate a university policy that protects their rights would lead to mistreatment by plaintiff and, potentially, other professors” and also would “inhibit them from pursuing future claims” against Meriwether. Meriwether asserts that the interest doesn’t apply to this particular case and that Doe and SAGA make only “generic and sweeping conclusory claims” about the legal interest that will be impaired.

Judge Litkovitz finds that an adverse ruling could subject Doe and SAGA members “to disparate treatment and cause other detrimental impacts” and that intervenors have satisfied their minimal burden under Sixth Circuit construction of the element.

Finally, the court examines whether the parties before the court will adequately represent Doe and SAGA’s legal interests. Significantly, Shawnee State argues only that their non-discrimination policies are a neutral rule of general applicability that is part of its obligations under Title IX and Title VII. The university does not argue that the policy protects the rights of Doe and other transgender students. Shawnee State “has not raised as a defense to plaintiff’s constitutional claims the rights of transgender students under the constitution, the anti-discrimination laws, and the policies the university formulated and enforced in accordance with governing law.” Thus, the court finds that Doe and SAGA are entitled to intervene to protect their private interests which are clearly at stake should the Court invalidate the non-discrimination policies. She also granted Doe and SAGA leave to file a proposed motion to dismiss Meriwether’s lawsuit!

In sum, this case serves as a reminder of the myriad ways ADF and other anti-LGBT hate groups are weaponizing the First Amendment and other constitutional protections to take down basic civil rights protections for LGBT people in schools and every other aspect of public life.

Intervenors Doe and SAGA are represented by Jennifer Lynn Branch of Gerhardstein & Branch Co., LPA, Cincinnati; Adam G. Unikowsky of Jenner & Block LLP, Washington, and Asaf Orr, Christopher Stoll and Shannon Minter, of the National Center for Lesbian Rights. The Ohio Attorney General’s Office is representing the University. ■

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*Eric Lesh is the Executive Director of the LGBT Bar Association of New York (LeGal)*

## 9th Circuit Survivor’s Benefits Victory under ERISA Plan for Same-Sex Spouse

*By Arthur S. Leonard*

A three-judge panel of the U.S. Court of Appeals for the 9<sup>th</sup> Circuit unanimously ruled on May 16 that the Pension Committee of the KRON/IBEW Local 45 Pension Plan abused its discretion by denying a claim for survivor’s benefits for a retired employee’s surviving same-sex spouse in California. *Reed v. KRON/IBEW Local 45 Pension Plan*, 2019 U.S. App. LEXIS 14562, 2019 WL 2145652. The ruling turned on the question of how to characterize a California registered domestic partner as of the time the employee retired in 2009.

Donald Gardner worked for television station KRON-TV. In 1998, he began a committed long-term relationship with David Reed. In 2004, Gardner and Reed registered as domestic partners under California law. Gardner retired on April 1, 2009, and began receiving pension benefits under the Plan. In June 2013 the U.S. Supreme Court dismissed the appeal in *Hollingsworth v. Perry*, 570 U.S. 693, and California resumed allowing same-sex couples to marry. In May 2014, five days before Gardner passed away, he and Reed were married. The court’s opinion does not mention the state of Gardner’s health at the time of the marriage, or whether it was expected or unexpected. Pension payments to Gardner ceased upon his death, and Reed made a claim for a survivor-spousal benefit.

The 9th Circuit’s brief memorandum does not relate some relevant factual allegations that are provided in the unpublished opinion by District Judge Jeffrey S. White, 2017 WL 6523478 (N.D. Cal., September 25, 2017): “Mr. Gardner retired from KRON-TV in 2009, and elected single-life annuity

pension benefits. Plaintiff alleges that KRON-TV's human resources department did not mention the availability of a joint-and-survivor form of benefit despite being aware that Plaintiff and Mr. Gardner were registered domestic partners. Plaintiff alleges that section 7.06 of the Plan "mandates that a participant who is married at retirement or benefit commencement must be paid his monthly pension benefit in the form of a 50 percent joint-and-survivor annuity unless he elects otherwise after written notice of his right to the joint-and-survivor annuity and with the witness or notarized written consent of his spouse." According to Plaintiff, KRON-TV provided Mr. Gardner with a pension election form that stated a joint-and-survivor annuity was only available 'if married,' and that Mr. Gardner elected a single-life annuity, which was listed on the form as available to participants 'if not married.' Plaintiff alleges he did not sign a spousal consent to Mr. Gardner's election. Plaintiff also alleges that, under California law, RDPs are entitled to the same benefits as spouses."

Under the terms of the KRON-TV Pension Plan, the Plan "shall be administered and its provisions interpreted in accordance" with California law "in a manner consistent with the requirements of the [Internal Revenue] Code and ERISA." The Plan Committee turned down Reed's claim, stating that it "has consistently interpreted the term spouse to exclude domestic partners," evidently giving no weight to the fact that the men had actually married shortly before Gardner's death, presumably because they were not married at the time Gardner retired. (It was usual for Plan administrators to exclude registered same-sex domestic partners from being considered spouses under plans govern by ERISA because of the federal law definition of "spouse" as mandated by the Defense of Marriage Act until that law was stricken by the Supreme Court in June 2013.) When Reed sued in federal court under ERISA, Judge White granted the defendants' motion for judgment on the pleadings, finding

that the Committee did not abuse its discretion in denying the claim. Because the written Plan gave the Committee discretion to construe the terms of the Plan, the Committee's interpretation is reviewed under an abuse of discretion standard.

The 9<sup>th</sup> Circuit panel found that the Committee abused its discretion by denying Reed's claim for benefits. "During either time the Committee evaluated the Plan's benefits in this case – in 2009 or in 2016 – California law afforded domestic partners the same rights, protections, and benefits as those granted to spouses," wrote the court, citing California Family Code Sec. 297.5(a) and California case law. "Neither ERISA nor the Code provided binding guidance inconsistent with applying this interpretation of spouse to the Plan," the court continued, citing to *United States v. Windsor*, 570 U.S. 744 (2013), in which the Supreme Court held unconstitutional the federal Defense of Marriage Act's definition of "spouse" for purposes of federal law as consisting only of different-sex spouses. The court did note by way of a cf. cite a provision of the Code of Federal Regulations stating that as of September 2, 2016, "the Code excludes registered domestic partners from the definition of 'spouse, husband, and wife.'"

Because Reed and Gardner were registered domestic partners under California law at the time when Gardner retired and began to draw benefits, said the court, "the Committee should have awarded Reed spousal benefits in accordance with California law, as was required by the Plan's choice-of-law provision." The court did not mention the failure of Gardner to assert Reed's status at the time he filled out election of benefits form; presumably, it would conclude that because the Plan by its terms applied California law, the administrator erred in informing Gardner that he must use the "unmarried" election form, and that this error could not be allowed to compromise Reed's entitlement as a surviving spouse to benefits. The court remanded the case to the district court "with instructions to determine

the payments owed to Reed." That determination may pose interesting problems in light of the payment of full benefits to Gardner from the time of his retirement until his death several years later, so there may be further litigation as to the amount of Reed's entitlement.

The Court of Appeals' Memorandum opinion (not attributed to any individual judge, so probably drafted by a court attorney) specifically states that it "is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3." Circuit Rule 36-3 allows citations of unpublished opinions issued since 2017, but limits their *precedential* application to cases in which they are "relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Acknowledging the availability of many unpublished opinions on electronic databases, the Rule requires a party who wishes to cite an unpublished opinion to attach a copy to their pleadings unless it is available on electronic databases. Peculiarly, although the court says this disposition is not appropriate for publication, Lexis has assigned it a citation used for published opinions, and notes that it will be receiving a citation to Fed. App'x.

The three-judge panel consisted of M. Margaret McKeown and William A. Fletcher (appointed by Bill Clinton) and Mary H. Murgia (appointed by Barack Obama).

David Reed is represented by Teresa Renaker and Margo Hasselman, of Renaker Hasselman Scott LLP, San Francisco, and Amy Whelan and Julie Wilensky of the National Center for Lesbian Rights. ■



# Federal Judge Denies Preliminary Relief to Transgender Inmate Whose Hormone Therapy Was Abruptly Stopped after Two Years' Treatment in Custody

By William J. Rold

This is an odd one: A federal district judge appointed counsel for a *pro se* transgender inmate but then denied relief before counsel had a chance to be heard. The transgender inmate, Miss Glenn A. Porter, filed a lawsuit against Oklahoma officials complaining primarily about her health care, but also raising issues about cross-gender searches and other conditions of confinement. She amended her initial filing of September 2018, and she also sought preliminary relief, since her hormones (which she had been taking for almost two years) were abruptly stopped on order of a physician's assistant. Porter, age 60 and serving for life, has been at multiple correctional facilities (both state-operated and private) in Oklahoma since 1999. Chief U.S. District Judge John E. Dowdell issued two separate rulings on the same day in *Porter v. Allbaugh*, 2019 U.S. Dist. LEXIS 83633, 2019 WL 2167415 (N.D. Okla., May 17, 2019). In the first (unreported) decision, he appointed counsel because of the “complexities” of the case and the need for discovery, and he granted counsel a modest budget for costs, with leave to request more. In the second (reported) decision, he disposed of all pending motions, including the one for preliminary relief, and he granted a motion to amend the complaint, giving newly appointed counsel a short thirty days to do so.

This note focuses primarily on the denial of preliminary relief, which in this writer's view caused more confusion than clarity, when Judge Dowdell could have simply stayed pending motions until new counsel had an opportunity to reframe the case. Instead, this decision stands for a questionable proposition: preliminary relief will not be granted to restore hormone therapy when it is abruptly suspended by allegedly “unqualified”

practitioners following two years of consensus ordering of same by multiple providers who agreed on a diagnosis of gender dysphoria. Porter claims that her transition was well underway when her hormones were interrupted and that she continues to suffer irreparable injury in terms of physical and mental consequences, including failure to monitor her medical and emotional withdrawal from hormones and her loss of clothing and other items in support of her transition.

The denial of preliminary relief consideration is particularly troubling because of the unique use in the Tenth Circuit of a procedure called a “*Martinez* report” (from *Martinez v. Aaron*, 570 F.2d 317, 318-19 (10th Cir. 1978) (*per curiam*)), that allows the state to submit a written justification for its actions as part of the screening of the case under the Prison Litigation Reform Act. Here, the report contained medical records that Judge Dowdell allowed to be filed under seal. This was done ostensibly to protect Porter's privacy, but it also has the effect of concealing the state's evidence in a docket in which Porter had already shown her willingness to put her medical situation in the public domain based on the unsealed medical records she filed on her own. Such records showed repeated diagnoses and prescription of hormones by various physicians in the Oklahoma DOC. She also had written orders allowing her to wear female undergarments.

According to the pleadings and Porter's submissions, the problem with hormones started when defendant “Dr. Patricia Jones” (who is identified as a psychologist in defendants' motion papers) came to the facility where Porter was incarcerated and said that Porter was “masquerading as a female,” prompting a defendant physician's assistant to suspend Porter's hormones

and to overrule prior diagnoses of gender dysphoria. [Note: According to the Oklahoma Board of Examiners of Psychologists, there is no license for a Dr. Patricia Jones. Per “Google.com” and the records of the Oklahoma Board of Professional Licensing, the only Patricia Jones licensed to practice any type of health care in Oklahoma is Patricia Kay Jones, with a license (and doctorate) in physical therapy.] Jones' evidence and opinions appear to be part of the state's sealed submissions to Judge Dowdell. The Oklahoma Attorney General's motion papers paint a complicated mental health history for Porter, but their support for same is under seal.

Judge Dowdell engages in an epistemological debate about whether Porter is seeking to preserve the status quo, the status quo “ante,” or the “the last uncontested status between the parties which preceded the controversy” – quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005). Drawing on preliminary relief in commercial and employment cases, Judge Dowdell decides that it is immaterial how the requested relief is characterized (refrain from suspending hormones – prohibitory injunction; or restore hormones that were suspended – mandatory injunction). A heightened standard is required in either case because this kind of relief is “disfavored”; and it places the court in the position “where it may have to provide ongoing supervision to assure the non-movant is abiding by the injunction,” quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991).

Judge Dowdell cites no prison health care cases involving such a finding. Moreover, the preliminary injunction procedural vehicle for adjudication of transgender inmates' hormones or

other medical claims has been used by other courts, rejecting the analysis here. *See, e.g., Edmo v. Idaho Dep't of Corr.*, 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018) (granting preliminary relief for sex confirmation surgery) (order stayed by Ninth Circuit, appeal expedited, and plaintiff allowed to keep pre-surgery appointment in Nos. 19-35017 and 19-35019). In *Edmo*, entry of a preliminary injunction for gender confirmation surgery required overruling far weightier jurisprudential objections than those interposed here, where the issue is simply continuing hormone therapy while the case proceeds.

In this case, Judge Dowdell found that Porter was unlikely to prevail on the merits because there was a disagreement among doctors as to her diagnosis and treatment, citing *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). Judge Dowdell found such a “disagreement” based on the opinion of “psychologist” “Dr. Jones.” Porter says that Jones’ assessment lasted “less than 45 minutes” and she did not ask any questions about gender dysphoria before concluding that Porter was “masquerading.” Judge Dowdell says that even if Jones were negligent or “sub-par,” these kinds of errors do not violate the Constitution, relying on *Lamb v. Norwood*, 899 F.3d 1159, 1162 (10th Cir. 2018); and *Supre v. Ricketts*, 792 F.2d 958, 959, 963 (10th Cir. 1986). [Note: *Lamb* kept the analytical framework of *Supre*, but it questioned the possibly “outdated” medical assumptions about transgender people and the lack of consensus for hormone treatment that underpinned the *Supre* decision. *Lamb* addressed a dispute about the level of hormones appropriate for a transgender patient, not the suspension of hormones entirely.]

In addition, it is undisputed that the hormone suspension was ordered by a *physician’s assistant* based on Jones’ opinion. Yet, a physician’s assistant must be supervised by a *physician* under Oklahoma law, not by a *psychologist*. 50 O.S. §§ 519, *et seq.* It would follow that an opinion of a psychologist (or worse, if true as suggested by our research,

of a physical therapist) cannot be used to “overrule” the prior diagnoses and treatment orders of physicians. Thus, a genuine dispute among *peers* is not presented within the meaning of *Ramos*.

Moreover, the Tenth Circuit itself has cautioned another Oklahoma federal judge on application of the “professional disagreement” language of *Lamb* that had been used, in effect, to deny all treatment for a transgender inmate. *See Hardeman v. Smith*, 2019 U.S. App. LEXIS 5163 (10th Cir., February 22, 2019) (in dicta that is not binding precedent, trial judge who had granted summary judgment is warned against “overly ambitious” application of *Lamb* on remand).

Judge Dowdell also found that Porter had failed to show irreparable injury. Her condition allegedly dated to her childhood and had been documented by Veterans officials in the 1980’s. Despite her threats of self-harm, Judge Dowdell found only one incident of wrist cutting in the (sealed?) records. There is no discussion of the consequences of failure to monitor abrupt cessation of hormones. Similarly, Judge Dowdell found that the balance of harms does not favor Porter because she is unlikely to prevail on the merits due to Jones’ assessment of no gender dysphoria. He also asserted that the public interest favors denial of relief, since balancing under *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), requires deference to prison administration. Judge Dowdell justifies this proposition with an incomplete citation to a presumably non-precedential decision: “See *Pinson*, 424 F. App’x at 749.” [Perhaps he meant *Pinson v. Archeda*, decided as non-binding precedent on May 26, 2011. This writer is aware of no binding precedent in the Supreme Court or Tenth Circuit – or anywhere else – that applies *Turner* balancing to claims of Eighth Amendment deliberate indifference, since they already require heightened risk and a subjective state of mind.] These arguments were all rejected by the *Edmo* court in a lengthy discussion of preliminary relief.

One final point. Porter also challenged cross-gender searches

of her person, relying on the Prison Rape Elimination Act, 34 U.S.C. §§ 30301, *et seq.* [PREA]. Notably, when Porter complained under PREA that her searches violated the statute and regulations requiring correctional searches by officers of the same gender as the identification of the transgender inmate (absent exigent circumstances), she was given a disciplinary ticket for “attempted coercion.” The “coercive” action was described on the ticket as filing of the PREA complaint. Such cross-gender searches and retaliation are prohibited by 28 C.F.R. §§ 115.15 and 115.67, respectively. In their papers, the Oklahoma Attorney General says that all state corrections officials are trained in their PREA obligations. Maybe not so much.

Porter is now represented by the law firm of Doerner Saunders Daniel & Anderson LLP, Tulsa. ■

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# Texas Federal Court Will Allow Surviving Same-Sex Partner to Replead Claim for Death Benefits

By Arthur S. Leonard

On May 21, U.S. District Judge Jane J. Boyle issued a ruling in a complicated employee benefits case involving a same-sex partner's claim to benefits under the employment-related life insurance policy of his late partner. *Ford v. Freeman*, 2019 U.S. Dist. LEXIS 85178, 2019 WL 2189256 (N.D. Tex.). The ruling concerned the part of the case in which Rodney Ford sought to hold either Bank of America (BoA) or Prudential Life Insurance Company (Prudential) liable for over \$700,000.00, the amount in contention as between Ford and his late partner's father, to whom Prudential had paid on the Policy. This ruling did not concern Ford's claim against Otis Freeman, his late partner's father.

Rodney Ford and David Freeman lived together as same-sex partners when Freeman worked for MBNA Bank. MBNA provided a life insurance policy as an employee benefit. In 1996, Freeman completed a beneficiary designation form designating Ford as "100% beneficiary" under the policy. Freeman continued actively to work for MBNA until 2005, when he left active employment on long-term disability. From 2005 until Freeman died in October 2016, Ford alleges that MBNA, and then Bank of America (BoA), which purchased MBNA and took over its obligations to MBNA employees and retirees, and Prudential, the issuer of the life-insurance policy, periodically sent David Freeman information confirming his insured status and that Ford was his beneficiary on the policy. However, Ford claims, sometime before Freeman died, he "cleaned out" these documents, as a result of which they were not available to Ford after Freeman's death.

Ford contacted Prudential and BoA to claim survivor benefits under various employee benefit plans, including this life insurance policy. Prudential responded that there was no beneficiary designation on the life insurance Policy

and advised Ford to contact BoA to obtain the original records. Ford then called BoA and spoke with an HR representative, Kecia Atkins, who told him that she "found your name, but could not (would not) certify that the beneficiary designation applied to the Policy," according to the allegations of Ford's complaint. Ford also alleged that Atkins "stated unequivocally that there was no beneficiary form showing Ford as beneficiary of the Policy." Ford then contacted Prudential to ask what would happen in the absence of a written beneficiary designation and was told, accurately, that under the policy the proceeds would go to Freeman's heirs, meaning, in this instance, his father, Otis Norman Freeman. The Prudential representative also told him that if he could prove he was a surviving spouse under Texas law, he would take priority over Otis Freeman, but since Rodney and David had not married after *Obergefell v. Hodges* was decided in 2015, that would mean he would have to prove he was a surviving common law spouse, a difficult but not necessarily impossible task.

Ford decided that rather than go through that, he would approach Otis Freeman to see if they could work out an agreement. He alleges that Freeman agreed to obtain the proceeds of the policy as heir to his son, and then pay them over to Ford. The opinion does not mention any further details about this alleged agreement, only to say that Otis Freeman received the death benefit payout and, instead of turning it over to Ford, used it to pay off a mortgage and other debts. Based on the court's reference to this as an "alleged" agreement, one infers that a copy of a written agreement was not attached as an exhibit to Ford's complaint.

In February 2017, Ford filed suit in Texas state court against Freeman, alleging breach of contract for Freeman's failure to pay over the proceeds from

the Policy. While this litigation was going on, Ford alleges, BoA responded to a discovery subpoena for the Policy records and, lo and behold, the records "showed Ford as the sole 100% beneficiary of the Policy based on the 1996 designation." Ford amended his state law complaint to add claims against BoA and Prudential, and they quickly removed the action to federal court, resting jurisdiction on Employee Retirement Income Security Act (ERISA). Since the Policy was provided under an employee benefits plan, it is governed by ERISA. Then BoA and Prudential moved to dismiss the claims against them, citing ERISA preemption of state law claims and failure by Ford to exhaust administrative remedies under the Policy by filing a claim and appealing any resulting denial as provided in the Policy. Judge Boyle's May 21 opinion addresses these motions by the bank and the insurance company.

ERISA expressly preempts all state laws relating to an employee benefits plan. Under Supreme Court precedents, "state laws" are broadly construed to include common law claims, such as breach of contract or negligence. The court addressed separately the preemption defenses advanced by BoA and Prudential.

The essence of the state law claim against BoA was negligent misrepresentation. Ford claimed that Atkins failed to take reasonable care to find the relevant records, which only surfaced later in response to the subpoena, and that Ford had relied upon Atkins' misrepresentation when he decided to forego attempting to prove surviving spouse status and instead to make a deal with Otis Freeman to obtain the benefit and pay it over to Ford. The issue for the court was whether Ford's claim against BoA could be held to "affect an employee benefits plan," which turned on whether it might be conceptualized as an ERISA claim,

in which case the state law claim he had asserted in his complaint would be preempted. Judge Boyle explained two kinds of ERISA preemption, “complete preemption” and “conflicts preemption,” and explained why she concluded that both theories produced the same result: the state law claim was preempted. Instead, Ford would have to assert that BoA had violated his rights under ERISA by providing misinformation and failing to verify the beneficiary designation upon David’s death and Ford’s inquiry. Dismissal of the negligent misrepresentation claim would not necessarily deprive Ford of his cause of action against BoA. Judge Boyle found it appropriate to dismiss the state law claim, but to allow Ford quickly to replead his claim against BoA as a federal claim under the pertinent provision of ERISA, giving him thirty days to do so.

Turning to Prudential, the court found that Ford has no viable ERISA claim against Prudential. ERISA would automatically preempt any attempt by Ford to assert a breach of contract claim against Prudential on the assertion that Prudential paid the benefit to the wrong person. As the issuer of the insurance policy, Prudential was required under ERISA to interpret and apply the Policy according to its terms. Having been advised by Ford that he did not have a beneficiary designation, Prudential applied the relevant Policy terms to pay out the proceeds to David’s father. In the absence of any evidence of bad faith by Prudential, it could not be held liable under ERISA. “Plaintiff chose not to pursue a claim for benefits under the Policy with Prudential,” wrote Boyle, “but instead entered into an agreement with Freeman where he would receive the Policy’s proceeds and then give the proceeds to Plaintiff. In Plaintiff choosing this path, Prudential did what it was required to do under the Policy – and what Plaintiff expected them to do – it paid the Policy’s proceeds to Freeman since there was no beneficiary designee and no claim by the Decedent’s spouse or children.” Thus, the complaint failed to state a claim against Prudential under ERISA.

Both BoA and Prudential had also sought dismissal on grounds of failure to exhaust administrative remedies. ERISA requires that employee benefit plans have a process of handling claims and providing for appeals of claim denials. Ford did not try to invoke these procedures, instead merely adding BoA and Prudential as defendants in his state court lawsuit against Freeman two years after the death of his partner. Ford argued that BoA’s exhaustion argument was “misplaced because BoA has failed to show that the Policy required him to make a claim with BoA, as opposed to the plan-administrator, Prudential,” wrote Boyle. “In its Reply, BoA does not respond to this argument or make additional exhaustion arguments . . . the Court does not find it appropriate to dismiss Plaintiff’s claims against BoA for failure to allege exhaustion of administrative remedies at the motion-to-dismiss stage” because, among other things, exhaustion is an affirmative defense, and it would be premature to deal with it at this stage of the case. For another, of course, courts have recognized exceptions to the exhaustion requirement where a beneficiary had a “valid reason” for failing to exhaust administrative remedies. “Although discovery will be needed to determine the applicability of this and other potential exceptions to the exhaustion requirement,” wrote Boyle, “the Court finds that the allegations in Plaintiff’s Complaint and the unique circumstances of this case are sufficient to infer that an exception to exhausting administrative remedies may be appropriate in this case.”

Turning to Prudential, however, the court found that this was an additional reason to grant Prudential’s motion to dismiss. “Prudential’s position as to who is entitled to the Policy’s proceeds has remained the same from the time Plaintiff called Prudential following the Decedent’s death to the present day – absent a beneficiary designee, the Policy’s proceeds would be paid out to the Decedent’s spouse, and if none, to the Decedent’s heirs. Prudential’s current position is not that it would have refused any claim by Plaintiff,

but that the time to make a claim was when it originally advised Plaintiff of the proper claim process after the Decedent’s death and prior to filing suit.” The judge noted that Ford had not alleged that Prudential’s policy was discriminatory, or that it would have refused to pay out if he had attempted to “prove up” his common law spouse status, and “there are no allegations that Prudential was hostile or biased against Plaintiff’s attempt to collect the Policy’s proceeds.” The bottom line– Prudential is out of the case, because it did just what a Plan administrator is supposed to do: administer the Policy according to its terms.

The court gave Ford, who is represented by counsel – Tom C. Clark of Clark, Malouf & White LLP, Dallas – thirty days to amend his Complaint to convert the dismissed state law claim into a federal claim under ERISA. The court did not give Ford leave to replead against Prudential. The judge explained, “The Court finds that allowing Plaintiff the opportunity to replead against Prudential would be futile because Plaintiff would in essence have to contradict many of the allegations and arguments he currently asserts against Prudential in order to state a viable [ERISA] claim.” Of course, the case continues against Otis Freeman, giving Ford alternative theories to pursue in seeking to recover the \$726, 299.18 (presumably plus interest) at stake in this case. ■



# Texas Federal Court Rejects Gay Plaintiff's Attempt to Plead Around the Lack of Express Title VII Protection Through a Gender Stereotype Claim

By Arthur S. Leonard

U.S. District Judge Karen Gren Scholer granted Xerox Corporation's motion for summary judgment dismissing a Title VII employment discrimination claim by Kyle Berghorn, who alleged that he was terminated for failing to conform to traditional male gender stereotypes. *Berghorn v. Xerox Corporation*, 2019 U.S. Dist. LEXIS 87225, 2019 WL 2226763 (N.D. Texas, Dallas Div., May 23, 2019). "Plaintiff is not a member of a protected class," wrote Judge Scholer, reflecting the casual disregard by federal district judges of the fact that there are no protected classes under Title VII, which is a "forbidden grounds" anti-discrimination law. She continued that "all of his allegations of discrimination relate to his sexual orientation; Plaintiff was not treated less favorably than similarly situated coworkers; and Defendant articulated a legitimate, non-discriminatory reason for the termination."

Berghorn worked for Xerox as a senior manager overseeing a team of auditors. His complaint alleges that he was fired because "he failed to conform to traditional sex-based stereotypes" by "having sex with men, having romantic attraction to men, and exhibiting gay mannerisms." Xerox's response was that it fired Berghorn for misusing his corporate AMEX card. Berghorn's reply is that this reason is a pretext; that the company's suspicion that he and a male colleague "were having a sexual and/or romantic relationship" sparked an investigation of his card use to determine whether the rumors were true, and the investigation led to the conclusion that he was gay, prompting his discharge.

In sorting this out, Judge Scholer cited the Supreme Court's *McDonnell Douglas* burden-shifting analysis, repeating the casual mischaracterization of the first step as the plaintiff's burden to show that "he is a member of a protected class." This is a misstatement of the

*McDonnell Douglas* test, reflecting the analytical short-cuts taken by federal judges in disregard of the context in which the Supreme Court articulated the test. The purpose of the test is to determine whether a Title VII plaintiff who lacks direct evidence of discriminatory intent should be allowed to proceed with his lawsuit. In *McDonnell Douglas*, the allegation was that the employer refused to hire the plaintiff because of his race, but there was no direct evidence of that. The Supreme Court, per Justice Lewis Powell, held that the plaintiff could get past a motion to dismiss by alleging facts sufficient to raise an inference of discriminatory intent, shifting a burden of production on the defendant to show a non-discriminatory reason for refusing to hire the plaintiff. In the context of a race discrimination hiring case, such facts could be that plaintiff is a member of a racial minority, was qualified for an open position, was rejected despite his qualifications, and the employer continued to consider applications for the position or filled it with a person who was not a member of a racial minority group. This would support an inference that plaintiff's race had something to do with rejecting his application. The Supreme Court made clear that the pleading requirement should be adjusted based on the nature of the plaintiff's claim. Thus, in pleading a gender stereotyping sex discrimination discharge case under Title VII, the plaintiff should be able to satisfy the initial burden by alleging that he is a man who fails to comport with his employer's stereotyped view of how men should appear and/or act, that he was performing his job satisfactorily, and that nonetheless he was discharged and somebody else who did not fail to comport with gender stereotypes was hired or reassigned to perform the plaintiff's job duties.

That is neither here nor there, however, if the defendant can articulate a

non-discriminatory reason for discharge and the plaintiff is unable to counter the defendant's reason by showing that it is a pretext for discrimination. In light of Supreme Court precedent holding that discriminatory action against a person for failure to comport with gender stereotypes may violate Title VII (see *Price Waterhouse v. Hopkins*), Judge Scholer's stated analysis under *McDonnell Douglas* is flawed at the first step. But she accepted Xerox's argument that "all of the facts showing the alleged discrimination relate to Plaintiff's sexual orientation, rather than to his failure to conform to gender norms." She went on to state, "Plaintiff has not met his burden of showing that similarly situated employees who were outside the plaintiff's protected class were treated more favorably under nearly identical circumstances." That is to say, Berghorn did not present evidence of pretext by showing that gender-conforming employees who similarly abused their corporate AMEX cards were not discharged.

Interestingly, Judge Scholer "notes that there is evidence in the record of certain employees describing Plaintiff as having 'more effeminate mannerisms,' being gay for going to a Brittany [sic] Spears concert, 'coming off as a gay person,' having a 'voice that is a little higher,' 'dressing really nice,' and 'waving . . . not like any other guy.'" But, she insisted, Berghorn had "made no showing that his non-conforming appearance or behavior impacted the decision to terminate him." She pointed out that the comments were not attributed to people who were involved in making the termination decision, but then in the next sentence she writes: "The remaining evidence shows that individuals involved in Plaintiff's termination 'snickered' and asked whether Plaintiff was gay upon discovering that he went to a Brittany [sic]

Spears concert. This incident occurred more than a year before Plaintiff's termination. Nothing in the record suggests that Plaintiff's attendance at the Brittany [sic] Spears concert, rather than his sexual orientation, motivated Defendant to investigate and terminate Plaintiff. Accordingly, the Court finds that there is no evidence to support Plaintiff's claim that the alleged discriminatory termination occurred "because of . . . sex," an essential element of his claim." Just a minute . . . If people involved in making the decision to discharge Berghorn snickered and asked whether Berghorn was gay because he attended a Brittany [sic] Spears concert, how can the judge say that failing to comport with gender stereotypes was not a reason that the investigated his AMEX card use? (Assuming, of course, that Berghorn's employer's stereotype of appropriate male behavior requires eschewing any interest in attending a Brittany [sic] Spears concert? Britney Spears' manager would undoubtedly be very upset to hear this, as well as the fact that her first name was misspelled consistently through a federal district court opinion!)

The court rejected any argument that "having sex with men and having romantic attraction to men" would count as failure to conform to gender stereotypes for purposes of such an analysis. "Plaintiff cannot 'bootstrap protection for sexual orientation into Title VII,'" she quoted from another N.D. Tex. ruling, *Lynch v. Baylor University Medical Center*, 2006 U.S. Dist. LEXIS 62408, 2006 WL 2456493 (2006), aff'd, 236 F. App'x 918 (5<sup>th</sup> Cir. 2007). "The Court is bound by Fifth Circuit law that Title VII does not prohibit sexual orientation discrimination," she wrote, adding, "For the same reason, the court refuses Plaintiff's invitation to recognize sexual orientation discrimination as a form of associational discrimination." In other words, the plaintiff's counsel attempted to make the kinds of arguments that have been accepted by the EEOC and the 2<sup>nd</sup> and 7<sup>th</sup> Circuits, but without success because the 5<sup>th</sup> Circuit has continually rejected them, usually by citing an old circuit precedent that predates even *Price Waterhouse* (1989).

The court found that plaintiff's evidence was "sparse" on the issue of pretext. "Although the evidence shows that Plaintiff was not the only employee in the Internal Audit Department who had personal expenses on his corporate AMEX card, Plaintiff provides no evidence that any of these other employees violated Defendant's policy. Even if the other employees were in fact violating Defendant's policy, Plaintiff has not identified a single employee that had dozens of personal charges on the card in violation of the policy. Accordingly, the Court cannot conclude that any of the other employees in the Internal Audit Department are similarly situated to Plaintiff." The court pointed out that all the "comparators" suggested by Berghorn had not offended to the degree that he had in terms of personal use of the AMEX card, and thus he failed to meet his burden to "prove that others similarly qualified but outside the protected class were treated more favorably." If one defines "protected class" in this context as consisting of employees who did not fail to conform to gender stereotypes, maybe the term makes analytical sense. But it is time for federal district courts to avoid sloppy language, recognizing that the clear language of Title VII does not involve "protected classes." All people are protected against discrimination because of their sex under Title VII, not particular "classes" of people. The Supreme Court has made that clear by upholding Title VII discrimination claims by men, and in its famous same-sex harassment case, *Oncala v. Sundowner Offshore*.

Berghorn is represented by Kalandra Nicole Wheeler and Rob J. Wiley, of Rob Wiley P.C., Houston, Texas. There have been recent opinions by 5<sup>th</sup> Circuit Court of Appeals judges reaffirming the circuit's rejection of sexual orientation claims under Title VII, so an attempt to appeal this summary judgment ruling might be seen as pointless spinning wheels. But, in hopes that the Supreme Court might affirm the 2<sup>nd</sup> Circuit's ruling in *Zarda v. Altitude Express* next term, it might be worth noting an appeal anyway . . . ■

## New Jersey Judge Rejects Plaintiff Anonymity in Same-Sex Harassment Case

By Corey L. Gibbs

A survivor of the Pulse Nightclub shooting in Orlando, Florida, sought legal help, but this help turned to harm and a lawsuit commenced in the Camden County Superior Court of New Jersey. John Doe, the plaintiff, anonymously alleged that the defendants violated the Consumer Fraud Act and are liable for employment discrimination. The defendants include the Law Office of Conrad J. Benedetto, John Groff, Conrad J. Benedetto, ABC Corps. 1-5, and John Does 1-5. Upon the defendant's filing of motions to dismiss, Judge Thomas T. Booth, Jr. dismissed the consumer fraud claims and said that the plaintiff could not plead anonymously. *Doe v. Law Office of Conrad J. Benedetto*, 2019 N.J. Super. Unpub. LEXIS 1033, 2019 WL (N.J. Super. Ct., Camden Co., May 3, 2019). Currently, all facts are based on the allegations made in the complaint.

At the same time, Judge Booth considered a motion by the same defendant in a similar case. The plaintiff in *Nunez v. Law Office of Conrad J. Benedetto* alleged virtually the same claims against the same defendants. 2019 N.J. Super. Unpub. LEXIS 1034 (2019). However, Brian Nunez was forthcoming with his identity, unlike Doe. Both plaintiffs are survivors of the shooting at Pulse Nightclub. Nunez claimed that Groff solicited survivors of the Nightclub shooting by creating a Facebook group titled "Survivors of Mass Shootings." Groff informed both Doe and Nunez that they had causes of action based on their presence at the shooting. Then the plaintiffs retained the Law Offices of Conrad J. Benedetto, where John Groff worked. After retaining the firm, they claimed that Groff sought to transform their professional relationships into something a bit more personal.

Doe said that it began with personal text messages, which were unrelated to the case at hand. After months of hearing nothing with regards to his case, the Law Office of Conrad J. Benedetto asked Doe to accompany Groff to Nevada and California following the Las Vegas Shooting. The law firm provided the finances for this trip. Groff sought Las Vegas shooting survivors to retain the Law Offices of Conrad J. Benedetto. Both Doe and Nunez chose to go on this trip, along with other survivors.

Doe alleged that the survivors were soon treated like employees. According to the facts of the complaint, Groff told the survivors, "Do your job and get other people to sign up." Later, Groff denied that this trip was the plaintiff's job. While this is not the typical form of employment, Judge Booth acknowledged that the Law Against Discrimination (LAD) also protect "individuals in a nontraditional employment relationship." Despite the request for dismissal on the ground that Doe and Nunez are not employees at the law firm, the judge ruled that a factual analysis would be needed.

Doe disclosed in his complaint that Groff harassed other survivors on the recruitment trip to Nevada. Doe claimed that Groff's attention turned to him once the California stint of the recruitment trip began. Groff began making sexual advances towards him which would persist throughout the trip. Because he had no money of his own to pay his way home, Doe endured Groff's persistence.

Groff sent Doe pornographic images, hoping to entice Doe to engage in sexual activities with him. Groff even asked that Doe cut his nails so that he would not scratch Groff if they were to have a sexual encounter. Groff sent Doe screenshots of someone who gave Groff a positive review regarding his ability to perform oral sex on other men. Doe was uninterested in this review and tried to ignore Groff.

Despite Doe's lack of interest, Groff proceeded to send a picture of himself lying with a younger man. Doe responded by texting, "I'm a good boy." Groff responded, " \* \* \* \* that." Groff then texted, "If you wanted to get your \* \* \* eaten I will do that too."

Judge Booth wrote that Groff "offered to perform other sex acts on plaintiff besides oral sex." Doe continued to express his disinterest.

Beyond the recruitment trip in which Doe and Nunez took part, both alleged that Groff has a prior history of criminal conduct, fraudulent behavior, unlawful intimidation, sexual harassment, and retaliation. The two further alleged that the Law Office of Conrad J. Benedetto was aware of Groff's past. Both cases referred to another lawsuit filed against the Benedetto law firm, *Carrasquillo v. Benedetto*, to show that there was a previous case focused on Groff's predatory behavior.

Judge Booth ruled on both Doe and Nunez on May 3, 2019. The judge dismissed the consumer fraud claims in both, because in New Jersey there is a "learned professional exemption." The defendants cited *Vort v. Hollander*, 257 N.J. Super. 56, 62 (1992), which states, "Attorney services do not fall within the intent of the Consumer Fraud Act."

Judge Booth did not dismiss the LAD claims in either case. The judge cited *Hoag v. Brown*, 397 N.J. Super. 34, 50 (2007), to show that New Jersey recognizes nontraditional employment relationships as protected from employment discrimination. Further, New Jersey codified protections from employment discrimination against one's "affectional or sexual orientation." Judge Booth stated that a factual analysis is needed to provide "a fully-developed factual record," because the only facts present are those in the complaints. Something to consider is that not every state provides these protections for LGBTQ+ individuals, and without these codified protections, both Nunez and Doe's cases may have been tossed out of court all together.

While both Nunez and Doe are very similar, Judge Booth distinguished them because of the anonymity present in Doe. Doe sought to keep his sexual orientation private. The judge contended that Doe's argument for continuing anonymously is not legally sufficient.

Doe cited *Doe v. Tris Comprehensive Mental Health, Inc.*, 298 N.J. Super. 677 (1996), to show that the court in that case

protected the identity of a gay person from public identification. However, Judge Booth stated, "In *Doe v. Tris Comprehensive Mental Health, Inc.*, the plaintiff was a physician who alleged employment discrimination based upon his status as a homosexual infected with HIV." The judge contended that a close reading of *Tris Comprehensive Mental Health* shows that the court provided anonymity only to homosexuals infected with HIV. In that case Judge Orlando stated, "A plaintiff should not be compelled to turn himself or herself into a social outcast in order to pursue a legally recognized right." The doctor claimed he was terminated because of his HIV status. Judge Booth found that "it was plaintiff's HIV positive condition" that was the reason he was allowed to sue anonymously. Thus, *Doe v. Law Office of Conrad J. Benedetto* is distinguishable. However, Doe is similar to the plaintiff in *Doe v. Tris Comprehensive Mental Health, Inc.*, because Doe faced discrimination and claims to have a fear of future harassment. Doe asserted that naming him in connection with the Pulse shooting was effectively outing him as gay, but Judge Booth, finding nothing in the record to show that only gay people frequented Pulse, rejected the necessary inference.

Judge Booth also referred to a *New York Times* interview that contained Doe's name as another reason behind rejecting the plaintiff's anonymous status. The argument that Doe's identity was previously disclosed in print and therefore can be exposed in a different form of public record, shows that perhaps this judge lacks sensitivity to the plaintiff's concerns. Disclosure of one's sexuality in one domain does not mean that the individual intends to disclose that particular information to the rest of society across all other domains. Doe expressed concerns that providing his identity in his pleading could subject him to future harassment.

Doe revealed his identity in the *New York Times* as a survivor of the Pulse Nightclub shooting. In the present case, Doe sued a man who exploited his victimhood and sexuality. The *New York Times* published the article nearly two

years after the events in Orlando. The events of this case occurred in the midst of the #MeTooMovement, as people are challenging exploitative relationships. The first instance of revealing himself occurred when the public was less engaged with the topic, and the plaintiff was comfortable revealing himself then. The current instance will force the plaintiff to reveal his homosexual identity at a time when the public is even more engaged with the topic at hand.

While the judge appears to abide by the precedent set by previous decisions, one might argue that when deciding whether anonymity should be allowed, a court should take a more nuanced approach. Despite the progress that some believe that the nation has made in terms of LGBTQ+ rights, many in the community continue to prefer privacy regarding their identification as gay. As rights of individuals continue to be chipped away during the Trump Era, maybe judges like Judge Booth should take into consideration the concerns of the people that seek justice in their courts. After all, a “close reading of the decision in *Doe v. Tris Comprehensive Mental Health*” shows that Judge Orlando considered the then-current “stigmatization of homosexuals because of the widespread fear of AIDS.” Perhaps Judge Booth should show similar sensitivity.

Both *Doe v. Law Office of Conrad J. Benedetto* and *Nunez v. Law Office of Conrad J. Benedetto* were decided on May 3, 2019, and both were designated by the court as unpublished decisions, although they appear on Lexis. Judge Booth ruled similarly in both cases by denying the motions to dismiss based on the LAD (Law Against Discrimination), but he granted the motions to dismiss based on the Consumer Fraud Act claim.

Brian Nunez is represented by Matthew A. Luber of McOmer & McOmer, P.C. John Doe is represented by Nellie Fitzpatrick. Both must amend their complaints and drop the claims alleging consumer fraud. However, John Doe must additionally provide his name if he wishes to proceed. ■

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## Transgender Inmate Beaten by Guards States Claims for Excessive Force, Deliberate Indifference to Injuries, and Denial of Equal Protection

*By William J. Rold*

Pro se transgender inmate Jennifer Amalie Rose, a/k/a John David Gann, filed a civil rights suit for damages after a severe beating by officers in *Rose v. Adair*, 2019 U.S. Dist. LEXIS 77209, 2019 WL 2009531 (E.D. Calif., May 7, 2019). U.S. Magistrate Judge Jeremy D. Peterson recommended that Rose be allowed to proceed on claims of excessive use of force, deliberate indifference to her health care, and denial of equal protection.

According to Rose, while confined at Kern Valley State Prison she was “viciously attacked” from behind by two officers (Adair and Harmon), who tackled her, forced her to the ground, beat and kicked her about the head and face, knelt on her, twisted her arms behind her back, and cuffed her. She says Harmon called her a “faggot” while kicking her. She was then lifted by her cuffed arms, and thrown onto asphalt by other officers (Franco and Rodriguez) who continued the beating, while she was helpless.

Rose says that the security defendants placed her in leg restraints and a “spit mask.” They then shackled her prone (face down) on a gurney. All of this was supervised by defendant Sergeant Moody, after which Rose was taken to the facility medical clinic. Rose also identifies inmate witnesses and says there is videotape of some of the events.

At the medical clinic, defendant licensed vocational nurse Agbayani refused medical care at the direction of Sergeant Moody. According to the pleadings, Agbayani falsified the medical record by writing “no injury, only dried blood” in Rose’s chart, despite her hemorrhaging. After about a half hour of inattention, security placed Rose in a standing only “holding

cell” for over four hours, until she was taken to segregation. On arrival, she received a nursing assessment. The nurse sent Rose to an emergency room, where she received multiple sutures for a four-centimeter forehead laceration and a CT-scan for her head injuries. Rose had “additional injuries,” per Judge Peterson’s decision. According to the pleadings, these consisted of contusions, bruises, and lacerations involving her right eye, her face and chest, both knees, and her right shin, as well as ligature lacerations to her wrists and ankles from restraints.

Rose’s allegations that the four officers used excessive force and that sergeant Moody organized and supervised them are sufficient to state a claim for violation of the Eighth Amendment under *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992) (force applied “maliciously and sadistically to cause harm”). This is true even if the injuries are not permanent. *Id.*; see also, *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (no lasting injury required).

The allegations against defendant LVN Agbayani also state a claim of deliberate indifference to Rose’s serious medical needs. Agbayani allegedly did nothing, then lied about Rose’s condition. While LVNs have restricted practice in California, per Calif. Bus. & Prof. Code §§ 2859, et seq., Agbayani should have referred Rose to a higher-level practitioner, as was done by the nurse who assessed her in segregation. In this writer’s view, acceding to a sergeant’s demand that medical staff not document or treat injuries is never justified by the law or by professional ethics. See National Commission on Correctional Health Care, *Standards for Prisons*,

P-A-03 (“Medical Autonomy”) (2008) (“Clinical decisions . . . are the sole responsibility of qualified health care professionals”). A prison that deviates from this standard cannot be accredited by the Commission.

Judge Peterson found that Rose’s injuries were serious because they required a hospital visit. He could have as easily found them serious because they were of a nature that even a lay person could identify as needing medical attention. Even an adolescent who has earned a Scouting merit badge in first aid would recognize the seriousness of a 4-cm head laceration, bleeding and unclosed. Moreover, basic first aid (in which all prison security employees should be trained) dictates that one does not shackle a head injury patient face-down; they should be placed on their back (supine), with their head elevated above their heart, if possible. They should never be made to stand for over four hours in a telephone-booth-sized cage.

California’s use of such cages at its prisons, with the acquiescence of the medical department, so outraged the Supreme Court that Justice Kennedy for the majority had a photograph of the cages printed as an Appendix to the Slip Opinion of the Court in *Brown v. Plata*, 563 U.S. 493 (2011) (Slip Op’n at 5, 52). Presumably this extraordinary inclusion served better than words to show the horror of such confinement to generations for whom the telephone booth was no longer ubiquitous. Judge Peterson’s opinion does not discuss Rose’s condition after she was left like this for hours with an open head wound.

Judge Peterson does not allow Rose to proceed with a deliberate indifference claim against any security defendants, although such a claim is allowed by the seminal case on correctional health care, *Estelle v. Gamble*, 429 U.S. 97, 104-5 (1976) (deliberate indifference can be “manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care”). Indeed, the case against security defendants, including the warden, was remanded in *Estelle*. Id. at 108.

Judge Peterson allows Rose to proceed on an Equal Protection claim—solely against defendant officer Harmon, who called her a “faggot.” He finds this actionable regardless of the scrutiny level applied to the discrimination, which he defers to a later day.

Hopefully, Rose will find counsel. Judge Peterson gives her leave to file an amended complaint. There is grist for that. Rose tried to raise a “hate crime” issue under state law, and Judge Peterson as much as calls the collective participation a conspiracy when he addresses the actions of the sergeant. An amended pleading could allege a conspiracy to violate Rose’s civil rights based on anti-LGBT animus by all defendants, imputing the explicit evidence against Harmon against all co-conspirators. Rose has asked for an extension of time to object/reply to Judge Peterson’s recommendations because she was transferred, her new facility was locked down, and she did not receive the decision until two weeks after it was issued. ■



## Illinois Federal Judge Advances Two Cases on Transgender Prisoner Rights

By William J. Rold

Many states with large urban centers incarcerate prisoners in remote rural locations. New York City’s inmates find themselves on the Canadian border; Detroit’s inmates, on Michigan’s Upper Peninsula; and Chicago’s inmates, in Southern Illinois farmland. For years *Law Notes* has covered the plight of transgender prisoners incarcerated in the Southern District of Illinois, focusing on plaintiff successes before Judges Nancy J. Rosenstengel and Staci M. Yandle and Senior Judge J. Phil Gilbert. The synopsis of the two Rosenstengel cases that follows continues in that vein. [Note: Federal Office of Court Administration records show two vacancies in the Southern District of Illinois. No nominations are yet pending from President Trump.]

The litigation of Deon (Strawberry) Hampton has been the subject of multiple *Law Notes* reporting. See November 2017 at pages 461-2, January 2018 at page 43, and February 2019 at page 35. Hampton, a transgender woman, has sued over issues including her treatment, safety, and Equal Protection in various male institutions. In 2018, joining the Illinois Secretary of Corrections (Baldwin) as a defendant, she sought transfer to a women’s prison. After Judge Rosenstengel granted a preliminary injunction requiring that Illinois consider same and report back to the court (also ordering defendants to develop a plan for staff training regarding transgender inmates), the issue was settled with the transfer of Hampton to a women’s prison, which is the subject of the report of February 2019. Now, in *Hampton v. Baldwin*, 2019 U.S. Dist. LEXIS 82087 (S.D. Ill., May 15, 2019), Judge Rosenstengel

allows Hampton to proceed on the merits of her claims.

Earlier this year, U.S. Magistrate Judge Reona J. Daly issued a Report and Recommendation [R & R], clearing the underbrush on exhaustion of administrative remedies under the Prison Litigation Reform Act. Examining in detail some twenty grievances filed by Hampton over the years, Judge Daly recommended that Hampton be permitted to proceed past exhaustion on all but two claims against some defendants. No one objected. This reporting omits this analysis.

Judge Rosenstengel adopted the R & R in full, allowing Hampton to proceed to the merits on the following: (1) an Equal Protection claim against defendant Baldwin in his official capacity “for refusing to place Plaintiff in a women’s prison;” (2) an Equal Protection claim against Baldwin and a warden in their official capacities for subjecting Hampton to “continued verbal sexual harassment due to her gender identity;” (3) an Eighth Amendment claim against officers (including John Does in their individual capacities, and against Baldwin and a warden in their official capacities, for “failing to ensure Plaintiff’s safety . . . despite their knowledge that she is vulnerable to abuse and sexual assault;” (4) an Eighth Amendment claim against two wardens in their individual capacities and against Baldwin and one warden in their official capacities for “placing Plaintiff in segregation, thereby exacerbating her serious mental health problems;” (5) an Eighth Amendment excessive force claim against two officers; (6) a claim under the Americans with Disabilities Act against Baldwin and a warden for “failing to provide Plaintiff with reasonable accommodations for her gender dysphoria disability;” (7) a *Monell* claim under 42 U.S.C. § 1983 against Baldwin and a warden in their official capacities for “ratifying and implementing unconstitutional policies related to transgender prisoners;” (8) a claim under the Illinois Hate Crimes Act against an officer in his individual capacity and against Baldwin and a warden in their official capacities

“to prevent the continued violation of Plaintiff’s rights under the Illinois Hate Crimes Act;” and (9) a claim for intentional infliction of emotional distress under Illinois tort law against Baldwin, two wardens, and some officers in their individual capacities.

Although Judge Rosenstengel refers to going forward on the merits, there are numerous issues remaining on these claim – like individual versus official capacity, personal involvement, and sovereign and qualified immunity – that are not addressed or are treated only in conclusory fashion. [Note: This writer does not know what Judges Daly and Rosenstengel mean by a “*Monell* claim” against Baldwin and the warden “in their official capacities.” *Monell* theory applies to municipalities’ and counties’ patterns and practices, not to suits against state officers in their official capacities, who cannot be sued for damages “officially,” due to sovereign immunity under *Hafer v. Melo*, 502 U.S. 21, 27 (1991), and *Will v. Michigan Department of State Police*, 492 U.S. 58, 71 (1989). They can be sued for an injunction to conform their conduct to constitutional requirements under *Ex parte Young*, 209 U.S. 123, 159-60 (1908); but this is not *Monell* theory.]

The second opinion by Judge Rosenstengel is *Tay v. Baldwin*, 2019 U.S. Dist. LEXIS 82089 (S.D. Ill., May 15, 2019) (same day as Hampton), involving transgender prisoner Tay Tay, who is still confined in a men’s institution. This is a screening of an initial pleading that Judge Rosenstengel allows to proceed against Baldwin, wardens, and several officers, including “John Does.”

Tay, who has identified as female for 27 years, raises claims under 42 U.S.C. § 1983 and the American with Disabilities Act (similar to Hampton’s claims) regarding her housing, safety, sexual abuse, and harassment in several Illinois prisons by staff and other inmates. She has made several attempts at suicide and has had self-mutilation episodes.

Judge Rosenstengel finds that Baldwin and the warden are appropriate official capacity defendants

for injunctive relief and for discovery (identification of the “John Does”), citing *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011); *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 832 (7th Cir. 2009). She indicates that she will issue an order setting a hearing date on the motion for a preliminary injunction that would transfer Tay to the women’s prison and will direct defendants to respond.

Hopefully, Judge Rosenstengel’s shots across the bow in these two cases will force a statewide transgender prisoner epiphany on defendants’ part that will settle for them and create policies for others like them – rather than continue to litigate before a judge who has shown her hand. Something like that happened in California, prompted by an individual settlement in the *Quine v. Beard* litigation, reported in *Law Notes* (November 2017 at page 460).

Hampton and Tay are represented by the MacArthur Justice Center, Northwestern University School of Law, and Uptown People’s Law, Chicago. ■



# Family's Prison Visits Suspended After Transgender Sister's Penis Showed on Security Screening; Federal Judge Stays Discovery Pending Qualified Immunity Determination

By William J. Rold

Transgender plaintiff, Donald (China) Nelson is the sister of prisoner Timothy Lenoir, whom she has visited at the Louisiana State Penitentiary for over 14 years. On September 10, 2017, Nelson went to the prison to visit Lenoir, accompanied by her mother and another brother. Upon seeing her male genitalia on a screening device, officers escorted her to a restroom and demanded that she remove her pants and underwear to display an “unknown object” in her crotch. She refused, explaining she has a penis. A supervisor and the officers took her to a private room and restated the demand; she again refused, saying she would forego the visit and wait for her family in the car. Shortly after she reached the car, the supervisor and about nine officers came outside the prison to the parking lot and demanded yet again that she strip and also allow them to search the vehicle, as a condition of leaving the premises. She refused to disrobe, but she allowed them to search the car. The rest of her family returned to the car at this point, having been denied their visit with Lenoir. Shortly thereafter, the visiting privileges of the entire family were suspended for six months, with no promise to reinstate the visiting.

Nelson brought a civil rights case in federal court as a result of these events. Her amended complaint against the Louisiana DOC Secretary and various “John Doe” defendants seeks injunctive relief and punitive damages, but it omits claims for compensatory damages from her original complaint. In *Nelson v. La. Dep't of Pub. Safety & Corr.*, 2019 U.S. Dist. LEXIS 78560 (M.D. La., May 9, 2019), U.S. Magistrate Judge Erin Wilder-Doomes issued a stay of all discovery because there is a motion to dismiss pending before Chief U.S. District Judge Rachell Lynn Dick, which includes a claim of qualified immunity.

Judge Wilder-Doomes' stay of discovery is not justified by law or by sound discretion. Before discussing Judge Wilder-Doomes' errors, it is appropriate to say something about the setting where these events transpired.

With over 6000 inmates and a staff of 1800, the Louisiana State Penitentiary – called “The Farm” – is the largest penal institution in the United States. It occupies the grounds of four contiguous pre-Civil War plantations, larger in area than Manhattan and surrounded on three sides by the bends of the west bank of the Mississippi River as it snakes south to Baton Rouge. It is so remote that its perimeter is not fenced.

The Farm has its own radio station, airstrip, post office, dairy, canning factory, and sugar mill. The Farm has the state's death row, the country's highest percentage of inmates serving life sentences (7 of 10), and its own cemeteries. It is common for inmates to serve thirty or more years at The Farm, and staff have worked there for generations.

The Farm has a reputation as a virtual charnel house of cruelty, violence, and lost existence for its inmates. Its corrections officers are the lowest paid in the United States. It has been the subject of hundreds of court cases; written exposés in magazines, newspapers, television, and film: “The Farm: Angola, USA” (1998); and “Dead Man Walking” (1995). The Farm is known as an insular setting with its own ways and culture. Most of its inmates, like Lenoir, do not anticipate parole. Visits are a lifeline for them and their families.

The U.S. Court of Appeals for the 5th Circuit set the legal parameters of strip searches of visitors to inmates at The Farm in *Thorne v. Jones*, 765

F.2d 1270 (5th Cir. 1985), cert. denied, 475 U.S. 101 (1986). The court found Louisiana's argument that a prison visitor had no Fourth Amendment right against an unreasonable strip search to be “meritless.” There must be a “particular” inquiry under “all the facts and circumstances,” which will “vary from case to case.” To strip search a visitor (or deny a visit for refusing same), prison officials must point to “specific objective facts and rational inferences that they are entitled to draw from those facts . . . .”

The Thorne court granted qualified immunity in that case because the law about searches of visitors was not clearly established when that search occurred (i.e., in 1981). The court wrote, however, that past “uncertainty” was overcome, and the law became “clearly established” with its decision that day. For 33 years, careful factual development has been required to present a claim of qualified immunity on prison visitor searches in the Fifth Circuit.

It follows that discovery should not have been stayed. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (discovery may be necessary to present the immunity question); *see also, Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994) (where “reasonableness” is legal test, summary judgment “can rarely be granted as to the questions bearing on the defendants' claims of immunity”).

While qualified immunity is before Judge Dick, the question of discovery is before Judge Wilder-Doomes. Plainly, factual development is needed to determine whether a demand for a strip search of a prison visitor is reasonable. When factual development is needed, ruling on motions for qualified immunity must await such development.

The stay of discovery is wrong for at least two other reasons. First, qualified immunity only applies to damage claims; it does not apply to injunctive claims. *Anderson v. Creighton*, 438 U.S. 636, 638 (1987). Nelson has both such claims here, as there is no finding that her visits have been reinstated.

Secondly, Nelson has sued “John Does.” She needs to be able to identify and serve them. The statute of limitations in Louisiana for federal civil rights claims is one year. *Harris v. Hegman*, 198 F.3d 153, 154 (5th Cir. 1999). Staying discovery on this point only delays service, making Nelson’s tolling arguments on timeliness more difficult.

In this writer’s view, the Magistrate Judge has lost both the forest and the trees. What was done in this case – following Nelson out to her car and demanding she strip in the parking lot where she presented no penological danger – and then banning the whole family’s future visits – was cultivated by transphobia at The Farm and a mentality that line institutional decisions must be defended, right or wrong. Discovery, including identification of defendants, as well as document production and depositions necessary to the decision on the motion to dismiss, should proceed. Otherwise, all progress will stop.

None of the cases in the last few paragraphs are cited in Judge Wilder-Doomes’ decision, which is limited mostly to generalities about the purposes of qualified immunity. Granted: where the question is one of law or one based on stipulated facts with no need for “reasonableness” development, discovery should be stayed pending a ruling on the law and any interlocutory appeal– which would be allowed as an exception to the final order doctrine under *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). That is not this case.

Here, Judge Wilder-Doomes relies on *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987), to justify her ruling. In *Lion Boulos*, the Fifth Circuit considered a challenge to a discovery order in a suit against government environmental officials who claimed qualified immunity. The district judge

allowed limited discovery of policies and directives, and development of what happened on three site visits (to include depositions of the agents who made the visits). Finding the limited discovery necessary to a resolution of the qualified immunity issue, the Court of Appeals dismissed the appeal, since the ruling was proper and not appealable as an interlocutory order resolving qualified immunity as a matter of law. *Lion Boulos* supports denial of a stay in this case. The “John Does” here are like the EPA agents deposed in *Lion Boulos*.

Finally, it should not be taking Judge Dick six months to rule on this silly motion to dismiss. The Supreme Court has noted that “in an obvious case [general] standards can ‘clearly establish’ [a right] . . . even without a body of relevant case law.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *see also, Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003) (qualified immunity not available to defendant who waited two hours to call an ambulance after a prisoner had lost consciousness from the heat since the delay was obviously unlawful).

Here, The Farm’s officers have seen penises on visitor x-rays thousands of times. Their actions (that extended even to the parking lot) were unjustified voyeuristic “curiosity.” Hopefully, one day, this case will join the string cite of cases of obvious abuse of authority.

Nelson is represented by Scott, Vicknair, Hair & Checki; and by AIDSLaw of Louisiana; both of New Orleans. ■



## Taiwan Becomes the First Asian Nation to Adopt Marriage Equality

By Arthur S. Leonard

Two years ago, the highest constitutional court of Taiwan (Republic of China) ruled that equality provisions of the nation’s constitution mandated that same-sex couples be allowed to marry, but gave the government a two-year grace period in which to adopt requisite legislation. The court stated that if legislation was not adopted by May 24, 2019, the opinion would go into effect of its own accord by adopting an interpretation of existing marriage law to be gender-neutral.

The ruling set off an intense debate in the legislature and among the public. Opponents of marriage equality, many citing religious objections, proposed referenda to gauge public opinion. Massive demonstrations were held, pro and con. Although the referenda could not in themselves overrule a constitutional decision, they might shape the scope of legislative action in the interim. Ultimately, referendum questions were placed on the ballot for late November 2018, producing a result that showed a sharply divided public, with a majority opposed to full marriage equality, but a significant portion of the public willing to see some legal status otherwise named made available for same-sex couples. The campaign around the referenda showed sharp divisions on the issue of gay parenting as well as the issue of marriage.

In the event, the issue came down to three alternative legislative proposals that came to a vote barely a week prior to the deadline set by the court. While it appeared at times that the legislature, influenced by the referendum outcomes, might adopt a measure to create a separate civil partnership status for

same-sex couples despite warnings that this might be found unconstitutional, in the end a proposal tendered by the government of President Tai Ing-Wen, a marriage equality supporter, that referred to marriage was adopted. At the same time, however, the legislation was not all-encompassing. The bill, back by members of the Democratic Progressive Party and passed by a vote of 66-27, allows same-sex marriages only between Taiwanese citizens, or with foreigners whose own countries recognize same-sex marriage. Enforcement Act of Judicial Yuan Interpretation No. 748 (passed on May 17 and signed into law on May 22). It allows adoption of children who are biologically related to at least one of the same-sex pair (what are called in some American courts “second-parent adoptions), but not joint adoptions of children who are not biologically related to either of the parents. There were predictions that passage of the controversial measure might imperil the re-election of the president.

To the extent that the legislation, which went into effect on May 24, did not extend full and absolute marriage equality, it may be subject to further challenges in the courts. The *Taiwan Times* reported that 526 same-sex couples appeared to register their marriages on May 24, out of which 15 registrations were between a Taiwanese national and a foreign national. The Ministry of the Interior reported that 185 were male couples and 341 were female couples.

*Taiwan News* reported on May 30 that the Ministry of the Interior was prepared to grant legal certificates recognizing “gay partnerships” between citizens of the Peoples’ Republic of China and citizens of Taiwan, but that regular marriage licenses would not be available as the Peoples’ Republic does not recognize same-sex marriages. It was reported that in the first week of marriage equality in Taiwan, there had already been two couples that included a PRC citizen who had successfully completed the process for registering a legal partnership.

Press reports heralded this as the first Asian country to allow same-sex couples to marry, although Taiwan is an island nation, not attached to the Asian continent. Taiwan’s “official status” as an independent nation is disputed by the People’s Republic of China, the mainland communist government, which considers Taiwan to be a rebellious province and officially does not recognize its independent status as a democratic republic. For its own part, the government in Taiwan is descended from mainland Chinese nationalists who fled to the island and established their political and military domination there under the leadership of Chiang Kai-Shek, after the communist revolution deposed the prior Republic of China and replaced it with the People’s Republic of China. The military dictatorship of the government-in-exile evolved to a democratic state in 1996 with the first election of a president. The United States ultimately shifted its recognition from the nationalists to the mainland government after the famous “opening” by President Richard Nixon, who controversially travelled to Beijing and met with Chairman Mao Tse-Tung. The United Nations had previously bowed to reality by conferring upon the mainland government China’s seat on the Security Council, which had been held since the founding of the U.N. by the nationalist government, despite its exile from the mainland. The possibility of the People’s Republic of China allowing or recognizing same-sex marriages seems remote, although that country’s view of homosexuality has liberalized somewhat in recent years. Hong Kong, the former British possession that was eventually returned to a quasi-self-governing status under the umbrella of the People’s Republic, has experienced marriage equality efforts through litigation, which has resulted in limited-purpose recognition for same-sex marriages of Hong Kong residents entered into elsewhere, but government officials remain opposed to extending full marriage rights to same-sex couples. ■

## Australia’s National Elections Maintain Conservatives in Power, Pledged to Protect Discriminatory Religionists

*By David Buchanan*

In a surprise result, the conservative Liberal/National Party coalition won the federal election held in Australia on May 18. Contrary to opinion polls, the coalition was not just returned to office but, on early results, increased their majority. This has implications for LGBTIQ rights because the coalition has promised to legislate for religious freedom.

In December 2017, after a divisive and painful plebiscite which nevertheless roundly approved of same sex marriage, same-sex marriage was legalized in Australia. To assuage angst in the more conservative sections of the country, the Liberal/National government promised to look at protecting religious freedom. In 2018, the Commonwealth (i.e. federal) government established a Religious Freedom Review which took evidence and reported that there was only a small minority of cases where the right to religious freedom had been infringed. Nevertheless, it made a series of recommendation for, in the main, policy and administrative actions to be taken to protect religious freedom.

Because of its potential to stir up the culture wars in an election when the government was down in the polls and wanted to appeal to the center, the government did not release this report for 7 months but, when it did, promised to revisit the issue if it won the election. However, for a short time the opposition Australian Labor Party waged an effective campaign for the protection of children from the risk of being expelled from church schools, to the point where

the opposition proposed legislation protecting also LGBT teachers. The government, on the back-foot, promised to legislate to protect school students, though not teachers.

In April, in the lead-up to the election campaign, a famed rugby player, Israel Folau, published a tweet saying that, unless they repent, gays and other sinners will go to hell. Folau, with his extended family, plays a large role in the Assemblies of God Pentecostal Church. He said that he was exercising his freedom of religion. Because he had been warned after previous similar statements, Folau faced a lengthy hearing by Rugby Australia into whether he had committed a 'high level' breach of his contract. He was found to be in breach and, the day before the election, the hearing panel handed down its decision that the contract should be terminated. He has since decided not to appeal. He has also lost his major sponsor. However, there are numbers of other rugby players in Australia from countries in the South Pacific who share Folau's religious faith (if not his denomination) and many of them have spoken out on Folau's side and against Rugby Australia. The Folau case has stirred up considerable controversy in this football-mad country.

The right-wing, particularly the Murdoch press, which has a large slice of the Australian media market, leapt upon the Folau case during the election campaign. The Prime Minister, Scott Morrison, was asked whether he thought gays should go to hell and, for a while, avoided answering the question. The then-opposition leader, Bill Shorten, slammed Morrison for this (on election night, Shorten resigned as leader of the parliamentary ALP) and Morrison eventually said he did not so believe. Morrison, however, is himself a member of a Pentecostal church and, during the election campaign, arranged to be photographed worshipping. Morrison then reiterated that the issue of protection of religious freedom would be revisited. Morrison has a track record on LGBTI issues. Despite the outcome of the plebiscite, he was one of four conservatives who

abstained during the vote on the bill to legalize same-sex marriage. He has also publicly denigrated sexuality and gender diversity training in schools as "gender whispering".

After the election, Morrison reiterated that he will legislate for religious freedom, and did not mention the protection of gay students. The Murdoch press has crowed that protection of religious freedom was a "sleeper" issue in the election and contributed to the surprise result for the government, particularly in electorates with large Muslim populations.

Despite it being contrary to a recommendation of the Religious Freedom Review, a likely move will be the establishment within the Commonwealth Human Rights Commission of a Religious Freedom Commissioner. Other moves, including implementation of a number of the Review's recommendations, face constitutional difficulty because, broadly speaking, religion and education fall within the remit of the States rather than the Commonwealth. However, it can be expected that the Commonwealth government will pressure the States, especially those with coalition governments, to implement state-based changes to protect religious freedom. In particular, the Commonwealth is likely to pressure states which presently do not do so to amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's religious belief or activity.

Watch this space! ■

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## Gay Fathers Loose Battle over Foreign Birth Certificate before Italian Supreme Court

*By Matteo M. Winkler*

On May 7, 2019, a nine-judge panel representing the Joint Divisions (Sezioni Unite) of the Italian Supreme Court (Corte di Cassazione) delivered a ruling concerning a gay man who sought the registration (trascrizione) of a foreign birth certificate reporting himself as the father of two children in addition to the children's biological father (No. 12193/2019, *Procuratore Generale presso la Corte d'Appello di Trento and others v. X & Y as parents of A & B*).

The case concerned a gay couple residing in Trento, in Northern Italy, who got married in Canada in 2008 and gave birth to two children via surrogacy two years later. Two women, an egg-donor and the carrier, took part in the process, at the end of which the biological father obtained a parental order from the Superior Court of Ontario declaring him as the sole parent. For this first order, the related birth certificate was registered in Italy without odds (this outcome is dictated by European Court of Human Rights, *Menesson v. France*, App. No. 65192/11, [2014] ECHR 664 and *Labassee v. France*, App. No. 65941/11, [2014] ECHR 668, June 24, 2014).

In a subsequent moment, the intentional father obtained a parental order from the same Superior Court, which he attempted to have registered in Italy. The civil status office refused, claiming that a birth certificate reporting two fatherd was against public policy. The couple decided to sue in court not by filing an appeal against the office's denial, but by directly seeking the recognition and enforcement of the Canadian birth certificate before the competent court of appeals under

Article 67 of Law No. 218 of May 31, 1995 (Reform of the Italian System of Private International Law). The Court of Appeals of Trento granted the petition (*In Re X & Y*, Feb. 23, 2017). The government appealed against this judgment and the Supreme Court opted for a joint divisions proceeding, which typically occurs for “particularly important issues” (Art. 374(2) of the Italian Code of civil procedure).

In Italy, a law enacted in 2004 after a heavily ignited debate established the access to medically assisted procreation procedures (MAPP) only to couples of the opposite sex, either married or cohabiting on a stable basis, and punished “surrogate motherhood” (*maternità surrogata*) with harsh criminal penalties (from 6 months to 2 years imprisonment and from 600,000 to one million euro fine: Article 12(6) of Law No. 40 of Feb. 19, 2004, Provisions on Medically Assisted Procreation).

Furthermore, the Law on Same-Sex Civil Partnerships passed in 2016 [No. 76/2016, rep. *LGBT Law Notes* 226 (2016)] deliberately avoided taking a position over same-sex parenting, making the judicial discretion for stepchild adoption continue operating [see Matteo M. Winkler, *Italy’s Gentle Revolution: The New Law on Same-Sex Partnerships*, 25 *Digest – National Italian American Bar Association Law Journal* 1, 26 (2017); Nicola Cipriani, *Unioni Civili: Same-Sex Partnerships Law in Italy*, 3 *Italian L. J.* 343, 353 (2017)].

As a result, same-sex couples are forced to move to surrogacy-friendly jurisdictions in order to realize their procreative plans. Once they have obtained the birth certificate mentioning both of them as legal parents, they seek recognition and registration (*trascrizione*) in Italy on the basis of the above mentioned Article 67 of Law No. 218/1995, which establishes the automatic recognition of foreign civil status deeds provided that they are not against international public policy.

The Joint Divisions built on a precedent handed down by a single chamber of the Supreme Court in 2016 in favor of a lesbian couple and

their child born in Spain through an anonymous donor [*X & Y v. Ministero dell’Interno*, No. 19599 of Sept. 30, 2016, rep. *LGBT Law Notes* 470 (2016)]. There the court had held that the couple was entitled to have the birth certificate issued by the Spanish authorities registered in the Italian civil status registry since recognizing two women as one child’s parents is not against international public policy. Moreover, the court had elaborated on a notion of international public policy that was restricted to constitutionally mandated and defined statutes (*leggi costituzionalmente necessarie; leggi a contenuto costituzionalmente vincolato*), whereas provisions that allowed legislative discretion were not included in such a notion. From this standpoint, MAPP regulations are not constitutionally mandated and therefore were considered not to be part of the international public policy. Finally, the continuity of the civil status acquired in the country of birth was consistent with the best interest of the children involved, thus avoiding cross-border “limping” situations where the same children have two legal fathers in a country and one only in another.

The Joint Divisions disagreed with this view, stating, on the one hand, that Law no. 40/2004 was “constitutionally necessary” and, on the other, that “the legislative discretion cannot be downgraded to cheap regulation.” Under this view, the prohibition of surrogacy is part of the country’s international public policy and the reproductive rights of same-sex male couples should be insulated from those of female ones.

In this respect, the Joint Divisions distinguished the case of a female couple, where both the procreative plan and the MAPP are exhausted inside the couple’s boundary, from that of a male couple resorting to a carrier. Whereas the former case is simply a MAPP with a heterologous insemination, which is currently permitted under Italian law (see Constitutional Court, No. 162 of June 10, 2014), the latter represents a true surrogacy, still subject to a statutory ban. In light of these considerations,

the Joint Divisions concluded that recognizing and registering a foreign birth certificate reporting two men as a child’s legal fathers would infringe upon the existing statutory ban on surrogacy and therefore be against the international public policy.

Finally, the Joint Divisions observed that the statutory ban on surrogacy is meant to protect “fundamental values such as the carrier’s human dignity and the institution of adoption.” The best interest of the child cannot prevail over these values, but the intentional father is still entitled to file in court to obtain the stepchild adoption of his children [see It. Supreme Court, June 22, 2016, No. 12962, rep. *LGBT Law Notes* 283 (2016)]. ■

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# LGBT Rights Campaigners in Kenya Lose First Round of Challenge to Sodomy Law

By Arthur S. Leonard

The much-anticipated ruling by the High Court of Kenya at Nairobi in Petition No. 150 of 2016, a constitutional challenge the country's sodomy law – essentially a holdover from British colonial times – was, in the event, a great disappointment to LGBT rights campaigners in the country. After some delays, the three-judge panel released its ruling on May 24, rejecting the constitutional challenge.

While conceding that courts in many other English-speaking countries had declared such laws unconstitutional, the court emphasized that interpretation of Kenya's unique Constitution required reference to the beliefs and values of the people of Kenya, who overwhelmingly oppose homosexuality, and that when the Constitution was being constructed, there was a decisive determination to reject the possibility of same-sex marriage, and to forbid it in Article 45(2). This seemed decisive to the court, even though this case was not challenging the constitutional ban on same-sex marriages, but rather the criminalization of private, consensual same-sex conduct between adults.

"The values and principles articulated in the Preamble of the Constitution . . . reflect the historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya," the court asserted. "Essentially, this affirms that the progress of the Kenyan nation and the realization of the aspirations of its citizens are predicated on the institutionalization and infusion of those values into all segments of the Kenyan society. In that regard, Article 11 further recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation . . . It is common ground that during the Constitution making process, the issue of same sex

marriage was one of the issues raised, discussed, and a recommendation was made outlawing same sex marriage. The final CKRC Report at paragraph 8.7(h) on Family and Marriage recommended the recognition of marriage only between individuals of the opposite sex and the outlawing of same sex unions."

The court rejected the petitioner's argument that "sexual orientation is innate," conceding that if it were to agree with that argument its analysis might be different, stating, "We also appreciate that if they were born that way, they have rights like everyone else. In appreciation this position we must uphold the spirit and intention of the Constitution . . ."

"We are unable to agree with the Petitioners that the impugned provisions violate the Constitution or their rights to dignity and privacy. If we were to be persuaded that the Petitioners' rights are violated or threatened on grounds of sexual orientation, we find it difficult to rationalize this argument with the spirit, purpose and intention of Article 45(2) of Constitution," which forbids same sex marriages. "In our view, decriminalizing same-sex sexual activity on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45(2). The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution."

The court rejected arguments that the penal provisions were unconstitutionally vague, or that they offended equality principles, pointing out that the statute forbids "unnatural sex" for anybody, regardless of their

sexual orientation. The court also suggested at several points that the petitioner's generalized arguments about discrimination and unequal treatment were posed in hypothetical terms, such that the petition lacked any reference to concrete instances of unfair treatment. The implication was that a lawsuit initiated by a person who was arrested and severely mistreated might prompt a different sort of ruling than what the court saw as a hypothetical test case.

The court's discussion of the merits of the petition was confined to a few pages at the end of an extended written opinion, which was mainly devoted to a lengthy, discursive recounting of Kenyan jurisprudential principles, ultimately reiterating many times that the Constitution must be construed within the context of Kenyan popular culture and traditions, minimizing the relevance of rulings by foreign courts, even those in countries whose sodomy laws were, like Kenya's, introduced through British colonial rule. In arguing to the court, the government invoked religion as a significant factor in determining that "unnatural" sexual acts must be subject to criminal punishment.

A High Court ruling is subject to appeal to the Court of Appeal and thence to the Supreme Court, and petitioners expect to perfect their appeal promptly. ■



# CIVIL LITIGATION *notes*

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## 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** – Still pending at the Supreme Court at the beginning of June was the petition for certiorari filed by the proprietor of an Oregon bakery who was found to have violated the state’s public accommodations law by refusing to make a wedding cake for a same-sex couple. *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507 (De. 28, 2017), review den’d, 363 Or. 224 (June 23, 2018), petition for certiorari filed November 21, 2018, No. 18-658. Earlier in the term, the Court granted petitions to review three cases putting into play the question whether federal sex discrimination laws cover claims of discrimination because of sexual orientation or gender identity. Those cases will be argued early in the Fall 2019 Term of the Court.

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**U.S. COURT OF APPEALS, 8TH CIRCUIT** – An 8<sup>th</sup> Circuit panel has affirmed a ruling by U.S. District Judge Beth Phillips, 2017 WL 6815041 (W.D. Mo.), that the city of Springfield, Missouri, did not violate the 14<sup>th</sup> Amendment’s Equal Protection Clause by enacting an indecent exposure ordinance that prohibits women from exposing their breasts and nipples in public but is indifferent to such exposure by men. *Free the Nipple – Springfield Residents Promoting Equality v. City of Springfield, Missouri*, 2019 WL 1984498, 2019 U.S. App. LEXIS 13481 (May 6, 2019). In a *Per Curiam* opinion, the court noted that “the majority of courts considering equal protection challenges have upheld similar laws prohibiting women, but not men, from exposing their breasts,” although it also noted a recent 10<sup>th</sup> Circuit ruling, in

*Free the Nipple – Fort Collins v. City of Fort Collins*, 916 F.3d 792 (2019), which held that an equal protection challenge to such an ordinance was “likely to succeed on the merits,” and a ruling to similar effect by the New York Court of Appeals in *People v. Santorelli*, 80 N.Y.2d 875 (1992). District Judge Phillips had relied on *Ways v. City of Lincoln*, 331 F.3d 596 (8<sup>th</sup> Cir. 2003), to find that the “gender-based classification was related to the City’s legitimate interest in prohibiting nudity and promoting morality.” FTN argued on appeal that “the law is based on impermissible stereotypes.” In *Ways*, the circuit court had concluded that “the city’s interests in preventing the secondary adverse effects of public nudity and protecting the order, morality, health, safety, and well-being of the populace are important” and that the “ordinance is substantially related to those objectives.” The court rejected the argument that the Supreme Court’s opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), which rejected “moral disapproval” as a justification for a criminal prohibition, had rendered its own precedent obsolete. The court asserted that *Ways* had recognized justifications apart from moral disapproval for the distinction made by the ordinance. The panel said it remained bound by *Ways* and was compelled by circuit precedent to affirm the district court. Time for *en banc* review? What nobody will openly talk about in these cases is that viewing the sight of an undraped female breast as a cause of social disorder and moral depravity while viewing an undraped male breast is a completely unremarkable event with no secondary effects worth addressing totally ignores the erotic attraction of undraped male breasts for gay men!! Perhaps the response to that is that, as a social phenomenon, the sight of undraped female breasts incites heterosexual men to disorderly conduct, while gay men are more restrained in their response to the visual enticements of undraped male

breasts, and that heterosexual women who might be aroused by the sight of male nudity are not thereby inclined to engage in public disorderly conduct, thus justifying the distinction made by the law? We hesitate to speculate further here, but look forward to the day when the U.S. Supreme Court will devote hearing time to an equal protection argument about the exposure of female nipples in public.

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**U.S. COURT OF APPEALS, 9TH CIRCUIT** – The State Department has noticed its appeal in *Dvash-Banks v. Pompeo*, 2019 WL 911799, 2019 U.S. Dist. LEXIS 30525 (C.D. Cal., Feb. 21, 2019), in which District Judge John F. Walter construed the existing statutory framework contrary to the position taken by the Department in a case where a married male same-sex couple is claiming birthright citizenship for one of their sons who was conceived using sperm from the spouse who is not a U.S. citizen, for the purposes of a surrogacy arrangement carried out in Canada. The State Department refused the request for U.S. documentation of citizenship for the child, who was allowed to enter the U.S. on a visitor’s visa together with his father, who is lawfully present in the U.S. as the spouse of a U.S. citizen, the co-parent of the child and biological father of his fraternal twin, conceived through the same surrogacy arrangement. The State Department’s position is in derogation of the requirement under *Obergefell v. Hodges* that same-sex marriages be treated the same for all legal purposes as different-sex marriages. The State Department takes the position that it is not discriminating, merely applying a literal requirement that to be considered a birthright citizen of the U.S., an individual has to have at least one *biological* parent who is a U.S. citizen. That both men are listed on the child’s Canadian birth certificate as parents of the child doesn’t matter to the State

# CIVIL LITIGATION *notes*

Department. Judge Walter disagreed, characterizing the Department's interpretation of the relevant statutory provisions as "strained." Now that the 9<sup>th</sup> Circuit features half a dozen judges appointed by Donald Trump, who knows what the outcome of this appeal might be? But it seems strange that the State Department (and, presumably, the Justice Department) would be devoting significant resources for the purpose of splitting up an intact family. And this is not the only case where they are applying this "strained interpretation" to refuse citizenship status to children of LGBT married couples, according to press reports. Where are their vaunted "family values?"

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**CALIFORNIA** – The office of San Francisco City Attorney Dennis J. Herrera filed suit on May 2 in U.S. District Court challenging the Final Rule announced by the U.S. Department of Health & Human Services, privileging employees of health care providers to deny services based on their religious beliefs. *City and County of San Francisco v. Azar*, Case 3:19-cv-02405 (N.D. Cal.). The suit seeks declaratory and injunctive relief. The complaint charges that in the Final Rule, HHS's Office of Civil Rights (OCR) "appropriates language from civil rights statutes and regulations that were intended to remedy discrimination, and applies it in a manner that will, in fact, increase discrimination and disparities in Health Care." The Complaint explains that the rule requires San Francisco "in any and all circumstances – to prioritize providers' religious beliefs over the health and lives of women, lesbian, gay, bisexual or transgender people, and other medically and socially vulnerable populations. If San Francisco refuses to comply, it risks losing nearly \$1 billion in federal funds that support critical health care services and other vital functions." The Complaint describes the rule as a "perversion of OCR's mission,"

and insists that San Francisco "will not abide it." The Complaint alleges that the new rule exceeds statutory authority, is contrary to law, is arbitrary and capricious in violation of the Administrative Procedure Act, violates the Establishment Clause by preferring religion, violates the separation of powers by legislating, violates the Spending Clause of the Constitution, and finally violates Due Process because it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" or to "provide explicit standards for those who apply them." \* \* \* Lambda Legal, Americans United for Separation of Church and State, and the Center for Reproductive Rights filed suit on May 28 in the U.S. District Court for the Northern District of California, seeking declaratory and injunctive relief against the U.S. Department of Health and Human Services and Secretary Alex M. Azar, II, seeking to block implementation of the Trump Administration's new regulation authorizing anybody employed by a health care organization to deny services to individuals based on the employee's religious beliefs. The regulation would prohibit health care employers from disciplining employees who refuse to provide services, and is so wide-ranging, according to the complaint, that it extends beyond employees directly involved in providing care to such people as receptionists and ambulance drivers. The complaint in *County of Santa Clara v. U.S. Department of Health and Human Services*, Case No. 5:19-cv-02916, asserts that this regulation's adoption violates the Administrative Procedure Act, is inconsistent with the federal statutes that it purportedly interprets, and violates the Constitution on several grounds. Attorneys on the complaint include Richard B. Katskee, Americans United for Separation of Church and State; Genevieve Scott, Center for Reproductive Rights; Jamie A. Gliksberg, Lambda Legal; James R. Williams, Greta S. Hansen, Laura S.

Trice, Susan P. Greenberg, and H. Luke Edwards, Office of the County Counsel, Santa Clara County, California; and Lee H. Rubin of Mayer Brown LLP, Palo Alto, local counsel.

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**CALIFORNIA** – Dante Michelucci, formerly employed as a Napa County correctional officer, filed a multi-count complaint consisting of federal and state claims in U.S. District Court for the Northern District of California, claiming constructive discharge, violations of his due process and equal protection rights, violations of California anti-discrimination law, and interference with his rights under the federal Family and Medical Leave Act. The complaint is directed against Napa County and three county employees. The story recounted in District Judge Haywood S. Gilliam, Jr.'s, opinion on Napa County's motion to dismiss some, but not all, of the claims, is too lengthy to relate at length here, but is set out in admirable detail by Judge Gilliam. See *Michelucci v. County of Napa*, 2019 U.S. Dist. LEXIS 7640, 2019 WL 1995332 (N.D. Cal., May 6, 2019). As relevant here, it suffices to note that Michelucci documented an extended campaign of harassment against him for being perceived as bisexual or gay, and for his championing an African-American trainee he was supervising against whom the harassers were biased because of the trainee's race. Michelucci alleges that his complaints to county officials did not produce any investigation until after he suffered a breakdown as a result of the harassment, going on FMLA leave at the direction of his doctor. The precipitating incident for his resignation was that he was charged with failing to cooperate with the belated investigation because he declined to attend an interview while he was out on medical leave. For him, that was apparently the last straw, and he quit. Judge Gilliam found that his due process and equal protection

# CIVIL LITIGATION *notes*

claims against Napa County failed under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because he failed to allege facts that would show that the county had a policy of denying due process to employees or of denying equal protection on the grounds alleged in his complaint. However, the court declined to grant the County's motion to dismiss his associational race discrimination claim. "Though Michelucci's race discrimination association theory is not particularly well-developed," wrote Gilliam, "the Court finds that he has pled sufficient facts to avoid dismissal. Michelucci alleges that Defendants 'harrassed' him when 'he refused to fail or disqualify' an African-American trainee because they 'simply did not want to work with an African-American correctional officer.' Although Michelucci does not explain exactly what this instance of harassment consisted of, he has pled numerous and detailed examples of the harassment and discrimination he faced at work, such that the Court cannot conclude that this allegation is merely conclusory. And Michelucci has adequately pled that this discrimination was on account of his association with or advocacy for the trainee, who Defendants did not want to work with because of his race." The court also rejected the County's argument that demanding the plaintiff come to an interview during his medical leave could not be held to violate the FMLA, noting Michelucci's argument that the County "used the investigation as a 'sword' by demanding that he attend an interview and cooperate with their investigation – and then accused him of failing to cooperate when he responded that he was on leave. Construing the facts in the light most favorable to Michelucci, as the Court must do on a motion to dismiss, these allegations are sufficient at this stage to state a claim for FMLA interference because they go far beyond requiring periodic reporting or other de minimis, work-related contacts, and could support a finding

that Napa County used the investigation to discourage Michelucci from taking FMLA leave. The motion did not address plaintiff's direct discrimination claims under the California Fair Employment and Housing Act, or claims against the individual defendants in their personal capacities. Michelucci is represented by David M. Poore of Brown Poore LLP, Walnut Creek, and James Mills of Oakland.

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**ILLINOIS** – The employer-defendant professed to be confused by the plaintiff's statement in his complaint that he was a "non-sex male-gender identity person" and moved for a more definite statement prior to answering the complaint. U.S. District Judge J. Phil Gilbert rejected the motion. *Davis v. Deep Rock Energy Corp.*, 2019 U.S. Dist. LEXIS 83651, 2019 WL 2162086 (S.D. Ill., May 17, 2019). According to Judge Gilbert's opinion, David Davis "filed this case complaining that Deep Rock, his former employer, discriminated against him because he was a male and failed to act and appear according to expectations defined by gender. He claims this violated Title VII . . . and the Illinois Human Rights Act." Davis claims that he was meeting the employer's performance expectations but that "when Deep Rock found out in July 2018 that he sometimes dressed as a woman while not at work, Deep Rock's president told David he could not work for Deep Rock anymore because Deep Rock could have 'someone like that' working for the company." In his complaint, Davis pleads that "similarly-situated non-sex male/gender identity persons' were treated differently than he was in that they were not discharged." His Title VII claim is phrased as "gender stereotyping" and his Illinois state law claims as discrimination on the basis of sexual orientation. Deep Rock's motion claims that Davis's factual allegations are "vague and, at times, unintelligible," and that Davis never

clearly states in the complaint "when he considered himself discharged and whether it was an affirmative discharge or a constructive discharge." Judge Gilbert agreed with Davis that the complaint was "sufficiently clear to allow Deep Rock to respond," writing that "although some of his language is a bit confusing, overall the pleading is not so unintelligible that a more definite statement is necessary to enable Deep Rock to reasonably prepare a response. It is clear that Davis is complaining that, when the company found out he was a man who sometimes dressed like a woman, it said he could not work there anymore. Furthermore, any confusion in the details can be easily clarified by a few deposition questions or contention interrogatories. There is simply no need to require Davis to provide more details at the pleading stage of the litigation." Davis is represented by James Albert Devine of Springfield, IL.

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**INDIANA** – Reversing the Marion Superior Court, the Court of Appeals of Indiana held in *G.F. v. St. Catherine Hospital, Inc.*, 2019 Ind. App. LEIS 204, 2019 WL 1983837 (May 6, 2019), that an HIV-positive patient's breach of confidentiality claim against his doctor and the hospital where he was being treated for pneumonia was not within the scope of the Indiana Medical Malpractice Act (MMA), but instead was an ordinary negligence claim that he could pursue free of the strictures and limitations of the MMA. J.F. was being treated at St. Catherine for "pneumonia-related symptoms." While a co-worker was visiting in his hospital room, Dr. Vatsal Patel entered the room and told G.F. that his "CD4 count is low . . . you need to see your infectious disease doctor as soon as you can!" J.F.'s co-worker "had a prior family experience with HIV" and she "immediately understood the implication of Dr. Patel's communication to G.F.," wrote Judge Patricia Riley for the court,

# CIVIL LITIGATION *notes*

continuing: “As soon as Dr. Patel exited the room, G.F.’s co-worker voiced her understanding of Dr. Patel’s statement: as her step-brother had died from HIV/AIDS, she recognized the inferences of discussing CD4 counts with an infectious disease doctor. Four days later, Dr. Patel phoned G.F. to apologize for what he said in front of G.F.’s co-worker. Dr. Patel had assumed the co-worker was G.F.’s fiancée.” But the cat was out of the bag. When he returned to work, G.F. alleges, he was shunned by the co-worker and by others to whom he believes she spread this information. He filed a proposed complaint for breach of confidentiality with the Indiana Department of Insurance, as he apparently thought was required by the MMA, and five months later filed an anonymous complaint for damages in Lake County Circuit Court. Defendants moved to dismiss the Circuit Court case for failure to state a claim, citing the MMA, but their motion was denied promptly by the trial judge. Subsequently, the Medical Review Panel found no breach of care by the hospital, and opined that G.F.’s allegations against Patel hinged upon “a material issue of fact not requiring expert opinion, bearing on liability for consideration by the court or jury.” G.F. then initiated this action in Marion County Superior Court against both defendants, seeking a declaratory judgment that his claim fell outside the ambit of the MMA, and moved for judgment on the pleadings. Defendants got permission from the court to file an untimely response, arguing that the MMA covered this claim. The Court of Appeals held, *inter alia*, that the trial court erred in allowing the late responsive filing. The trial court held that having first filed a charge under the MMA, G.F. could not file an ordinary negligence claim against the defendants. Judge Riley’s opinion reviewed Indiana case law distinguishing between medical malpractice claims and ordinary

negligence claims, and decided that this breach of confidentiality claim fell on the ordinary negligence side of the line. “Here, the communication by Dr. Patel had the dual effect of providing medical information to G.F., while at the same time, an inadvertent broadcast disclosed confidential information to the visitor, a third party. It is this disclosure of confidential information that is the focus of G.F.’s claim; not the services provided by Dr. Patel. At no point did the broadcast of confidential information to the third party constitute a health care treatment to G.F., nor did Dr. Patel’s statement of G.F.’s HIV status to a third party have a curative or salutary effect on G.F.” The court also found that no expert testimony on standard of care would be required to determine liability on this claim, putting it outside the ambit of the MMA. The court also rejected the argument that because G.F. had first file a proposed complaint with the Malpractice Medical Review Board, he had made some sort of election of remedy precluding his negligence claim against the defendants. G.F. is represented by Neal F. Eggeson, Jr., of Fishers, Indiana.

**NEW JERSEY** – A Monmouth County jury ruled in favor of a former New Jersey police officer who claimed he was discriminated against by Sea Girt Police Chief Kevin Davenport because he believed plaintiff Kenneth Hagel was gay. Hagel also alleged that Davenport blocked Hagel’s promotion to sergeant because of periodic absences to fulfill his obligations as a U.S. Navy Reserve member. The jury awarded Hagel compensatory damages of \$262,800 for lost salary and benefits, \$500,000 for emotional distress, and \$1 million in punitive damages. Chances are that the full amounts will not be collected, as usual in these kinds of cases, where the parties are likely to negotiate a settlement for somewhat less in exchange for Sea Girt’s agreement not

to appeal the verdict. But who knows? *Associated Press*, May 31.

**NEW YORK** – In *Cipolla-Dennis v. County of Tompkins*, 2019 U.S. Dist. LEXIS 84291 (N.D.N.Y., May 20, 2019), U.S. District Judge Thomas J. McAvoy relates in the detail Joanne Cipolla-Dennis’s account of how she was stymied in her attempt to get the Tompkins County Public Safety Committee and the County Board to address her complaints about a police officer who was allegedly dealing unfairly with LGBT people. The plaintiff, a lesbian, appeared to present her views at public meetings, also seeking present a statement that was prepared by the LGBTQ Action Team of the First Unitarian Society of Ithaca. She claims that these bodies were violating her First Amendment rights as well as the state’s open meetings law, but much of her case was reduced by Judge McAvoy’s May 20 ruling on pre-trial motions, although she was given leave to replead various of her claims if she could come up with the kind of factual allegations that would support a legal claim. She charged that the legislators initiated rules for speakers at public session intended to deter her participation, and that a gay man who also sought to speak was similarly disrespected. The court granted in part and denied in part the defendants’ motion to dismiss the case, finding non-actionable events that occurred more than three years before the complaint was filed, found that the rules devised by the legislature to govern the participation of public members in the meetings were content-neutral and not constitutionally objectionable and did not serve as prohibited “prior restraints” on speech. The main objection voiced by legislators to plaintiff’s statements were that they were aimed at county personnel matters that the legislators deemed inappropriate for public discussion, noting that the policy chief offered to meet

# CIVIL LITIGATION *notes*

privately with Cipolla-Dennis to get her complaints. As to her open meeting law claim, the court pointed out that the law requires sessions to be held in public, but does not require the public bodies to allow members of the public to speak during their meetings. However, the possibility remains that through repleading the plaintiff will be able to get some judicial review on her claims of being discriminatorily precluded from present her message. Plaintiff is represented by attorney Edward E. Kopko of Ithaca.

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**NEW YORK** – A gay Muslim who was hired by Morgan Stanley claimed that he was being subjected to sexual harassment because of his sexual orientation in violation of Title VII and the New York State and City Human Rights laws. He filed a John Doe complaint in U.S. District Court in Manhattan (S.D.N.Y.) last December 10, but Morgan Stanley asserted that he should have to sue in his own name. After District Judge Denise Cote ruled that the plaintiff could not proceed anonymously, Mahmoud Latif filed an amended complaint on May 23 reasserting his claims. Morgan Stanley then contended that the case had to go to arbitration because of an agreement Latif had signed, but Latif is arguing that under a New York law adopted in 2018, plaintiffs whose “primary” allegations concern sexual harassment are not required to arbitrate their claims. The headline under which this was reported in Bloomberg Law’s Daily Labor Report (May 6) tells the tale: “Morgan Stanley Worker Cites #MeToo Law to Keep Case in Court.” Stay tuned for the continuing saga of *Latif v. Morgan Stanley & Co. LLC*, Case 1:18-cv-11528-DLC-JLC (S.D.N.Y.). Latif, who is seeking a jury trial is seeking punitive damages, attorney’s fees, costs and disbursements, and “such relief as the Court deems just and proper.” He is represented by Abe Melamed of Derek Smith Law Group, PLLC, New York.

**OHIO** – The Lyceum, a Catholic high school in South Euclid, Ohio (a suburb of Cleveland), professed alarm when the municipality adopted an Ordinance banning discrimination in employment and public accommodations because of an individual’s sexual orientation or gender identity and did not include an overt exclusion or exemption for religious schools, having actually deleted a religious exemption provision that had been included in the initial drafts of the proposed law. The Lyceum corresponded with City officials seeking assurance that the school remained free to discriminate on these grounds. At first the City ignored the correspondence, but eventually, according to The Lyceum’s federal court complaint, the City Law Director “suggest that The Lyceum hire legal counsel and figure it out.” This was waving a red flag, and Alliance Defending Freedom, representing The Lyceum, filed suit in the U. S. District Court for the Northern District of Ohio before Judge James S. Gwin, arguing that it the school is entitled to a religious exemption and that “no citizen should be forced to hire legal counsel – or worse yet, file a federal lawsuit – simply to find out whether it falls under a vague law with criminal penalties.” In response to a motion for preliminary injunctive relief, the City finally articulated its position, stating that in the City’s view The Lyceum is “not a place of public accommodation” as “private schools are not public accommodations,” and that The Lyceum’s religious hiring practices are exempt under the City’s “religious necessity exception.” The City also acknowledged the constitutional ministerial exemption enjoyed by religious institutions, and specifically agreed with The Lyceum that this would extend to the plaintiff’s teachers as well as an employee who “performs an administrative role that does not involve verbal communication of the Catholic faith but who is expected to provide a Catholic witness by example to The Lyceum students with whom she is in

continual contact.” The City Attorney agreed, based on the allegations in The Lyceum’s complaint, that The Lyceum “does not currently employ and is not seeking to employ anyone who does not fulfill a ministerial role.” In paragraph 18 of its Complaint, The Lyceum states: “The Lyceum is satisfied with the City’s legal admissions and its assurances before this Court that it does not intend to apply the Ordinance to the school.” Thus, through litigation The Lyceum received the written assurance it sought from the City, and was willing to voluntarily dismiss its case, filing a notice to that effect with the court on May 28. The City’s admission appears broader than would be constitutionally required, but at least a bit, but undoubtedly signals a pragmatic view that the City should not waste resources attempting to enforce the Ordinance against a religious school.

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**OREGON** – U.S. District Judge Marco A. Hernandez has reversed the Social Security Commissioner’s denial of disability benefits to a plaintiff identified as “Claire G” and remanded the case for reconsideration by the agency, in light of numerous faults Judge Hernandez found with the Administrative Law Judge who heard Claire G’s appeal from the administrative denial of her claims. Claire G is a transgender woman who was transitioning during the time period covered by her disability application. Her gender identity, transitioning, and side effects of the procedure, were not the sole basis for her disability benefits claim, but were certainly a contributing factor, especially regarding the issue of depression, post-traumatic stress disorder, anxiety, obsessive compulsive disorder, and attention deficit disorder. Although she had been employed part-time in a variety of jobs, she had never obtained full-time employment. The judge disputed the grounds for the ALJ’s rulings on the credibility of Claire G’s testimony, as well as the

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ALJ's treatment of testimony by Claire G's treating therapist, a licensed clinical social worker whose written opinion was that Claire G would be unable to undertake full-time work without accommodations, especially regarding regularity of attendance because of her PTSD, anxiety, bipolar and gender dysphoria, which "made it impossible for her to work regular hours." The court was also critical of the ALJ's analysis of the medical record. The court rejected the grounds cited by the ALJ for giving little weight to the therapist's opinion. *Claire G. v. Berryhill*, 2019 U.S. Dist. LEXIS 89477, 2019 WL 2287733 (D. Ore., May 28, 2019).

**PENNSYLVANIA** – A gay man in Pennsylvania who suffers workplace discrimination and retaliation because of his sexual orientation lacks a federal law remedy, found U.S. District Judge James M. Munley in *Troutman v. Hydro Extrusion USA, LLC*, 2019 U.S. Dist. LEXIS 87716, 2019 WL 2249957 (M.D. Pa., May 24, 2019). The defendant hired David Troutman and promoted him to the position of "senior extruder" on October 10, 2014. "Shortly after the plaintiff began his new position," wrote Judge Munley, "he was asked if he was gay, to which he responded in the affirmative. Since this communication, the plaintiff claims that he has been subjected to continuous sexual harassment by co-workers and managers." The court devoted a paragraph to detailing Troutman's factual allegations, noting that his objections to the harassment brought no action from management and led to retaliation against him. In other words, if sexual orientation discrimination is illegal, Troutman has a great case. But, unfortunately, Pennsylvania is in the 3<sup>rd</sup> Circuit, where the binding precedent, *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3<sup>rd</sup> Cir. 2001), requires the court to dismiss Troutman's Title VII discrimination

and retaliation claims. "The trend in other circuits appears to be inclusion of sexual orientation under Title VII' protections," wrote Munley, and "Supreme Court dicta also advocates for the rights and dignity of gay people," citing *Lawrence v. Texas*, where "the Supreme Court stated that homosexuals are 'entitled to respect for their private lives' and 'still retain their dignity as free persons.'" But, he concluded, "the law of the Third Circuit, however, remains clear – sexual orientation is not covered by the protections of Title VII." Similarly, he found, suffering retaliation for complaining about sexual orientation discrimination is not covered by the statute's anti-retaliation provision, either. Troutman also filed supplementary state law claims, but the court concluded that because his federal claims were dismissed, "there are no other grounds for supplemental jurisdiction" which "will no longer be exercised in this case." The federal counts were dismissed "with prejudice as an amendment to the complaint would be futile as the plaintiff has pled causes of action for which no legal remedy exists under Third circuit precedent." Troutman did not have an alternative route in state court, because a bill to add "sexual orientation" and "gender identity" to the state's anti-discrimination law has been bottled up in the legislature for years. Many localities in Pennsylvania have ordinances forbidding such discrimination. The court's opinion does not mention the local jurisdiction where Troutman is employed, whether it has such an ordinance, and whether the local ordinance provides any basis for administrative or judicial action. This case is one of several district court decisions we've seen recently in states outside the 7<sup>th</sup> or 2<sup>nd</sup> Circuits that reinforce the importance of the Supreme Court's April 22 grant of certiorari in two Title VII cases presenting sexual orientation discrimination claims. Troutman is represented by George S. Kounoupis and Rebecca E. Mitchell, of

Hahalis & Kounoupis, P.C., Bethlehem, Pennsylvania.

**SOUTH CAROLINA** – In *Rogers v. U.S. Department of Health and Human Services*, Lambda Legal, the ACLU and ACLU of South Carolina, and South Carolina Equality Coalition have teamed up to sue the U.S. Department of Health and Human Services and the state of South Carolina on behalf of a married lesbian couple – Eden Rogers and Brandy Welch – who were turned away by Miracle Hill Ministries, South Carolina's largest state-contract foster care agency, when they sought to be certified as prospective adoptive parents. It seems that Miracle Hill imposes a religious test that includes not being a same-sex couple, married or otherwise. South Carolina requested from HHS a waiver of federal nondiscrimination rules in order to continue the state contract which also involves federal money. In other words, HHS and South Carolina are authorizing and enabling taxpayer-funded foster care agencies to use religious criteria to exclude families based on their faith and sexual orientation, a clear violation of the 1<sup>st</sup> Amendment. The suit was filed on May 30 in the U.S. District Court for the Southern District of South Carolina, alleging violations of the Establishment Clause, the Due Process Clause, and the Equal Protection Clause, by both the federal and state governments.

**VIRGINIA** – In *Roe v. Shanahan*, 359 F. Supp. 3d 382 (E.D. Va., Feb. 15, 2019), U.S. District Judge Leonie M. Brinkema refused to dismiss an action challenging the Defense Department's recently adopted policy of dismissing HIV-positive airmen, regardless of their state of health, on the pretext that they were not freely assignable anywhere in the world because of their HIV status, and she issued a preliminary injunction prohibiting the Defense Department

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from “making or enforcing discharge determinations” base on this policy while the case was pending. The government filed an appeal from this ruling in the 4<sup>th</sup> Circuit on April 18. Meanwhile, the government is fighting discovery requests by the plaintiffs. In *Harrison v. Shanahan*, 2019 U.S. Dist. LEXIS 86589, 2019 WL 2216474 (E.D. Va., May 22, 2019), Judge Brinkema ruled on a dispute related to about 300 documents for which the defendants had asserted “deliberative process” privilege. The essence of plaintiffs’ case is to show the lack of a rational basis for the challenged policy, and they seek to discover through, among other things, “documents and information considered or relied upon in the drafting or updating of defendants’ regulations pertaining to HIV” and those “considered or relied upon in drafting two DoD reports to Congress regarding DoD’s HIV policies,” the alleged basis for the policy. As they are doing in the several lawsuits challenging the transgender service policy, the government attorneys are attempting to stonewall against disclosure of the basis for the HIV-related policies. The magistrate judge delegated to decide discovery issues got the parties to negotiate about the document request, ultimately boiling it down to documents as to which they could not reach agreement, and then submitting the issue to the magistrate, who granted plaintiffs’ motion to compel as to 330 disputed documents on March 14, 2019. The magistrate articulated “multiple grounds for the ruling, including that defendants had not demonstrated that all of the withheld documents were deliberative in nature; that under the four-part balancing test articulated in *Cipollone v. Liggett Group, Inc.*, 1987 WL 36515 (4<sup>th</sup> Cir., 1987), defendants’ assertion of the privilege should yield in favor of plaintiffs’ interest in the relevant and otherwise discoverable information, and that the privilege had been waived with respect to withheld draft documents that were ‘substantially

identical’ to the final, publicly available version of those documents.” In her ruling on the magistrate’s order, Judge Brinkema largely agreed that most of the documents should be disclosed to plaintiffs’ counsel. The defendants had submitted a sample of documents for *in camera* review. Judge Brinkema agreed with the magistrate that many of them did not even qualify for a claim of deliberative privilege. She was particularly critical of the “conclusory descriptions” of documents that did not communicate why they should be considered deliberative in nature, and found that defendants’ “invocation of the privilege is overbroad” because many of the documents were merely “compilations of statistics or facts, summaries of current policies without commentary or suggested amendments, lists of meeting attendees, and other matters that are unquestionably factual rather than deliberative in nature” and thus not privileged. As to potentially privileged documents, the judge subjected them to the 4<sup>th</sup> Circuit’s *Cipollone* balancing test and concluded, “with one categorical exception,” that they should be produced to plaintiffs, the judge concluding that any risks to the deliberative process were outweighed in this case by the plaintiffs’ “compelling need for most of the disputed documents.” The categorical exception related to documents concerning an ongoing “as-yet-unfinalized” revision of a particular regulation. Since these related not to the challenged regulations, but to proposed future regulations, there was no compelling need to disclose them in this litigation. Plaintiffs’ counsel on the motion are Andrew Ryan Summer of Greenberg Traurig LLP, McLean VA, and John Webster Hunter Harding of Winston & Strawn LLP, Washington DC.

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**WISCONSIN** – U.S. District Judge William M. Conley has refused to stay litigation challenging Wisconsin

Medicaid’s regulatory ban on coverage for hormone therapy and sex reassignment surgery for transgender individuals participating in the state’s Medicaid program. *Flack v. Seemeyer*, 2019 U.S. Dist. LEXIS 83523, 2019 WL 2151702 (W.D. Wis., May 17, 2019). The original complaint was filed by two transgender women who had been denied coverage for medical expenses of their transitions. On July 25, 2018, Judge Conley granted their motion for a preliminary injunction to block the Medicaid program from enforcing the “Challenged Exclusion” against their requests for insurance coverage, *see* 328 F. Supp. 3d 931. Then, on April 23, Judge Conley granted plaintiffs’ motion to add two more named plaintiffs and certify the case as a class action, *see* 2019 WL 1772403. Then the defendants filed this motion on May 9 to stay proceedings “pending the outcome of the Department’s promulgation of emergency and permanent rules to remove” the “Challenged Exclusion” from the regulations. A trial is scheduled for September 16, 2019, but the defendants argued that a trial was not necessary because they were taking steps to remove the rule and authorize coverage for such claims. Plaintiffs opposed the motion, arguing that the lengthy process of promulgating a new permanent rule could take up to 13 months, based on past experience, and also would provide the Wisconsin legislature with “multiple opportunities to suspend or block a new rule,” making this process “inherently uncertain.” “Moreover,” wrote Judge Conley, “this case will have to move forward eventually, unless a settlement is reached with the named plaintiffs,” noting as well that the state had not conceded that its existing regulation violates the Affordable Care Act’s sex discrimination prohibition, as alleged by the plaintiffs. When issuing the preliminary injunction, the court necessarily found that plaintiffs stood a fair chance of prevailing on that claim. What the court does not mention, but

# CRIMINAL LITIGATION *notes*

alludes to obliquely, is the plaintiffs' determination to get a final judicial ruling on the merits of their ACA claim, inasmuch as the Trump Administration has changed signals from the Obama Administration, taking the position that the ACA's sex discrimination ban does *not* apply to gender identity discrimination claims. Several lawsuits in different states are advancing, seeking to establish a favorable judicial interpretation of Section 1557 to counter the Trump Administration's interpretation. This seems particularly attainable in the 7<sup>th</sup> Circuit, in light of its recent flexibility in interpreting federal sex discrimination provisions, as exemplified by the *en banc* decision in *Hively v. Ivy Tech*. The plaintiffs argued that "regardless of the outcome of the rulemaking process, the court will need to determine the legality of the Challenged Exclusion," and that a temporary rescission "would not moot their challenge" due to individual damage claims that are part of the case. Judge Conley state his inclination to agree with the plaintiffs, concluding: "Unless defendants are willing to concede liability, court resources are unlikely to be preserved through a stay." Plaintiffs are represented by a large team of attorneys, including Daniel A. Peterson, Mark A. Peterson, and Robert Theine Pledl, of McNally Peterson, S.C., Milwaukee; Joseph J. Wardenski, Orly May, and Jennifer Klar, of Relman, Dane & Colfax PLLC, Washington, D.C.; Abigail Koelzer Coursolle of the National Health Law Program, Los Angeles; and Catherine Anne McKee, also of National Health Law Program, Carrboro, N.C.

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## CRIMINAL LITIGATION NOTES

*By Arthur S. Leonard*

**CALIFORNIA** – Sometimes appellate courts in criminal cases are so terse in dealing summarily with appeals that

they deprive readers of insight into the nature of the offense, rendering opaque an attempt to understand either the trial court's ruling or the appellate court's reversal. Such is the case with *People v. Mazzanti*, 2019 Cal. App. Unpub. LEXIS 3677, 2019 WL 2294623 (3<sup>rd</sup> Dist. Ct. App., May 30, 2019), one of scores of cases in which California appellate courts have reversed trial court orders directing that defendants submit to HIV testing. This is a tantalizing one. George Anthony Mazzanti, Jr., pleaded no contest in Shasta County Superior Court to two counts of corporal injury upon a spouse or cohabitant, one count of criminal threats, one count of false imprisonment by violence, one count of misdemeanor resisting a peace officer, and one count of misdemeanor sexual battery of a person who is unlawfully restrained. The trial judge ordered that Mazzanti submit to HIV testing. Mazzanti appealed the order. Judge Peter Krause wrote for the appeals panel, "Due to the limited scope of the claims on appeal, we need not recite the offenses in great detail. It suffices to say that the defendant had an intimate relationship with the victim from 2014 to 2016. Over the course of their relationship, he subjected the victim to verbal and physical abuse, which continued even after their relationship ended." The opinion never mentions whether the victim with whom Mr. Mazzanti had an "intimate relationship" was male or female. It sounds like he had the victim tied up and committed a "sexual battery," but we are not told anything more detailed about that. Why would the trial judge have ordered HIV testing? Inquiring minds want to know, but are not enlightened by reading Krause's opinion. Mazzanti's appeal against the testing order is granted by the court, however, on two grounds. First, "Misdemeanor sexual battery of a person who is unlawfully restrained is not included among the list of offenses authorizing a court-ordered AIDS test," and, second, "the offense is not listed in

section 1202.1, subdivision (e)(6)(A), as an offense that permits the court to order testing upon a finding of 'probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.'" Is it possible that the trial judge (not named in the opinion) ordered testing because this was a case of two men, leading the judge to presume HIV risk from sexual contact? We just don't know. And the court of appeals is not willing to enlighten us to that extent. The court rejected Mazzanti's appeal of the trial judge's denial of his motion seeking disclosure of the personnel files of the arresting police officers from Redding. The court found no abuse of discretion, but once again does not explain why Mazzanti was asking for the information.

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**NORTH CAROLINA** – No entrapment defense for David Alan Keller, who was convicted in Lincoln County Superior Court (Judge Eric L. Levinson) of solicitation of a minor by computer or electronic device and appearing at a meeting location for the purpose of committing an unlawful sexual act. *State of North Carolina v. Keller*, 2019 N.C. App. LEXIS 485, 2019 WL 2180368 (N.C. Ct. App., May 21, 2019). Of course, no minor was actually involved. A detective went out onto the internet trolling for men interested in sex with boys by posting a personal advertisement on Craigslist under the heading "Boy Needs a Man," which attracted the attention of Keller. Considerable on-line interchange ensued, and Keller persisted even after the undercover claims he stated he was fifteen and expressed concern whether he was "old enough" to be doing this. As happens in these cases, a date and place to meet were agreed upon and when Keller showed up he was arrested, charged, and ultimately convicted. Judge Levinson refused to charge the jury on entrapment, and the Court of Appeals voted 2-1 that

# PRISONER LITIGATION *notes*

this ruling was not erroneous. Appeals Court Judge Phil Berger, Jr., writing for the majority, produced an opinion consisting heavily of cut and paste from prior decisions about the doctrine of entrapment, culminating in the assertion that the evidence “supports Defendant’s predisposition and willingness to engage in the crime charged. Defendant responded to a posting entitled ‘Boy Needing a Man’ with messages that (1) inquired if Kelly wanted to be a ‘daddy’s boy,’ (2) stated Defendant was ‘looking for a boy,’ and (3) repeated that Defendant was ‘still looking for a boy’ when Kelly failed to respond quickly enough for Defendant. Even after ‘Kelly’ told Defendant he was fifteen-years-old and may be too young, Defendant continued to speak with Kelly, and Defendant asked Kelly to send him a picture. Defendant then sent sexually explicit messages to someone he believed was fifteen years old and attempted to meet ‘Kelly’ for the purpose of engaging in sexual acts. Thereafter, he readily agreed to have oral and anal sex with ‘Kelly’ when they were to meet.” Berger found it “irrelevant” that Keller did not have a criminal record, had never previously solicited a child for sex, had never had sex with a child, and had never brought a child into his home, rejecting the claim that Berger had been “manipulated” by the undercover. He also noted, which seems irrelevant in this context, that Keller did have a history of meeting men for sex through Craigslist, one of whom was sixteen (the age of consent in North Carolina). Judge Lucy Inman dissented, arguing that the trial judge “committed prejudicial error in denying Defendant’s request for an instruction on entrapment,” stating that she would vacate the conviction and remand for a new trial. She argued it should have been up to a jury to decide, based on all the evidence, whether Keller could prove that he had been entrapped. Keller had testified that he was not seeking to have sex with a minor but just wanted to make his

boyfriend jealous, and that he believed he was responding to an ad placed by an adult. Keller testified he believed “Kelly” was at least 16 when he agreed to meet him. In any event, Judge Inman argued, the judge should have allowed the jury to hear all this evidence and decide whether entrapment occurred, and, of course, whether the undercover or Keller was the more credible witness about what was said. She also contended that Berger’s characterization of the evidence was misleading. For example, Keller did not testify that he had sex with a sixteen year old whom he met online; rather, “he testified that more than three decades earlier, when he was nineteen and living in another state, he and a sixteen-year-old boy engaged in mutual fondling.” Keller is represented on appeal by Appellate Defender Glenn Gerding and Assistant Appellate Defender Emily H. Davis. Perhaps they will consider appealing this one to the North Carolina Supreme Court.

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## 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.*

**CALIFORNIA** – U.S. Magistrate Judge Barbara A. McAuliffe is at it again in another *pro se* transgender case, misapplying the law and the facts in a sexual harassment/sexual assault and equal protection action involving transgender inmate Malcolm Tandy Lamont Stroud. *Stroud v. Pruitt*, 2019 WL 2077028 (E.D. Calif., May 10, 2019), is Judge McAuliffe’s second screening of Stroud’s pleadings, addressing Stroud’s amended complaint, filed nearly months ago in July 2018. Judge McAuliffe recommends that certain of Stroud’s pleadings go forward, while rejecting others (in this writer’s view, incorrectly).

Stroud seeks damages for events that occurred at California’s Substance Abuse Treatment Facility, where Stroud was previously incarcerated and assigned to work in industry. Her supervisor, Ted Pruitt, allegedly harassed her verbally daily, behavior that escalated to touching, groping, fondling, rubbing his erect penis on her back, and assaulting her. Pruitt also forced Stroud to take paperwork from him by holding it in his crotch and making her reach for it. Defendant Jack Smith replaced Pruitt for a time as supervisor, and he continued the verbal harassment, including pronouncements about his hatred of LGBT people and how they are “destroying the World.” Smith also performed strip searches on Stroud (never finding any contraband), although he was admonished by custody staff that searching inmates was not part of his job – and he never searched any other inmate. Smith called Stroud a “faggot, queer, and homo”; and he singled out her work for excessive and biased scrutiny. Pruitt eventually returned, in a position senior to Smith. The harassment by both men continued, with Smith trying to get Stroud to quit and Pruitt attempting to extort sexual favors from her in exchange for favorable treatment for job promotion and wage increases. Stroud says she was warned about Pruitt by other inmates and that Pruitt’s “touchy” behavior and Smith’s homophobia were well known throughout the Treatment Facility. Stroud says she also complained about her work conditions to her counselor and to defendant Superintendent Nick Maloy, who took no action despite knowing of the circumstances. Stroud’s complaint says her job became a “living nightmare.” The behavior caused Stroud to suffer from hypertension, severe stress (which forced her to quit her job at the Treatment Facility), fear of working with civilians without security present, and post-traumatic stress syndrome. Although Stroud uses feminine pronouns to refer to herself, Judge McAuliffe uses masculine ones.

# PRISONER LITIGATION *notes*

Stroud says she is too afraid from her experience to proceed to the third triad of transition (surgery) because of her experiences, although doctors have recommended it. Demonstrating barely a rudimentary understanding of both confirmation surgery and transgender transition, Judge McAuliffe writes: “Plaintiff would like the sex relocation surgery to become a woman” – omitting Stroud’s use of the phrase “complete woman.” Relying on *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004); and *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (2000), Judge McAuliffe recommends that the claims resting on verbal harassment be dismissed. She also relies on the 2nd Circuit case of

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**DELAWARE** – This is the third note about transgender inmate Hermione Kelly Ivy Winter’s *pro se* federal litigation. She has several a/k/a’s, and previous notes appeared *sub nom*: *Allemandi v. Munoz*, 2018 U.S. Dist. LEXIS 718986 (D. Del., February 5, 2018), reported in *Law Notes* (March 2018 at page 142) (regarding various conditions of confinement issues, including health care and safety); and *Allemandi v. Hyde*, No. 17-1280 (D. Del., February 5, 2018), reported in *Law Notes* (April 2018 at page 203) (involving sex offender treatment program issues; also noting her legal name change to Winter). PACER identifies 9 related cases. In the instant case, *Winter v. Hyde*, 2019 WL 2022253 (D. Del., May 8, 2019), Winter again complains about her sex offender treatment and her gender transition, requesting a preliminary injunction directing her transfer to the Delaware prison for women. Winter also seeks to add plaintiffs and certify her case as a class action. The Delaware Department of Correction has now appeared, and the parties have disputes about discovery and about Winter’s access to the law library. Chief U.S. District Judge Leonard P. Stark denies without prejudice Winter’s motions to appoint

counsel, to add plaintiffs, and to proceed as a class action. Judge Stark raises a question about Winter’s ability to litigate without a *guardian ad litem* under F.R.C.P. 17(c), but he decides that the Court need not appoint one (or counsel, despite Winter’s allegations of mental illness) because Winter has not been adjudicated an incompetent. Finding that Winter is enrolled in a gender transition program at the men’s prison, Judge Stark determines that Winter is unlikely to prevail on a claim that she must be transferred to the women’s prison “where transition program is also offered.” Thus, he denies a preliminary injunction. [Note: Winter also tried to obtain this relief by mandamus in the state courts. The Delaware Supreme Court affirmed denial of the petition. *Winter v. Delaware Department of Justice*, 2019 Del. LEXIS 256 (May 15, 2019).] On matters of classification and housing, Judge Stark defers to prison administration, citing *Olim v. Wakinekona*, 461 U.S. 238, 251(1983) (inmate has no due process right to be incarcerated in particular institution inside state of conviction or outside that state). Winter says that she is subjected to stricter conditions in transition than other inmates, because she is being threatened with administrative consequences if she fails to attend even one meeting, while others are given a grace absence of three meetings. Defendants dispute this discrimination and assert that Winter is treated no differently than other similarly situated prisoners. This is enough for Judge Stark to deny preliminary relief. There is no discussion of equal protection. Judge Stark denies Winter’s request to compel depositions without showing ability to pay for subpoena or court reporter costs. Winter says her legal documents were destroyed, so she cannot effectively respond to discovery. Judge Stark directs the clerk to send her a free copy of her complaint, says she must pay for copying other court documents, and orders her to respond to interrogatories and document

request within her knowledge or control. Judge Stark opines that Winter can e-file her responses, although she says that state officials will not allow her access to a computer to do so. The opinion does not resolve this issue. Finally, on access to the law library, Judge Stark denies Winter’s request to allow her to use the library five days a week instead of the two days allowed for inmates with court deadlines. He writes: “While not clear, it seems that Plaintiff is seeking legal advice from the Court. The Court, however, may not provide Plaintiff legal advice.” This appears to be a mischaracterization of the relief sought (since Winter is seeking more time to do the research herself). Judge Stark finds that Winter is not entitled to greater law library access under *Bounds v. Smith*, 30 U.S. 817 (1977) (no jump cite), applying balancing of correctional administrative concerns under *Turner v. Safley*, 482 U.S. 78, 85 (1987), to this claim sounding under First Amendment access to courts. Underlying all of this are two subtexts: (1) Winters is a frequent but not favored litigant, who faces myriad roadblocks in presenting her claims; and (2) there may be other transgender inmates in Delaware whose rights are not being addressed. Winter filed a *pro se* Notice of Appeal to the Third Circuit on May 21, 2019.

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**ILLINOIS** – *Pro se* transgender inmate Kaabar Venson is a former gang member subject to a KOS [kill on sight] “order” issued by members of her former gang. She brought a civil rights action for her protection at Illinois’ Menard Facility after learning of her KOS status, and her assault by other inmates that occurred despite her requests for protection. In *Venson v. Gregson*, 2019 U.S. Dist. LEXIS 77083; 2019 WL 2006536 (S.D. Ill., May 7, 2019), U.S. District Judge Staci M. Yandle screened her complaint, reorganized it, and allowed her to proceed on four claims, while dismissing one without prejudice.

# PRISONER LITIGATION *notes*

Venson sued the warden and several security officers as well as a nurse at Menard. In the first claim, as restated by Judge Yandle, Venson adequately plead that she was subjected to deliberate indifference to her safety by the warden and security defendants when they denied her protective custody despite her requests and defendants' knowledge of her risk. Judge Yandle allows another claim of deliberate indifference to Venson's safety to proceed against an officer (Laser), who talked loudly about Venson's transgender status in front of gang members, called her a "snitch," escorted her in cuffs next to their cells, and failed to intervene promptly when she was assaulted through the bars by gang members. Venson sued a Menard nurse (Gregson) for deliberate indifference to her injuries after the attack. Because Venson fails to describe her injuries, however, Judge Yandle finds that she cannot determine if they were serious from the pleadings. She dismissed this claim with leave to replead, citing *Roe v. Elyea*, 631 F.3d 843, 857 (7th Cir. 2011). Nurse Gregson stays as a defendant, however, on a claim that Gregson was deliberately indifferent to her serious mental health care needs after Venson tried to commit suicide several times while seeking protection after the assault. Finally, Judge Yandle allows Venson to proceed against the warden and security defendants on the claim that they were deliberately indifferent to Venson's risk of future attacks. Interestingly, Venson only sought injunctive relief, and she has now been transferred to Illinois' Pontiac Facility. Judge Venson directs her to address whether her request for an injunction is moot by virtue of the transfer – and she further asks Venson to indicate whether she is seeking money damages from her time at Menard, even though the complaint did not request them. This is unusual; although, in this writer's experience, not for Judge Yandle, who frequently reorganizes *pro se* complaints. Judge

Yandle writes that a failure to request damages explicitly is not a ground for dismissal, citing *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002). If Venson is entitled to such relief, it is not fatal that she "has not demanded such relief in [her] pleadings." *Id.*, quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978).

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**ILLINOIS** – Transgender prisoner Carl Tate sues for sexual abuse in the Cook County Jail by defendant jail chaplain "Father Ron" DeRosa, occurring during the years 1998-2002. Tate also sues then-Sheriff Michael F. Sheahan for not protecting Tate. The two defendants are sued officially and individually, and this is Tate's fourth amended complaint. DeRosa has not appeared. U.S. District Judge Sara L. Ellis dismisses the complaint, with a final leave to amend, in *Tate v. Sheahan*, 2019 U.S. Dist. LEXIS 87474, 2019 U.S. Dist. LEXIS 87474 (N.D. Ill., May 24, 2019), without addressing the claims against DeRosa. The sexual acts began between Tate and DeRosa when Tate was a teen and continued at least weekly in private sessions. At times, other inmates were invited. DeRosa convinced Tate that the sex was a "blessing" and "God's work." According to the pleading, Tate has been suicidal since his time at the jail (he is now in state prison) and has post-traumatic stress disorder. He repressed awareness of the sexual abuse by DeRosa until 2016 and brought a lawsuit the next year. Judge Ellis makes the anticipated finding that the statute of limitations for § 1983 actions is borrowed from state law and is two years in Illinois. Accrual and tolling rules, however, are federal. Nevertheless, Judge Ellis finds that the Illinois Supreme Court's treatment of accrual and tolling are instructive in establishing the federal rules, since repressed memory of sexual assault or abuse most often arises in state law cases. Briefly, if the plaintiff retains some memory of the wrongful acts

and there is no allegation of repressed memory, the discovery rule does not save the stale case, even if full manifestation of injuries occurs only years later. The leading case is *Clay v. Kuhl*, 727 N.E.2d 217, 220-23 (Ill. 2000). Where the memory is repressed until a triggering event, however, the discovery rule can make the suit timely. See *Doe v. Soc'y of the Missionaries of the Sacred Heart*, 2012 U.S. Dist. LEXIS 162108, 2012 WL 5499430, at \*5 (N.D. Ill. Nov. 13, 2012) (applying Illinois law). Judge Ellis finds that it would not be proper on these facts (particularly after DeRosa used biblical justification for his abuse) to dismiss the pleadings on limitations grounds, even as to the Sheriff. Claims against Sheriff Sheahan are dismissed without prejudice, however, under § 1983 rules. In his official capacity, claims against him are claims against Cook County. Yet, the two paragraphs of allegations against Sheahan are conclusory as to any policy claim under *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 694 (1978). In his individual capacity, there is no showing of personal involvement. It is going to take some digging, but this writer suspects that there are people who remember "Father Ron" and his harem – and that claims against the County and the Sheriff are not beyond salvaging.

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**KENTUCKY** – A rather disjointed pleading by *pro se* transgender inmate Rodger Williams, a/k/a Willow Williams, does not survive initial screening in *Williams v. Wright*, 2019 U.S. Dist. LEXIS 87011, 2019 WL 2236257 (E.D. Ky., May 23, 2019). Williams had voluntarily dismissed a prior complaint seeking somewhat overlapping relief. Now, U.S. District Judge William O. Bertelsman finds the instant pleading without merit and enters judgment for defendants, without service or leave for Williams to replead. Addressing the major points: Williams, an inmate at the Campbell County

# PRISONER LITIGATION *notes*

Detention Center, alleges denial of medical care, interference with her right of access to the courts, and verbal abuse. She sued the CEO of Southern Health Partners, Inc. (contractual provider), a lieutenant who made derogatory comments and interfered with her legal calls, and the Campbell County Jailer. Williams alleges “inadequate” medical care for the “entire duration” of her stay at the jail, stating she has never seen a psychiatrist, that she has been denied estrogen hormone therapy, and has untreated toothaches. A primary problem (that persists throughout the pleading) is that she sued only executive or security defendants. Judge Bertelsman construes the complaint as suing them only in their official capacities. Thus, the official capacity claims collapse into actions against the county and against the private vendor of health care – and Williams fails adequately to plead failures in policy to withstand scrutiny under *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 694 (1978) (county); and *Thomas v. Coble*, 55 Fed. App’x. 748 (6th Cir. 2003) (vendor). Judge Bertelsman does not construe the complaint to sue the defendants in their individual capacities, but there would still be a problem with personal involvement for the CEO and the Jailer. As to access to court, Williams failed to show actual injury in terms of impairment of a non-frivolous legal claim under *Lewis v. Casey*, 518 U.S. 343, 354-55 (1996); and *Bounds v. Smith*, 430 U.S. 817, 828 (1977). The lieutenant’s verbal harassment does not violate the Constitution. *Wingo v. Tenn. Dep’t of Corr.*, 499 F. App’x 453, 455 (6th Cir. 2012), citing *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987). Finally, Judge Bertelsman applies 42 U.S.C. § 12211(b) – exempting “transsexualism . . . not resulting from physical impairments” – to exclude Williams’ claims that she was the victim of discrimination under the Americans with Disabilities Act. If Judge Bertelsman had stopped there, this writer could follow the opinion,

but he does not. Instead, he addresses Williams’ claim that she was denied Equal Protection because she was discriminated against in delivery of health care and access to courts because she is transgender. In so doing Judge Bertelsman confuses equal protection and substantive due process, citing a series of Supreme Court decisions holding that substantial due process is unavailable where specific provisions of the Bill of Rights apply: medical care under the Eighth Amendment; access to courts under the First Amendment; neither under substantive due process. This says nothing about equal protection. For example, suppose a jail allowed daily sick call for everyone but transgender inmates, who could ask for it only once a week – or the jail allowed law library access only to cisgender inmates. In such cases a transgender plaintiff could state a viable claim for violation of equal protection under class of one theory or under rational basis scrutiny – even if the deprivation did not rise to the level of deliberate indifference to health care or violation of the First Amendment. Regardless of substantive due process considerations, the Equal Protection Clause serves different interests than the provisions of the Bill of Rights.

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**SOUTH DAKOTA** – The federal Eighth Circuit comprises seven states, mostly rural and high plains leading to the Rockies. Only Minnesota and Iowa provide state statutory protection for LGBT rights. There is no state law protection for LGBT people in Arkansas, Nebraska, North Dakota, Missouri, or South Dakota. The Eighth Circuit has not been hospitable for federal protection, either, particularly for prisoners – where it may well rank last in the circuits in recognition of transgender prisoner rights. In *Reid v. Griffin*, 808 F.3d 1192, 1193 (8th Cir. 2015), over a dissent, the Circuit rejected a suicidal transgender prisoner’s case seeking hormones,

because correctional health staff had not diagnosed gender dysphoria. Reid went as far as summary judgment, but district courts in the Eighth Circuit are reading it expansively to dismiss on the pleadings, even when there is a diagnosis of gender dysphoria. That is what happened in *Butterfield v. Young*, 2019 WL 2304665 (D.S.D., May 30, 2019). U.S. District Judge Roberto A. Lange dismissed Kody Dean Butterfield’s *pro se* case on the pleadings without service (and obviously without hearing from the defendants) on the ground that denial of hormones presented merely a disagreement about treatment, since Butterfield was receiving psychotherapy, citing *Reid* (which did not actually say that). Judge Lange also cited district court cases from Arkansas and Nebraska with similar interpretations of *Reid*. Butterfield plead in her complaint that she is being “forced to be a man” and that she has been given tickets for make-up and hair “violations.” She also claimed harassment as a transgender person. Her *pro se* complaint is on PACER at 18-cv-4142 (D.S.D.). Judge Lange dismissed Butterfield’s claim for harassment, analyzing Eighth Circuit precedent on verbal harassment of prisoners that included racism and death threats. Transphobic comments apparently do not rise to the same level as racism in Judge Lange’s view, and Butterfield did not plead that she was threatened with death. Of note is that Judge Lange did the same thing to a case Butterfield filed a year ago: *Butterfield v. Young*, 4:17-CV-4162 (RAL); large swatches of this case are a “cut and paste” of the first one. Apparently, a year of psychotherapy makes no difference in the analysis. This writer is aware of no circuit case that has gone this far. Finally, Judge Lange assessed a second strike under the Prison Litigation Reform Act for the dismissal of this case (the first strike being his dismissal of the first case). Such dual strikes are explicitly allowed by *Orr v. Clements*, 688 F.3d 463, 465-6 (8th Cir. 2012); but they will likely

# LEGISLATIVE & ADMINISTRATIVE *notes*

chill Butterfield, since she has only one strike left. Iowa (through an enlightened corrections commissioner) and Missouri (after a preliminary injunction was won in a case brought by Lambda) have administratively adopted transgender prison policies that address current issues. Perhaps this is a case that can be used as a vehicle for the Eighth Circuit to limit the application of *Reid* by district courts and reduce the numbers of *pro se* cases dismissed on the pleadings.

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**NEW YORK** – Gay *pro se* inmate Zahmeil D. Washington-Steele, confined on Rikers Island, filed a civil rights case, alleging he was denied mental health services and was the victim of gay-biased assaults while confined. He also claimed interference with his mail. In *Washington-Steele v. Perez*, 2019 U.S. Dist. LEXIS 79539 (S.D.N.Y., May 10, 2019), Chief U.S. District Judge Colleen McMahon dismissed the case for failure to state a claim, but (broadly construing the allegations) granted Washington-Steele sixty days to file an amended complaint. Even assuming his mental health needs are serious by history, there was no showing in the pleadings as to what the plaintiff was denied and by whom. As to assaults, actions by other inmates do not state a claim against officials unless they knew about the risk and were deliberately indifferent to it. An allegation that an officer insulted Washington-Steele verbally with homophobic slurs suggesting he was “asking for it” is not alone sufficient under *Purcell v. Coughlin*, 790 F.2d 263, 265 (2d Cir. 1986) to state a claim against the officer or the Department. Chief Judge McMahon explains the “deliberate indifference” standard under both health care and protection from harm claims, to help Washington-Steele to frame his amended complaint. Interference with mail is not actionable unless it raises an issue of access to the courts, which plaintiff may try to do in an amendment. Washington-Steele’s

naming of New York City agencies as parties-defendant is dismissed, and the judge *sua sponte* substitutes the City of New York as the real party in interest, citing *Jenkins v. City of New York*, 478 F.3d 76, 93 n.19 (2d Cir. 2007). There is no discussion of a possible Equal Protection claim.

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**WASHINGTON** – This opinion, in a civil rights case brought *pro se* by transgender inmate Marco Santiago concerning provision of hormones, does not address the merits, but it has two nuggets that warrant flagging for those who cannot get enough civil procedure. In *Santiago v. Gage*, 2019 U.S. Dist. LEXIS 88059 (W.D. Wash., May 24, 2019), U.S. Magistrate J. Richard Creatura denied relief on both of them. First, plaintiff Santiago argued creatively that the state should be held to the “heightened” pleadings standards of plausibility in its affirmative defenses, as required of plaintiffs by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). Judge Creatura notes that this standard has not been adopted by the Western District of Washington for affirmative defenses, citing *Opico v. Convergent Outsourcing, Inc.*, 2019 U.S. Dist. LEXIS 67238, 2019 WL 1755312, at \*1 n.1 (W.D. Wash. April 19, 2019). In rejecting this argument, *Opico* noted that the Ninth Circuit has not yet adopted it, although at least one district court in the circuit has – citing *Barnes and Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 928 (N.D. Cal. 2012). Judge Creatura also strikes a number of “affirmative” defenses (like standing, personal involvement, failure to state a claim, and causation) because they are arguments that negate an essential element of plaintiff’s cause of action and are not truly “affirmative” defenses, like statutes of limitations. The second unusual holding relates to Santiago’s alleged failure to mitigate damages. Defendants

argued that Santiago should have sought transgender treatment earlier, including before she was arrested, and that her present circumstances are aggravated by her failure to do so. Despite the “offensiveness” of the argument (and lack of clarity as to how it would apply as the case goes forward), Judge Creatura declines to strike it, noting that it could possibly be relevant to Santiago’s claim for monetary damages and should survive the pleadings stage, citing *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994), which held that defendants have the burden of proof on mitigation (and failed to meet it in this employment case because they did not show other jobs that the plaintiff could have taken). Mitigation has no relevance to injunctive relief. Moreover, a prisoner has no choice in providers for health care. In this writer’s view, this damages defense may well come back to bite defendants, because it will lead almost inevitably to discussion of what they could have provided to Santiago on a timely basis, whether it would have been adequate, and whether the delays were her fault or theirs.

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## LEGISLATIVE & ADMINISTRATIVE NOTES

*By Arthur S. Leonard*

### UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

– HHS has proposed to revise its rules under the Affordable Care Act, Section 1557, to replace the Obama Administration’s interpretation of the sex discrimination provision with one that would cut out protection against discrimination in health care for LGBT people, part of the Trump Administration’s agenda to “Make America Great Again” by rescinding protection for LGBT people, thus ensuring the nation’s greatness in the eyes of . . . Well, we shouldn’t say Whom. According to the “Fact

# LEGISLATIVE & ADMINISTRATIVE *notes*

Sheet” issued by HHS on May 24, the proposed rule would revise Section 1557, implementing regulations to “ensure the scope of the regulation matches the text of Section 1557 with respect to health programs and activities that received federal financial assistance through HHS,” programs administered by HHS under Title I of the ACA, and programs administered by “any entity established under that Title,” including “federally facilitated and state-based health insurance Exchanges created under the ACA, and the qualified health plans offered by issuers on those Exchanges.” The Obama Administration had interpreted Section 1557 to forbid sexual orientation and gender identity discrimination, and several courts have already followed that regulatory interpretation, but the Trump Administration is opposed to construing sex discrimination laws to cover discrimination on those grounds, a position it has taken in litigation (such as amicus briefing and argument in the Title VII *Zarda* case in the 2<sup>nd</sup> Circuit and at the Supreme Court). The “Fact Sheet” recites that the Obama Administration’s position provoked lawsuits by various states, and led to a nationwide preliminary injunction being issued against HHS by U.S. District Judge Reed O’Connor (N.D. Tex.), barring enforcement of the antidiscrimination provisions in *Franciscan Alliance v. Burwell*. The Obama Administration was appealing that ruling in the 5<sup>th</sup> Circuit, but the Trump Administration has withdrawn the appeal consistent with its position on interpreting the ACA. The “Fact Sheet” notes that the Supreme Court granted certiorari in three cases that will present the issue of whether Title VII’s sex discrimination ban applies to sexual orientation and gender identity discrimination cases, and that the Trump Administration takes the position that “sex for purposes of Title VII” and for all other federal sex discrimination laws “refers to biological sex.”

## **UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

– HUD has proposed on May 22 to change its Equal Access Rule for federally-funded homeless shelter programs, to make sure that shelter operators are insulated from any penalty for turning away people on religious grounds or because of their gender identity. HUD is particularly concerned to protect shelter operators and cisgender shelter residents from the trauma of having to share bathrooms and sleeping quarters with transgender people. The Trump Administration is apparently on a mission to overturn every Obama Administration policy providing equality and protection from discrimination for transgender people, a rather outsize response to the president’s reported sensitivity about remarks concerning the size of his fingers as indicative of the size of other body parts . . . . Or is it really about pandering to the “Evangelical base” of the president’s political supporters? Contrary to its proposal, HUD announced that it will continue “ensuring that its programs are open to all . . . regardless of sexual orientation or gender identity.”

## **UNITED STATES TREASURY DEPT.**

– The Treasury Department has imposed sanctions against the “Terek Special Rapid Response Team” and five individuals in the Chechen Republic (three of whom are Russians), for alleged human rights abuses including extrajudicial killing and torture of LGBTI individuals. The sanctions were imposed pursuant to the Global Magnitsky Act, a federal statute that imposed visa bans and asset freezes on Russian officials identified with the prison death of Sergei Magnitsky, a Russian whistleblower. A *Reuters* report on May 16 identified the individuals being sanctioned as Elena Anatolievna Trikulya and Gennady Vyacheslavovich Karlov, member of an “investigative committee” that allegedly “participated

in efforts to conceal the legal liability for the detention, abuse, or death” of Mr. Magnitsky, as well as Abuzayed Vismuradov, commander of the Terek Special Rapid Response Team in Chechnya, accused of “being responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights” against person seeking to expose illegal activity by Russian government officials. The Treasury sanctions also apply to Sergey Leonidovich Kossiev and Ruslan Geremeyev.

## **FEDERAL AVIATION ADMIN.**

– At the instigation of homophobic Texas state officials, the Federal Aviation Administration has opened an investigation into the decision by airport authorities in San Antonio to exclude Chick-fil-A from an airport concession because of the company’s pronounced homophobic views. A similar investigation was also launched against the Buffalo Niagara International Airport for the same reason. Chick-fil-A’s owner, a militant anti-LGBT Christian, has devoted profits from the business to donations to anti-LGBT groups. The municipalities involved have local laws banning sexual orientation discrimination. *New York Post*, May 30. The San Antonio airport’s action also spurred activity at the state level, with the Texas legislature approving a law forbidding government entities from discriminating against businesses due to their religious views and practices. The measure was popularly referred to as the “Save Chick-fil-A” bill, and was strongly endorsed by Governor Abbott.

## **IMMIGRATION CONTROL AND ENFORCEMENT**

– *CBS News* reported on May 2 that ten transgender women seeking asylum had won their cases and were being released from a detention center in Texas. The ten were reported

# LEGISLATIVE & ADMINISTRATIVE *notes*

to be part of a roughly 80-member group of LGBTQ migrants from Central America, which had splintered off from a larger “caravan” of thousands that arrived from Central America in the fall of 2018. Thirty transgender women from that group presented themselves together at an official border crossing in Tijuana and were immediately detained at the South Texas Detention Center, a facility that reportedly had no experience in housing transgender women. While ten were granted asylum, about 20 additional transgender women remain in custody in South Texas awaiting court dates or, in some instances, had lost their cases and were awaiting deportation. CBS reported data from the Syracuse University Transactional Records Clearinghouse, which reported that immigration judges approved only 35 percent of asylum claims in 2018, “a record low.” Other news reports have indicated that there are some immigration judges who have approved as few as 5% of the asylum claims presented to them, so the “average” figure masks enormous variations in approval rates among judges.

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**UNITED STATES CONGRESS** – U.S. Senators Tammy Baldwin (D-WI) and Patty Murray (D-WA) and Representative Mark Pocan (D-WI) have reintroduced legislation aimed at reducing bullying and harassment, according to a news release issued May 23. The measure, called the Tyler Clementi Higher Education Anti-Harassment Act of 2019, would require higher education institutions to adopt policies to prohibit harassment and would establish a grant program to support campus anti-harassment activities and programs. It is probably dead on arrival in the Senate, where any legislative proposal that would benefit LGBT people provokes instant opposition from the Republican leadership. But perhaps passage in

the House could build momentum for future enactment.

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**ALABAMA** – State legislators have approved a bill that would abolish the requirement that judges sign marriage licenses. Former Alabama Chief Justice Roy Moore ordered state probate judges not to sign same-sex marriage licenses in response to the Supreme Court’s *Obergefell* decision, based on his view that the decision was unconstitutional and did not obligate Alabama to allow or recognize same-sex marriages. The local federal district court disagreed, but Moore hung tough. For this and other offenses, Moore was suspended from his position on the court (for a second time, having been removed years ago for insisting on putting a Ten Commandment monument in the state supreme court building) and resigned to run unsuccessfully for the U.S. Senate seat opened up when President Trump made Jeff Sessions his first Attorney General. Moore’s insurrection did catch fire with a certain number of Probate Judges, who responded to the controversy by withdrawing entirely from signing marriage licenses, as a result of which anybody wanting to marry in several Alabama counties had to go to other counties to get marriage licenses. Alabama legislators, eager to coddle Probate Judges with religious objections to same-sex marriage, decided that the solution to this problem was to end the practice of judges signing marriage licenses. Henceforth, those wishing to marry could obtain the necessary forms, fill them out themselves, and submit them to the local courts for filing with no judicial signature needed. Presumably a clerk would verify that the parties filled out the form correctly before accepting it for filing. The measure passed the Senate on a unanimous vote in March. On May 23, it passed the House by a vote of 67-26 and was sent to Governor Kay Ivey, who had not signed it by the end of the month, giving priority to a bill

virtually outlawing all abortions in the state, imposing draconian virtual-life sentences on doctors performing such procedures.

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**COLORADO** – On May 31, Colorado Governor Jared Polis signed into law two bills dealing with LGBT rights. The bill summary for HB19-1129 states: “The bill prohibits a licensed physician specializing in psychiatry or a licensed, certified, or registered mental health provider from engaging in conversion therapy with a patient under 18 years of age. A licensee who engages in these practices is subject to disciplinary action by the appropriate licensing board.” This made Colorado the 18<sup>th</sup> state to enact such a ban, following Maine, the 17<sup>th</sup> state, where the measure was signed into law just days earlier (see below). The bill also makes advertising such services a violation of the state’s consumer protection law. The other bill, HB19-1039, simplifies the process for transgender and intersex individuals to update the gender on their birth certificate, overturning the requirement of proof of gender-related surgery or a legal name change as prerequisites. Polis, a Democrat who was formerly a member of the U.S. House of Representatives, is the first out gay man to be elected governor of a state and took office earlier this year. *ABCnews.com*, *DenverPost.com*, May 31.

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**FLORIDA** – The Alachua County Commission voted unanimously to ban “conversion therapy” on minors, becoming the first county in North Florida to do so, according to a May 29 press release by Equality Florida. The primary metropolitan area in Alachua County is Gainesville, home of the University of Florida.

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**MAINE** – On May 29 Governor Janet Mills (Democrat) signed into law a

# LAW & SOCIETY *notes*

measure intended to protect LGBT minors from “conversion therapy” by banning licensed health care practitioners from performing the controversial treatment on minors. Lead legislative sponsor of the measure was Representative Ryan Fectau. EqualityMaine undertook a major lobbying effort to get the measure through the legislature. The signing made Maine the 17<sup>th</sup> state (plus the District of Columbia) to prohibit such attempts to change the sexual orientation of minors. At a signing ceremony, Judge Mills stated: “Conversion therapy is a harmful, widely discredited practice that has no place in Maine. By signing this bill into law today, we send an unequivocal message to young LGBTQ people in Maine and across the country: We stand with you, we support you, and we will always defend your right to be who you are.” A similar measure passed the legislature during the previous session, but was vetoed by Mills’ predecessor, conservative Republican Paul LePage. The measure goes into effect 90 days after the end of the legislative session in June. *New York Daily News*, May 30.

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**NEW JERSEY** – Governor Phil Murphy issued an order to allow transgender troops to serve openly in New Jersey National Guard units, joining five other states are explicitly refusing to implement President Trump’s ban on transgender individuals serving in the military. The ban officially went into effect after the last district court stay was lifted by direction of the D.C. Circuit, but there has not been a final ruling on the merits of the four pending federal district court cases challenging the ban. The cases are bogged down in disputes about discovery, with the Trump Administration stonewalling against discovery requests in all four cases.

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**TENNESSEE** – The legislatures had pending during the session just ended

half a dozen measures that were broadly labelled by LGBT rights groups as anti-LGBT. In the event, however, only one of the measure was actually approved and signed into law: SB 12979/HB 1151, which enhances punishment for any person who commits indecent exposure in bathrooms, dressing rooms and similar facilities, including offenses committed by offenders who are members of the opposite sex than the sex designated by the bathroom’s use. It passed the House 69-25 and the Senate 21-5, and was signed into law by Governor Bill Lee on Thursday, May 2. Clearly motivated in response to legislator sex panic about allegations (totally unsubstantiated) that transgender people would commit “indecent exposure” in restrooms, the bill in its operation effectively does nothing new beyond enhancing penalties for indecent exposure in privacy facilities. The lead sponsors were Republicans John Ragan (House) and Mark Pody (Senate). One hopes their bathroom fears are assuaged by its passage, but at the first sign of unequal enforcement the state can expect an equal protection challenge. The bills that were not enacted would have (1) authorized the Attorney General to represent local school districts if they were sued for requiring students to use only facilities consistent with their sex as identified at birth; (2) allowed adoption agencies to deny services to same-sex couples based on the agencies’ religious beliefs; (3) prohibited private licensed child-placement agencies from doing anything that “would violate the agency’s written religious or moral convictions; (4) prohibited state and local government agencies from taking action against any business because of its internal policies, which, of course, would free businesses to discriminate on whatever ground they want to do so; (5) define marriage as between one man and one woman. Some of these measures were merely deferred to the next session of the legislature. *Tennessean.com*, May 3.

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

### WORLD HEALTH ORGANIZATION

– The World Health Organization has decided that transgender identity will no longer be classified as a mental or behavioral disorder in WHO’s latest manual – call the ICD-11. Instead, “transgender” will be listed in a chapter under sexual health. In the prior version, transgender was labeled as a gender identity disorder under the chapter for mental and behavioral disorders. The World Health Assembly approved the change at a meeting on May 25. Member nations of WHO are expected to make appropriate changes in their national policies by January 2022. A WHO expert, Dr. Lale Say, told the BBC that WHO now understands that transgender is “not actually a mental health condition,” reported Daily Mail Online on May 30. “It was taken out from mental health disorders because we had a better understanding that this was not actually a mental health condition, and leaving it there was causing stigma. So in order to reduce the stigma, while also ensuring access to necessary health interventions, this was placed in a different chapter.” \* \* \* This step is particularly noteworthy in the context of the continuing legal battle in the U.S. over President Trump’s determination to exclude transgender people from military service. In its presentation to courts considering legal challenges to the exclusion policy, the Justice Department has relied on the characterization of transgender as a “gender identity disorder” in the Diagnostic and Statistical Manual published by the American Psychiatric Association, arguing the military should not have to employ individuals afflicted by a mental disorder. The WHO’s action now gives challengers to the policy an additional weapon to combat the government’s argument.

# INTERNATIONAL *notes*

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## COMMEMORATING TRANS RIGHTS ACTIVISTS

– New York City officials announced on May 30 that the city will pay tribute to transgender activists Sylvia Rivera and Marsha P. Johnson by erecting a monument in Greenwich Village, about a block away from the Stonewall Inn, where both transgender women were involved in the uprising against police harassment in June 1969 that helped to spark the modern LGBT activist movements. The announcement was timed to coincide with the beginning of Stonewall 50<sup>th</sup> Anniversary commemorations worldwide that are centered on New York City. The decision to honor Rivera and Johnson comes amidst an effort by city government to combat the imbalance in public monuments in the city, few of which acknowledge the important contributions and achievements of women.

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## PRESIDENT TRUMP ON LGBT PRIDE

– (Tweeted May 31) “As we celebrate LGBT Pride Month and recognize the outstanding contributions LGBT people have made to our great Nation, let us also stand in solidarity with the many LGBT people who live in dozens of countries worldwide that punish, imprison, or even execute individuals on the basis of their sexual orientation. My Administration has launched a global campaign to decriminalize homosexuality and invite all nations to join us in this effort!” We wonder which staff member wrote this and sent it out under the president’s name? It certainly doesn’t sound like the man whose administration has spent almost two-and-a-half years rolling back Obama Administration LGBT equality initiatives and urging the Supreme Court to deny protection for LGBT people under the Civil Rights Act of 1964. How is he “celebrating?” Unlike President Obama, he has never held a Pride Month event in the White House . . .

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## LAW & SOCIETY NOTES

*By Arthur S. Leonard*

**COUNCIL OF EUROPE** – The Council of Europe issued a press release on May 15 stating: “Ahead of the International Day Against Homophobia, Transphobia and Biphobia marked on the 17<sup>th</sup> of May, Council of Europe Secretary General Thorbjorn Jagland urged for justice and full protection against discrimination for all persons, irrespective of their sexual orientation, gender identity and sex characteristics, in all the Council of Europe member states, of which there are 47 states, including quite a few that provide no protection against discrimination on these grounds. He noted that a majority of the member states had adopted such anti-discrimination laws, and urged the others to follow suit. He also urged that member states “bring their legislation and practices in line with the case law of the European Court of Human Rights” on the subject of legal gender recognition for individuals who do not identify with their gender as recorded at birth. The ECHR has ruled against requirements of surgical alteration or sterilization as a prerequisite for recognizing a change of gender identification from that recorded at birth. Many Council of Europe member states have no legislation providing for changing gender markers on official documents, and some others continue to require proof of surgical alteration.

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**BRAZIL** – In an implicit rebuke of anti-LGBT President Jair Bolsonaro, the Supreme Federal Court, acting on two cases brought by an LGBTQ rights group and the Popular Socialist Party several years ago, indicated that it would construe federal law to ban discrimination because of sexual orientation or gender identity, the *Los Angeles Times* reported on May 23.

A majority of the court stated that the Brazilian Congress had acted unconstitutionally by not including homophobia and transphobia in its anti-discrimination statutes. This is not yet a formal ruling, however. According to the news report, the court considered the cases for four days in February, at which time four justices said that such discrimination should be criminalized. Consideration of the cases was resumed on May 23, when two more justices agreed with this view, making up a majority. The remainder of the justices were to vote on June 5. The day before a majority was achieved on the court, the Senate’s Commission on Constitution, Justice and Citizenship voted in favor of a bill to criminalize homophobia and transphobia, according to the news report, and asked the high court to suspend its decision while the bill proceeds to the lower house for consideration, but the court voted 9-2 to continue considering the cases.

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**BRUNEI** – Responding to a global uproar of condemnation over the announcement that the southeast Asian country of Brunei would put into effect penal provisions authorizing the death penalty for sodomy, adultery, and rape, Sultan Hassanal Bolkhiah announced on May 5 the extension of a moratorium on the death penalty for these offences. Elements of the controversial law were enacted as long ago as 2014, but the death penalty had not been put into effect until a form announcement was made on April 3 of this year, rousing the storm of condemnation, protest, and threats to boycott businesses around the world owned by Brunei’s sovereign wealth fund, including hotels in the United States. The Sultan stated, “I am aware that there are many questions and misperceptions with regard to the implementation of the SPCO [Syariah Penal Code Order]. However, we believe that once these have been

# INTERNATIONAL *notes*

cleared, the merit of the law will be evident.” *Reuters*, May 5.

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**CANADA** – Health Canada has agreed to requests submitted by Hema-Quebec and the Canadian Blood Services to reduce the temporary exclusion period for donating blood for men who have sex with men. Under existing rulings, a man who has had sex with another man may not donate blood for a period of twelve months after the last sexual contact. Under the new rule, the exclusion period will be reduced to three months. The exclusion period concept was adopted due to concern about false negative tests for HIV due to delay in developing antibodies that trigger the screening tests used for blood donation. Improvements in testing technology make it possible to conclude with recent certainty that blood that tests negative three or more months after last sexual contact is safe for transfusion use.

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**CUBA** – Police refused to issue a permit for an LGBT Rights March in Havana, but activists determined to go ahead and hold a march without the permit. Police dispersed the group of about 100 marchers, who “managed to march a mere 400 meters along Havana’s downtown Paseo del Prado” before the police intervened, according to a *yahoo.com* news report on May 11.

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**HONG KONG** – Judge Thomas Au of the High Court ruled on May 30 that several criminal statutes specifically aimed at sexual activities of gay men are unconstitutional, because they discriminatorily target only men. Although Hong Kong “decriminalized homosexuality” as long ago as 1991, it did not remove from the books a variety of criminal statutes dealing with solicitation activities. Although a government commission has been

reviewing the laws with an eye to recommending revisions and reforms, a gay activist filed a challenge to those laws that apply solely to men, and the government conceded in the lawsuit that the laws are discriminatory, so an appeal is not likely. One of the laws, dealing with adults having sex with minors, imposed a maximum sentence of life imprisonment for “buggery” with a male under the age of 16, but only five years for sexual intercourse with a female under 16. Judge Au agreed that the government could continue to enforce the law pending a revision, but that the maximum sentence for sex with a male minor could not be greater than five years under the equality principle. *Agence France Press English Wire*, May 30. \* \* \* Late in May the Court of First Instance heard arguments in a case brought by a female Hong Kong resident, identified in court papers as MK, challenging the city’s ban on any legal recognition of same-sex unions. She claims that the government’s denial of her right to enter into a “civil partnership” with her same-sex partner is unconstitutional. Government lawyer Stewart Wong, defending the ban, told the court on May 29 that marriage would be “diluted and diminished” and “no longer special” if same-sex couples could marry. “Not all differences in treatment are unlawful,” argued Wong. “You are not supposed to treat unequal cases alike.” Also opposing civil unions, he argued that recognizing an “alternative form of same-sex relationships which we say are tantamount to a marriage is to undermine the traditional institution of marriage and the family constituted by such a marriage.” In separate litigation, two men are directly challenging the refusal of marriage rights to same-sex couples. The most recent polling on the subject shows that about half of Hong Kong residents support same-sex marriage, an increase over the past four years of about 12%. *HongKongfp.com*, May 29.

**IRELAND** – The *Arizona Republic* reported May 14 that Pastor Steven Anderson, of the fundamentalist Faithful Word Baptist Church in Tempe, Arizona, is the first person to be barred from entering Ireland under the Immigration Act of 1999, which allows officials to bar someone if it is “necessary in the interest of national security or public policy.” Justice Minister Charlie Flanagan announced that he had signed an exclusion order on May 12 under his executive powers “in the interests of public policy.” Anderson is noted for giving anti-LGBT sermons, arguing that being gay should be illegal and that killing gay people is God’s way of eliminating AIDS, according to the newspaper report. Flanagan’s action was provoked by an announcement that Anderson would be hosting a “preaching/soul-winning event” in Dublin on May 26, which stimulated an on-line petition signed by more than 14,000 people urging that he be barred from entering the country.

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**ISRAEL** – The Knesset, Israel’s Parliament, has moved to amend the policy of its legal department so as to recognize the same-sex partners of Knesset members for purposes of spousal rights and benefits of members of the body. As a result of the latest national election, there is a new high of five out gay members. Same-sex spouses of Knesset members will be able to receive permanent entry passes to the Knesset building, to drive Knesset-issued cars assigned to their partners, and will be invited to official events and ceremonies. The words “husband and wife” in existing rules will be changed to “couples.” In Israel, marriages are performed under the auspices of religious bodies, none of which will perform same-sex marriages. Israeli same-sex couples, in common with different-sex couples who do not desire or would not qualify for religious marriages, go out of the

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country to marry, and Israel recognizes civil marriages, including same-sex marriages, performed abroad. Same-sex couples who marry elsewhere can register their marriages, with their marital status noted on their national identity cards, and are generally treated as married by governmental agencies. As such, Israel is the only country in the Middle East where same-sex marriages are recognized.

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**LEBANON** – Although some courts have questioned the constitutionality of penal laws against gay sex, the Telecommunications Ministry ordered blocking access to Grindr, an international app, on the ground that Grindr facilitates “meetings between bisexuals or people of the same sex.” The app was formally blocked pursuant to an order issued on May 24, although it appears still to be accessible in some areas of the country during the last week of May. Amnesty International’s Middle East Research Director, Lynn Maalouf, criticized the move as “a deeply regressive step and a blow for the human rights of the local LGBTI community.” Malouf characterize the directive as “a flagrant assault on the right to freedom of expression.” The penal law punishes sexual relations “contrary to nature” with up to a year in prison, but several courts have overturned convictions under the law. *The New Arab*, May 30.

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**MEXICO** – Slowly but surely marriage equality spreads in Mexico. According to a summary posted by LGBT correspondent and blogger Rex Wockner, fifteen states and Mexico City (the capital district) have explicit formal marriage equality, and two more states out of a total of 31 “are all but there.” Eight states and Mexico City passed marriage equality legislation, five states had their ban on same-sex marriage “terminated by the Supreme Court,”

one state – Quintana Roo – decided that its laws never prevented marriage equality, and one “is not enforcing its ban by administrative fiat.” In two more states – Baja California and Oaxaca – same-sex couples must go through a “minor extra bureaucratic process that is not required of straight couples.” In the remaining states, however, same-sex couples who wish to marry must initiate an action before a federal judge to obtain an “amparo,” a court order directing local authorities to issue them a marriage license. The Supreme Court’s repeated rulings that same-sex couples have a federal constitutional right to marry is binding on federal judges, so a federal trial court must issue the amparo provided all prerequisites (apart from being a different-sex couple) are met. Any lawfully contracted marriage must be recognized by all public officials, regardless of the state of the law in their state. So, on balance, one can assert that Mexico is “sort of” a marriage equality jurisdiction, even though the method of achieving a same-sex marriage differs depending on the state of residence of the parties. We are indebted to Rex Wockner for monitoring the Spanish-language press in Mexico and reporting on these developments as they happen. \* \* \* The Supreme Court of Justice of the Nation ruled on May 8 in favor of a same-sex couple who sought to register the child they conceived through donor insemination with both of the women as parents. The ruling was unanimous.

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**NORTHERN MACEDONIA** – ILGA-Europe reports that on May 22 the newly-elected president of Northern Macedonia signed into law the Law on Prevention of and Protection Against Discrimination, which includes sexual orientation and gender identity as prohibited grounds of discrimination.

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**RUSSIA** – Human Rights Watch reported with concern evidence that

police in Chechnya have “carried out a new round of unlawful detentions, beating, and humiliation they presume to be gay or bisexual.” The HRW report explained that “the new abuses come against a backdrop of absolute impunity for the vicious large-scale anti-gay purge in Spring 2017,” and urges Russian authorities to “carry out an effective investigation into the anti-gay abuses and hold those responsible to account.” HRW based its report on interviews with victims who testified to their own mistreatment and the mistreatment they observed of others. HRW asserted that the interviews were consistent with allegations in a crime report filed with the government by the Russian LGBT Network, which reported on the detention and abuse of 14 men. The HRW press release on this, released on May 8, goes into horrifying detail about the physical abuse to which the detainees have been treated.

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**SWITZERLAND** – South African athlete Caster Semenya has filed an appeal in Switzerland’s Federal Supreme Court from a 2-1 ruling by the Switzerland-based Court of Arbitration for Sport (CAS) that would bar her from competing as a woman due to her naturally occurring heightened testosterone level. The CAS upheld a testosterone regulation recently adopted by the International Association of Athletics Federations that would require women whose testosterone exceeds levels set by the Federation to take medications to lower their testosterone levels if they wanted to compete against women; otherwise, they would have to compete against men. Critics have charged that Semenya and others with differences of sex development (DSD) that cause them to have a high level of testosterone have an unfair advantage competing against other women, and Semenya has emerged triumphant in several major competitions where she

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was permitted to compete. “I am a woman and I am a world-class athlete,” she said in a statement released in conjunction with filing the appeal. Her lawyers assert that the new regulation violates “widely recognized public policy values, including the prohibition against discrimination, the right to physical integrity, the right to economic freedom, and respect for human dignity.” They also claim the rule violates “principles of Swiss public policy.” The World Medical Association had condemned the CAS ruling and urged that doctors not be complicit, stating that medical treatment is “only justified when there is a medical need,” continuing: The mere existence of an intersex condition, without the person indicating suffering and expressing the desire for an adequate treatment, does not constitute a medical indication.” Athletics Canada responded to the ruling by stating it would not implement the regulation IAAF regulation for domestic competitions. *Globe & Mail*, Toronto, May 29.

**TUNISIA** – On May 20, the Court of Appeal affirmed a lower court ruling ordering the government to allow registration of Shams, the country’s leading LGBT rights group, which says it will build on this victory by pushing for the government to decriminalize consensual gay adult sex in private. Under Article 230 of Tunisia’s Penal Code, consensual gay sex can lead to up to three years in prison. According to Shams, convictions for same-sex relations rose by 60% last year from 79 conviction in 2017 to 127 in 2018, and more than 25 convictions were recorded during the first quarter of 2019. Fadel Mafoudh, an official in the Prime Minister’s office who “works on human rights issues,” hailed the ruling despite it being a defeat for the government’s legal position, stating that the judgment “once again proves Tunisia is a state that respects the rule of law and that

its judiciary is independent of the power of the government. The president acting established a Commission for Individual Liberties and Equality in 2017. The Commission recommended that Tunisia decriminalize same-sex relations and end forced anal examinations carried out by police doctors on men suspected of engaging in anal sex. But the parliament refused to debate the Commission’s proposals. These developments were reported online on the website openlynews.com on May 21.

**TURKEY** – Fotis Filippou, Campaigns Director for Europe at Amnesty International, issued a statement in reaction to news reports that police had violently broken up a Pride March organized by students at the Middle East Technical University in Ankara, the nation’s capital. It was reported that at least 25 people were detained by police, who reportedly used pepper spray, plastic bullets and tear gas to disperse the protesters. Filippou called for reports of excessive use of force by the public to be “urgently investigated,” describing the demonstration as a “celebration of love and solidarity.” *Amnesty.org*, May 10.

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## PROFESSIONAL NOTES

*By Arthur S. Leonard*

**DRU LEVASSEUR**, formerly Senior Attorney and Transgender Rights Project Director with Lambda Legal, joins the National LGBT Bar Association as Deputy Program Director on June 10. Levasseur is a recognized expert in transgender law, employment law, and public accommodations law. He will be engaged in deepening the Association’s programmatic work. Prior to Lambda Legal, Levasseur was a staff attorney at Transgender Legal Defense &

Education Fund. He is a graduate of Western New England School of Law and the University of Massachusetts.

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New York State Chief Judge Janet DiFiore has appointed **ANTHONY CANNATARO**, Administrative Judge of the Civil Court of the City of New York, to be the new co-chair of the Richard C. Failla LGBTQ Commission of the New York Courts, to take effect when Justice Marcy L. Kahn of New York County Supreme Court retires from the position this summer. The Commission, whose Executive Director, Matthew J. Skinner, is a former executive director of the LGBT Bar Association of Greater New York, presented special programs in courthouse in all regions of the state during June to mark Pride Month. In the New York County Supreme Court, the program scheduled for June 3 was titled “The Braschi Breakthrough: 30 Years Later, Looking Back on the Relationship Recognition Landmark,” and included remarks from Harvard Law School Professor William B. Rubenstein, who argued the case on behalf of the ACLU, Richmond County Surrogate Court Judge Matthew J. Titone, whose father, Vito Titone, authored the opinion in *Braschi v. Stahl Associates* for the Court of Appeals, New York State Bar Association President Henry M. Greenberg, who was clerking for Court of Appeals Associate Judge Judith Kaye at the time of the decision, and former New York State Senator and New York City Councilmember Thomas K. Duane, who was an activist leader in the movement for LGBT tenant succession rights at the time of the case. The surviving sister of plaintiff Miguel Braschi (who died shortly after winning the case in the Court of Appeals) also presented brief remarks about her brother. LeGal was a co-sponsor of the event, together with the NYS Unified Court System and half a dozen other organizations.

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## 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](mailto:info@le-gal.org).